THE DIGEST

OF

ENGLISH CASE LAW.

THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. XI.

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OF THE NAMES OF THE

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[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
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Arn.	Arnold. C. P.
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Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
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Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
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Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
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Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
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Br. & Lush.	Browning and Lushington. Adm.
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Buck	Buck. Bky.
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Burr.	Burrows. K. B.
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C. & M. .....Crompton and Meeson. Ex.
C. M. & R. .....Crompton, Meeson and Roscoe. Ex.
Con. & L. .....Connor and Lawson. Ch. (Ireland).
Cooper .....Cooper. Ch.
Ct. of Sess. Cas. ....Court of Session Cases (Scotland).
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Curt. .....Curteis. Eccl.

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Falc. & F. ..... Falconer and Fitzherbert. Election.
Fitzg. ..... Fitzgibbon. K. B.
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Hag. Ecc. ..... Haggard. Eccl.
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Hopw. & C. .....Hopwood and Coltman. Registration.
Hopw. & P. .....Hopwood and Philbrick. Registration.
Hurl. & W. .....Hurlstone and Walmsley. Ex.

Ir. C. L. R. .....Irish Com. Law (1850—1866).
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Ir. Eq. R. .....Irish Equity Reports.
[1894] Ir. R. .....Irish Law Reports (1894 onwards).
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J. P. .....The Justice of the Peace.
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Johns. .....Johnson. Ch.
Jones .....Jones. Ex. (Ireland).
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The Digest

OF

ENGLISH CASE LAW.

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[By JOHN MEWS.]

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F. IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—*See* COLONY.

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A. IN THE HIGH COURT OF JUSTICE.

I. NOTICE OF ACTION.

a. STATUTE.

Statute.]—By the Public Authorities Protection Act, 1893, s. 2, *so much of any public general act relating to notice of action is repealed as to the United Kingdom.*

b. TO WHOM GIVEN.

1. Persons Acting in the Execution of their Office.

Justices.]—In an action against a magistrate, for having, in the execution of his office, acted maliciously, and without reasonable and probable cause, he is entitled to notice of action, as required by 11 & 12 Vict. c. 44, s. 9. *Kirby* v. *Simpson*, 10 Ex. 358; 2 C. L. R. 1286; 23 L. J., M. C. 165; 18 Jur. 983.

In such case, the question whether he acted

bonâ fide, or used his office colourably, does not arise. *Ib.*

In an action against a magistrate for acts done in the execution of his office, the judge is to decide whether notice of action is necessary, and the jury is not to decide the question of bona fides. *Ib.*

Whether a magistrate acts bonâ fide is a question for the jury; and if the plaintiff seeks to maintain his action, on the ground that the magistrate acted so illegally as to have disentitled himself to any notice of action, it lies on the plaintiff to cause this question to be put to the jury. *Hazeldine* v. *Grove*, 3 Q. B. 997; 3 G. & D. 210; 12 L. J., M. C. 10; 7 Jur. 262.

A magistrate is entitled to notice of action when he acts as a magistrate, though what he does is not strictly within the scope of his office. *Bird* v. *Gunston*, 2 Chit. 459; 4 Dougl. 275.

So, where he acts upon a subject-matter of complaint over which he has authority, but which arises out of his jurisdiction. *Prestidge* v. *Woodman*, 2 D. & R. 43; 1 B. & C. 12. S. P., *Graves* v. *Arnold*, 3 Camp. 242. *See* 3 R. R. 355, n.

A lord of the manor, being also a justice of the peace, is entitled to notice of an action brought against him for taking away a gun in the house of an unqualified person; for it will be presumed that he acted as a justice. *Briggs* v. *Evelyn*, 2 H. Bl. 114; 3 R. R. 354.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4*s.* from a publican resident within the borough for renewing his annual licence; although it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to have a licence:—Held, that such fee was illegal, and that the mayor was not entitled to notice of an action to recover it back, as the fee could not be taken by him by virtue or in execution of his office as a justice of the peace. *Morgan* v. *Palmer*, 4 D. & R. 283; 2 B. & C. 729; 2 L. J. (o.s.) K. B. 145; 26 R. R. 537.

One magistrate committing the mother of a bastard to custody for not affiliating the child, was entitled to notice of action, though, by 18 Eliz. c. 3, s. 2, jurisdiction over the subject-matter was committed to *two* magistrates. *Weller* v. *Toke*, 9 East, 364.

Officers of the Revenue.]—It is necessary in an action for money had and received against an excise officer to recover duties received by him after the act imposing them was repealed, and he had paid them over to his superior. *Greenway* v. *Hurd*, 4 Term Rep. 553. *See* 3 R. R. 355, n.

To an action against a defendant, who was a land-tax commissioner, for authorising a seizure of the plaintiff's goods for land-tax, which had been previously redeemed, but without his knowledge, he pleaded not guilty by statute, and stated in his particulars that he relied upon 38 Geo. 3, c. 5, and 21 Jac. 1, c. 12. The plaintiff, being unable to prove that he had given notice of action under 5 & 6 Will. 4, c, 20 s. 19, and being also unable to prove the particulars, to shew that the defendant had waived the benefit of that statute, was nonsuited:—Held, that the defendant was entitled to notice of action, and that the nonsuit was right. *Thomas* v. *Williams*, 1 D. & L. 624; 13 L. J., Ex. 87.

Government Stores.]—A robbery having been committed at the government stores K., an inspecting officer of the coast-guard having charge of the stores, suspecting that S. was guilty of the felony in question, gave him into custody and prosecuted him before the magistrates on the charge of feloniously taking the said government stores. The magistrates dismissed the charge, and S., without giving K. a month's notice of action, brought an action against him for false imprisonment and malicious prosecution:—Held, that he was entitled to notice of action under 16 & 17 Vict. c. 107, s. 313, and that, in acting as he did, he acted in the execution of or by reason of his office. *Spitty* v. *Kitchin*, 15 W. R. 903.

Intention to Act.]—The surveyors of highways of a parish received payment from an inhabitant of an assessment of a highway rate which was neither signed, allowed, nor published according to 5 & 6 Will. 4, c. 50. s. 27, but which appeared to have been made under an earlier repealed act. In making the rate and receiving payment, the surveyors intended to act in the performance of the duties of their office. In an action brought to recover back the money paid:—Held, that they were entitled to notice of action, pursuant to s. 109. *Judge* v. *Selmes*, 40 L. J., Q. B. 287; L. R. 6 Q. B. 724; 24 L. T. 905; 19 W. R. 1110.

Bona Fides.]—In an action against a judge of a county court for making an order for committing a party to gaol for disobedience of an order for payment of instalments, after due service upon him of a writ of prohibition, the jury was told, that if the judge acted under a bonâ fide belief that his duty as judge of the county court rendered it incumbent on him to do so, notwithstanding the prohibition, the act must be considered as done in pursuance of the 9 & 10 Vict. c. 95, and he was entitled to notice of action:—Held, no misdirection. *Booth* v. *Clive*, 10 C. B. 827; 2 L. M. & P. 283; 20 L. J., C. P. 151.

Upon the trial of an action against an officer of the customs, it is the duty of the judge, unless the facts are admitted, to hear the evidence, and decide whether the officer did the act complained of honestly believing that his duty called upon him to do it, in which case the provisions as to notice of action would be applicable. *Arnold* v. *Hamel*, 9 Ex. 405; 2 C. L. R. 499; 23 L. J., Ex. 137.

A magistrate sued for detaining goods on a suspicion of felony is entitled to notice of action if he proceeded under a bonâ fide belief that he was executing his duty, although it is proved that he had no reasonable ground of suspicion. *Wedge* v. *Berkeley*, 6 A. & E. 663; W. W. & D. 271; 1 N. & P. 665; 6 L. J., M. C. 86.

So, if he does an unjustifiable act (as in person unjustifiably arresting an individual), but really believes that he has a right to do the act, in his capacity of justice, he is entitled to notice of action. *Ib.*

If a justice acts, believing that his jurisdiction extends to the subject-matter in question, he is entitled to notice of action, though it may turn out, on investigation, to be a case over which no justice of the peace has jurisdiction. *Jones* v. *Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 Car. & P. 459, 669; 3 L. J. (o.s.) K. B. 112; 27 R. R. 474.

If a person claims a right to act as a justice, he is entitled to notice of action, although the ground on which the plaintiff goes is a denial of such right. *Ib.*

But a magistrate is not entitled to notice of action for a trespass committed by him, where,

from the circumstances, the jury think he was not acting bonâ fide under an impression that what he did was within the scope of his duty as magistrate. *James* v. *Saunders*, 4 M. & Scott, 316 ; 10 Bing. 429 ; 3 L. J., M. C. 105.

A disturbance took place in C. upon the liberation of a prisoner. A magistrate seized the plaintiff because he was going towards the prison. The plaintiff was not concerned in the disturbance, which was going on out of sight of the place where he was seized by the magistrate :—Held, that he was not entitled to notice of an action of trespass brought against him by the plaintiff for the assault. *Ib.*

An excise officer was entitled to notice under 23 Geo. 3, c. 70, s. 30, before an action was brought against him for an act not warranted by his official capacity, if done bonâ fide in the supposed execution of his duty. *Daniel* v. *Wilson*, 5 Term Rep. 1.

A constable who takes a party into custody, bonâ fide believing that he has committed an offence against 7 & 8 Geo. 4, c. 30 (Malicious Trespass Act, is entitled under s. 41, to notice of action, although he did not see the trespass committed, and there is no proof of any complaint made to him by the owner of the property injured. *Ballinger* v. *Ferris*, 2 Gale, 111 ; 1 M. & W. 628 ; 1 Tyr. & G. 920 ; 5 L. J., M. C. 133. See *Gosden* v. *Elphick*, 4 Ex. 445 ; 19 L. J., Ex. 9 ; 13 Jur. 989.

When poor law guardians are acting in discharge of their public duty they are entitled to notice of action in respect of anything done by them in the discharge of such duty, unless it is shown that they have acted malâ fide ; and it is to be assumed, in the absence of proof to the contrary, that they have acted bonâ fide. *Walker* v. *Nottingham Union*, 28 L. T. 308.

Mistake or Misfeasance.]—Where a bailiff of a county court, under a warrant against the goods of A., by mistake takes those of B. this is an act done in pursuance of the act which entitles the bailiff to notice of action under 9 & 10 Vict. c. 95, s. 138, 13 & 14 Vict. c. 61, s. 19, and 15 & 16 Vict. c. 34, s. 6. *Burling* v. *Harley* 3 H. & N. 271 ; 27 L. J., Ex. 258 ; 4 Jur. (N.S.) 789.

By a local act, a borough court was empowered to try "actions of assumpsit, covenant and debt, and actions of trespass and trover, provided the sum or damages sought to be recovered shall not exceed 50*l.*" And in actions commenced, "for anything done in pursuance of that act," notice of action must be given. In an action against an officer of the court for neglecting to levy, and making a false return to a fieri facias, issued on a judgment for 50*l.*, and 6*l.* 15*s.* 8*d.* for damages :—Held, that notice of action was necessary, part of the cause of action being for a misfeasance in making a false return. *Joule* v. *Taylor*, 7 Ex. 58 ; 2 L. M. & P. 615 ; 21 L. J., Ex. 31.

Persons improperly Appointed.]—A surveyor of highways having been appointed by the inhabitants in vestry, but informally, cut down, in the supposed exercise of his duty as surveyor, a tree which was overhanging the highway so as to be a nuisance to it :—Held, that he was entitled to the protection of 5 & 6 Will. 4, c. 50, s. 109. *Huggins* v. *Waydey*, 15 M. & W. 357 ; 16 L. J., Ex. 136.

In an action against a person for the penalty given for acting as a magistrate without a proper qualification, the defendant is not entitled to notice of action. *Wright* v. *Horton*, Holt, 458 ; 1 Stark. 400 ; 2 Chit. 25 ; 6 M. & S. 50 ; 17 R. R. 665.

The 7 & 8 Vict. c. 19, after reciting that "courts are holden in and for sundry counties, hundreds and wapentakes, honours, manors, and other lordships, liberties and franchises, having by custom or charter jurisdiction for the recovery of debts and damages in personal actions," provides that the judge of every such court shall have power to appoint persons to act as bailiffs of the court, and in the execution of the process thereof ; and that one month's notice of action is to be given before any action is commenced against any bailiff of any such court for anything done in pursuance of his duty as such bailiff. The defendant acted as bailiff of a borough court in executing the process of such court, in aid of the serjeant-at-mace of the borough. Neither the defendant nor the serjeant-at-mace was appointed as bailiff of such court by the judge of the court :—Held, that the defendant was, therefore, not a bailiff entitled to notice of action within 7 & 8 Vict. c. 19. *Tarrant* v. *Baker*, 14 C. B. 199 ; 2 C. L. R. 78 ; 23 L. J., C. P. 21 ; 18 Jur. 15 ; 2 W. R. 62.

Bailiff receiving Indemnity.]—The receiving an indemnity from the execution creditor does not deprive the bailiff of a county court of his right, under the 9 & 10 Vict. c. 95, s. 138, to notice of action. *White* v. *Morris*, 11 C. B. 1015 ; 21 L. J., C. P. 185 ; 16 Jur. 500.

Persons acting in a Double Capacity.]—A party making a distress for two causes, as to one of which he is justified and entitled to notice of action, is nevertheless, liable in trespass as to the other. *Lamont* v. *Southall*, 5 M. & W. 416.

Replevin.]—A declaration that the defendant on the plaintiff's land took his goods and detained them against sureties and pledges. Plea, that the goods were taken under a warrant issued by a justice of the peace to enforce an order of quarter sessions for payment of costs of an appeal against a poor rate :—Held, that this was an action of replevin, and that no notice of action or demand of the perusal of the warrant was necessary. *Gay* v. *Matthews*, 4 B. & S. 425 ; 33 L. J., M. C. 14 ; 8 L. T. 674 ; 11 W. R. 922—Ex. Ch.

The Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 133, which, for the protection of persons acting in the execution of that act, enacts that "all actions shall be tried in the county," &c., and entitles the defendant in case of success to his full costs as between attorney and client, applies to replevin, although one of the provisions of the section by which a month's notice of action is to be given, is not applicable to that form of action. *Jones* v. *Johnson*, 6 Ex. 133 ; 2 L. M. & P. 177 ; 20 L. J., M. C. 169.

2. Acts done in pursuance of Statute.

What are.] — A local act for watching a town empowered the commissioners therein named to appoint a constable and assistant constables, "for executing all such warrants, as the justices of the peace acting for the counties palatine of Lancaster and Chester, or either of them, shall from time to time direct to them to be executed within the town." Another section enacted that no plaintiff should recover for "anything done in pursuance of the act" :—Held, that a constable appointed under the act, and directed by a warrant of a justice acting for the

counties palatine to enter a house and seize goods under 11 Geo. 2, c. 19, s. 7, was not entitled to notice of action. *Shatwell* v. *Hall*, 10 M. & W. 523; 2 D. (N.S.) 567; 12 L. J., Ex. 74.

—— **Actions on Contract.**]—A. contracted by deed with a local board of health to execute works according to a specification, and that the works should be begun, proceeded with, and completed to the satisfaction of their surveyor. Payment was to be made by instalments, upon the certificate of the surveyor. It was provided that if A., from bankruptcy, insolvency, or any cause whatsoever, should not proceed with the works according to the satisfaction of the surveyor, it should be lawful for the board of health, after three days' notice, to employ other persons to complete the works, and that the deed should, at the expiration of the notice, be void at the option of the board of health, and the amount already paid to A. should be considered the full value of the works which should up to that time have been executed, and the materials on the premises should become their property without any further payment:—Held, that in an action by A. against the board of health for not allowing him to complete his contract, no notice of the action was requisite under 11 & 12 Vict. c. 63, s. 139, which enacts that no writ shall be sued out against the local board of health, or the clerk or other person acting under the direction of the board, for anything done or intended to be done under the provisions of the act, until one month after notice. *Davies* v. *Swansea Corporation*, 8 Ex. 808; 22 L. J., Ex. 297.

A local act directed that the guardians of a parish should be sued in the name of their vestry clerk, and required notice to be given of any action for anything done in pursuance of the act. Notice was not necessary in an action for work and labour. The direction only applied to actions of tort. *Fletcher* v. *Greenwood*, 4 D. P. C. 166; 1 Gale, 34.

—— **Obstructing Highway.**]—An action was brought against a surveyor of highways for allowing and causing a heap of gravel, which had been placed for the purposes of the repair of the highway, to remain upon it, without taking any care or precaution to guard against damage to persons passing along it, contrary to his duty in that behalf:—Held, that the action was brought for a thing done in pursuance of, or under the authority of, 5 & 6 Will. 4, c. 50, and therefore, that he was entitled to notice of action. *Davis* v. *Curling*, 8 Q. B. 287; 15 L. J., Q. B. 56; 10 Jur. 69. See *Young* v. *Davis*, 2 H. & C. 197; 10 Jur. (N.S.) 79; 9 L. T. 145; 11 W. R. 735—Ex. Ch.

In pursuance of a resolution at a vestry, that it would be advantageous if a weighing-machine were erected to check the weight of materials purchased by the highways, the surveyors caused a machine to be placed in the highway:—Held, that although the 5 & 6 Will. 4, c. 50, gave no express power to erect weighing machines, the surveyors were acting in pursuance of the act, so as to entitle them to notice of an action for injuries sustained by a party in driving over a heap of earth excavated for the weighing machine. *Hardwich* v. *Moss*, 7 H. & N. 136; 31 L. J., Ex. 205; 7 Jur. (N.S.) 804; 4 L. T. 802.

—— **Negligence.**]—A Trinity House pilot, who in navigating a vessel negligently runs against and damages another vessel, is not within the protection of the 4 Geo. 4, c. 125 (Pilot Act) s. 84, which enacts that all actions brought for anything done in pursuance of the act shall be brought in the county where the cause of action arises. *Lawson* v. *Dumlin*, 9 C. B. 54.

The plaintiff was a driver employed by contractors who had contracted with the defendants, a metropolitan vestry, to provide them with horses and drivers for their carts used in watering the streets under the powers of 18 & 19 Vict. c. 120. The defendants negligently supplied a cart with a defective axle, and by reason thereof the plaintiff, whilst driving the cart for the purpose of watering the street, was thrown off and injured:—Held, that the defendants were entitled to notice of action under 25 & 26 Vict. c. 102, s. 106, because the supply of the water-cart to the plaintiff for the purpose of watering the streets was a thing "done or intended to be done" under the powers of the vestry under the act empowering them to water the streets. *Edwards* v. *St. Mary, Islington*, 58 L. J., Q. B. 165; 22 Q. B. D. 338; 60 L. T. 725; 37 W. R. 347; 53 J. P. 180—C. A.

An act for paving a town enacted, that no plaintiff shall recover in any action against the commissioners for anything done or to be done in pursuance or under the authority of the act, unless notice in writing shall have been given to them. The commissioners were sued for an injury occasioned by the negligence of some paviors, their servants:—Held, that they were entitled to notice of action. *Mason* v. *Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J., Ex. 407; 2 L. T. 632.

The building of a police station is an act done by justices in the execution of their office; and the justices, if sued for negligence in the building or maintaining thereof, and for damage arising therefrom, are entitled to the protection afforded by 11 & 12 Vict. c. 44. *Hardy* v. *North Riding JJ.*, 50 J. P. 663.

By a railway act, a company was empowered to make and maintain a railway; all persons were to have liberty to use the same, with carriages properly constructed, upon payment of tolls; and the company was empowered to provide locomotive engines and carriages for the conveyance of goods and passengers. It enacted, that no action should be brought against any person for anything done or omitted to be done in pursuance of the act, without notice:—Held, that the company was not entitled to notice where an action was brought against them for negligence in carrying a passenger, as they were sued merely as carriers, and not for anything done or omitted under the act. *Carpue* v. *L. B. & S. C. Ry.*, 5 Q. B. 747; D. & M. 608; 3 Railw. Cas. 692; 13 L. J., Q. B. 133; 8 Jur. 464.

A railway company was empowered by act of parliament to carry goods and passengers on the railway, and to keep in repair the fences of the same. The act contained a clause, that no action should be brought against the company for anything done or omitted to be done in pursuance of the act, unless fourteen days' previous notice of action was given of such intention. The company undertook to carry some horses by the railway, but in consequence of the fences of the railway having broken down, the train was upset and the horses injured:—Held, that the company, being sued in its capacity of carriers, was not entitled to notice of action. *Palmer* v. *Grand Junction Ry.*, 4 M. & W. 749; 7 D. P. C. 232; 8 L. J., Ex. 129.

—— **Nuisance.**]—The Metropolitan Police Act, 2 & 3 Vict. c. 47, having created several acts misdemeanours, inflicts a penalty, on summary conviction, in various other offences, and among them the laying shells on a thoroughfare. It likewise enacts, that any person found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction by virtue of the act may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and detained until he can be delivered to a constable; and notice in writing must be given of all actions against any person for anything done in pursuance of the act. A person employed by the owner to keep clean a thoroughfare, finding that another person was in the habit of laying oyster-shells upon it, consulted an inspector of police, and by his advice gave that party into custody. An action having been brought:—Held, that the defendant was entitled to notice of action, this being an act done in pursuance of the statute. *Danvers* v. *Morgan*, 1 Jur. (N.S.) 1051; 4 W. R. 21.

—— **Obstructing Canal.**]—A railway company was empowered to divert a canal; and it was enacted that, if by any accident or in the execution of any works authorised by the act (otherwise than from the neglect or mismanagement of the canal company), or by reason of the bad state of repair of the railway company's works, the canal should be so obstructed that boats could not pass, the railway company should pay the canal company, by way of ascertained damages, 10*l.* at least for every hour during which the obstruction should continue, and if it should continue beyond seventy-two consecutive hours, or should have been occasioned by any wilful act of the railway company, then at 20*l.* per hour at least by way of ascertained damages; and that, in default of payment on demand on the railway company's treasurer, the canal company might recover the sum by action. It was also enacted that no action should be brought for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it, without twenty days' notice:—Held, that an action for liquidated damages incurred by obstructing the canal was an action for something done in pursuance of the act, and that the limitation clause applied. *Kennet and Avon Canal* v. *G. W. Ry.*, 7 Q. B. 824; 4 Railw. Cas. 90; 14 L. J., Q. B. 325; 9 Jur. 788.

—— **Excessive Charges by Railways.**]—By a railway act it was enacted, that no action should be brought for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers or authorities given by the act, unless twenty days' previous notice in writing should be given. The company having, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff:—Held, that, in an action for money had and received, to recover the sums so extorted, the company was entitled to notice of action. *Kent* v. *G. W. Ry.*, 3 C. B. 714; 4 Railw. Cas. 699; 4 D. & L. 481; 16 L. J., C. P. 72.

Action against a railway company for money received by the company for the use of the plaintiff. Plea, no notice of action. The action was for overcharges. By a section of the company's act, no action shall be brought for anything done in pursuance of the act, unless notice in writing is given to the company. After verdict for the company:—Held, that the plea was bad for not averring that the action was for a thing done in pursuance of the act; and that the section did not apply to such an action. *Garton* v. *G. W. Ry.*, El. Bl. & El. 837; 28 L. J., Q. B. 321; 5 Jur. (N.S.) 1244; 7 W. R. 478—Ex. Ch.

—— **Act passed subsequently.**]—The effect of the Public Health Act, 1875, which makes improvement commissioners under local acts urban sanitary authorities, is to reconstitute them as new bodies under the act, vesting in them as such new bodies the powers given by the local acts as well as those given by the public health act; and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local acts are acting under the Public Health Act, 1875, and consequently are entitled in respect of such act to any protection or privilege given by that act to members of local authorities acting under its provisions. *Lea* v. *Facey*, 56 L. J., Q. B. 536; 19 Q. B. D. 352; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756—C. A.

Sect. 19 of 1 & 2 Will. 4, c. 41, by which, in all actions for anything done in pursuance of that act, the venue is to be local, and the defendant to receive notice of action, applies only to such acts as a constable might at the date of the statute have been called upon to perform; therefore the section does not apply in the case of a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson* v. *Russell*, 54 L. J., Q. B. 144; 14 Q. B. D. 720; 52 L. T. 208; 33 W. R. 34; 49 J. P. 293—C. A.

—— **Slander.**]—At a meeting of the London County Council held for the purpose of hearing applications for music and dancing licences, upon the plaintiffs applying for a renewal of such a licence for a place of entertainment belonging to them, the defendant, a member of the council, stated that he had been to the place in question, and had witnessed a most indecent performance there, and gave that as his reason for voting against the renewal. In an action of slander brought by the plaintiffs in respect of such statement:—Held, that the defendant was not entitled to notice of action under ss. 8 and 9 of 11 & 12 Vict. c. 44, words spoken not being "anything done" within the meaning of those sections. *Royal Aquarium* v. *Parkinson*, 61 L. J., Q. B. 409; [1892] 1 Q. B. 431; 66 L. T. 513; 40 W. R. 450; 56 J. P. 404—C. A.

To an action for slander, the defendant pleaded that the words were spoken while he was acting as clerk of the markets of Dublin, and in pursuance of statutes entitling him to a month's notice of action for any act done in pursuance of them, and that no notice was given:—Held, good, and that words spoken whilst acting in pursuance of the statutes were as much within their protection as acts done. *Murray* v. *M'Swiney*, Ir. R. 9 C. L. 545.

—— **Omission.**]—An omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an act of parliament, or the continuing to leave any such duty unperformed,

amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action. *Jolliffe* v. *Wallasey Local Board*, 43 L. J., C. P. 41; L. R. 9 C. P. 62; 29 L. T. 582.

The defendants were sued by a private person for not maintaining a public road in reasonable and proper repair:—Held, that their omission to do so was "an act done," which entitled them to the protection afforded by s. 95 of the Towns Improvement (Ireland) Act, 1854. *Butler* v. *Bray Township Commissioners*, Ir. R. 11 C. L. 181.

The omission to do something which ought to be done in order to the complete performance of a duty imposed on a public body by act of parliament amounts to "an act done or intended to be done in pursuance of the act" within the meaning of the clause requiring notice of action to be given to the public body. *Wilson* v. *Halifax Corporation*, 37 L. J., Ex. 44; L. R. 3 Ex. 114; 17 L. T. 660; 16 W. R. 707.

Reasonable Ground of Belief—Bona Fides.]—A statute enacted that no plaintiff should recover in any action commenced against any person, for anything done or performed in execution or under the authority of the act, unless notice thereof, in writing, should be previously given twenty-eight days before the commencement of the action:—Held, that a notice was necessary in those cases only in which the party against whom the action was brought had reasonable grounds for supposing that the thing done by him was done in execution of or under the authority of the act. *Cooke* v. *Leonard*, 6 B. & C. 351; 9 D. & R. 339; 5 L. J. (O.S.) M. C. 99; 30 R. R. 348. See *Spooner* v. *Juddow*, 6 Moore, P. C. 257; *Mason* v. *Newland*, 9 Car. & P. 575.

Where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, bonâ fide, that he was so acting. There must be reasonable ground for the belief. *Cann* v. *Clipperton*, 10 A. & E. 582; 2 P. & D. 560; 8 L. J., Q. B. 268.

If the party acted under a reasonable though mistaken persuasion, from appearances that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection though the real facts were such that the statute clearly affords no justification. *Ib.*

Trustees of a paving act were entitled to notice of action for anything done in pursuance of the act. They were authorised to abate any hog-sty, necessary house, or nuisance in the parish, on complaint of any inhabitant:—Held, that, whether a brothel was a nuisance within the meaning of this provision or not, if the trustees took steps to put down such a house bonâ fide, they were entitled to notice of action. *Norris* v. *Smith*, 2 P. & D. 353; 10 A. & E. 188; 8 L. J., Q. B. 274.

By a local act persons were compelled, under a penalty, to perform the duties of overseers; and no action was to be commenced against any person for anything done in pursuance of the act until notice, in writing, had been given. Overseers appointed under the act had assented to the imprisonment of a party in a workhouse, who was incorrectly supposed to have been a pauper and a lunatic. They had intended to act under 9 Geo. 4, c. 40, s. 38, but had not complied with its provisions:—Held, that this was not a thing done in pursuance of the local act and that the overseers were not, therefore, entitled to notice. *Elliot* v. *Allen*, 1 C. B. 18; 14 L. J., C. P. 136.

To give a defendant the benefit of a provision in a statute requiring notice of action, it is sufficient that the jury find that he intended to act in pursuance of such statute. *Cox* v. *Reid*, 13 Q. B. 558; 18 L. J., Q. B. 216; 13 Jur. 563.

A party entitled to notice of action, where the acts complained of are done by him in a particular character or under a particular authority, is entitled to such notice if he has acted under a bonâ fide belief that he filled that character or had that authority, and the absence of reasonable grounds for such belief is only evidence of the non-existence of such bonâ fide belief. *Booth* v. *Clive*, 10 C. B. 827; 2 L. M. & P. 283; 20 L. J., C. P. 151; 15 Jur. 563.

The question on which the right to notice of action turns is, whether a defendant acted in honest ignorance, or belief that he was acting by reason of his office, and this question is entirely for the judge; and to enable him to decide it he must receive so much of the evidence as will raise that question. *Arnold* v. *Hamel*, 9 Ex. 405; 2 C. L. R. 499; 23 L. J., Ex. 137.

A board for repair of the highways of a parish, by a resolution, referring to a previous resolution of the inhabitants that a footway should be open to the public, ordered the surveyor to open the same, and remove all obstructions there might be to the enjoyment of the road by the public. Sect. 69 of 5 & 6 Will. 4, c. 50, gives a summary power to remove encroachments on carriage-ways; s. 72 imposes a penalty on persons who obstruct footways; and s. 73 gives a power, by order of a justice, to remove any matter or thing laid upon any highway so as to be a nuisance. In an action against the members of the board and the surveyor for breaking a gate of the plaintiff across the footway, the bona fides of the defendants was admitted:—Held, that they might reasonably believe that they were acting in execution of the power to remove obstructions in public roads, and, therefore, were entitled to notice of action. *Smith* v. *Hopper*, 9 Q. B. 1005; 16 L. J., Q. B. 93; 11 Jur. 302.

The plaintiff was fishing near a spot where A. had a private right of fishery. The defendant, who was the servant of A., acting under 7 & 8 Geo. 4, c. 29, and bonâ fide, and reasonably believing A. to be the owner of a private fishery in the place where the plaintiff was fishing, although he was not in fact the owner, apprehended him and took away his net:—Held, that the defendant was entitled to the protection of the act. *Hughes* v. *Buckland*, 3 D. & L. 702; 15 M. & W. 346; 15 L. J., Ex. 233; 10 Jur. 884.

In order to entitle a party to a notice of action for a thing done in pursuance of 24 & 25 Vict. c. 99, s. 33, consolidating the law against offences relating to the coin, it is enough that he honestly and bonâ fide believes he is acting in pursuance of the act, whether there is reasonable ground for such belief or not. *Herman* v. *Seneschal*, 13 C. B. (N.S.) 392; 32 L. J., C. P. 43; 6 L. T. 646; 11 W. R. 184.

The proper question for the jury is, whether the defendant bonâ fide believed in the existence of a state of facts which, if it had existed, would have afforded a defence to the action. *Roberts* v. *Orchard*, 2 H. & C. 769; 33 L. J., Ex. 65 9 L. T. 727; 12 W. R. 253—Ex. Ch.

Therefore, where 24 & 25 Vict. c. 96, s. 103, provided that any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of that act, might be immediately apprehended without a warrant, and s. 113 also required notice of action for anything done in pursuance of the act, in an action by the plaintiff, a shop-woman of the defendant, for giving her into custody on the charge of stealing a florin:—Held, that it would not have been sufficient to leave to the jury the question whether the defendant honestly believed that the plaintiff had wrongfully taken the florin, and that in giving the plaintiff into custody he was executing a legal power, but the question ought also to be left to the jury whether the defendant believed that the plaintiff had been found committing the offence. *Ib.*

To entitle a defendant to notice of action under a statute, he must honestly intend to put the law in motion, and really believe in the existence of a state of facts which, if it existed, would have justified him in doing as he did. *Heath* v. *Brewer*, 15 C. B. (N.S.) 803; 9 L. T. 653.

In an action for false imprisonment for giving the plaintiff into custody on a charge of larceny, the defendant set up as a defence that he had had no notice of action, to which he was entitled under s. 113 of 24 & 25 Vict. c. 96; for that he had caused the plaintiff to be arrested under s. 103, believing he had found her committing a felony. The jury found that she had not committed the felony, but that the defendant bonâ fide believed, and on reasonable grounds, in the existence of facts which would have justified him in acting as he had done. On this finding the verdict was entered for the defendant. The plaintiff had not been apprehended on the spot where the defendant believed he had found her committing the felony, and the question, whether or not she had been "immediately apprehended," had not been left to the jury:—Held, that this was a question of fact for the jury which ought to have been left to them, and that there must therefore be a new trial. *Griffith* v. *Taylor*, 46 L. J., C. P. 152; 2 C. P. D. 194; 36 L. T. 5; 25 W. R. 196—C. A.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 103), any person found committing a theft may be immediately apprehended without a warrant, and by s. 113 notice of action must be given before anyone can be sued for anything done in pursuance of the act:—Held, that, to entitle a person to such notice of action, it is sufficient if he honestly believed that the person whom he apprehended was found by him committing a theft, and that if he might have so believed, it is no reason for disentitling him to such notice that a jury might think there was no reasonable ground for his so believing. *King* v. *Chamberlain*, 40 L. J., C. P. 273; L. R. 6 C. P. 474; 24 L. T. 736; 19 W. R. 931.

Where a plaintiff, under a claim of right, had taken forcible possession of premises, and committed several outrageous acts, the attorney of the owner of the premises having been sent for on the following day, gave the plaintiff, whom he found still on the premises, in charge, under 7 & 8 Geo. 4, c. 30:—Held, that although not justified in so doing, he was entitled to notice of action. *Cann* v. *Clipperton*, 2 P. & D. 560; 10 A. & E. 582; 8 L. J., Q. B. 268. S. P., *Beechey* v. *Sides*, 9 B. & C. 806; 4 M. & Ry. 634; 8 L. J. (O.S.) K. B. 71.

A fenreeve having the care of lands over which the plaintiff was making a road, asked him by what authority he acted; the plaintiff said, by authority of the magistrates, but did not exhibit any warrant, whereupon the defendant apprehended and took him before a magistrate:—Held, that he was entitled to notice of action under 7 & 8 Geo. 4, c. 30, s. 41, although the plaintiff was not committing a malicious injury. *Wright* v. *Wales*, 5 Bing. 336; 2 M. & P. 613; 3 Car. & P. 96; 7 L. J. (O.S.) M. C. 60; 30 R. R. 622.

Under 24 & 25 Vict. c. 96, ss. 103 and 113, the two questions to be answered in the affirmative, in order to entitle a defendant to notice of action, are, first, did he honestly believe that the person whom he has given in charge had committed a felony; and, secondly, that the same person had been found committing it. *Wynyard* v. *Marks*, 15 L. T. 591.

A., by the direction of his tenant, arrested on a Sunday two men, one of whom had just before wilfully broken one of his windows, and locked them up for two hours in a room of the house. The man who had committed the damage afterwards brought an action against A. for false imprisonment:—Held, that A. was entitled to notice of action under the 7 & 8 Geo. 4, c. 30, s. 41. *Jones* v. *Howell*, 29 L. J., Ex. 19; 8 W. R. 151.

A party having apprehended another, and proceeded against him before a justice, under 7 & 8 Geo. 4, c. 30, s. 24, for a malicious injury to property, the justice dismissed the complaint, being of opinion that the party charged had acted under a reasonable supposition of right. An action being brought for the arrest:—Held, that the defendant, if he acted under a bonâ fide belief that the case fell within the statute, was entitled to notice of action; and that, in default of notice, the jury might properly be directed to find for the defendant, if they thought that he had acted bonâ fide. *Reed* v. *Cowmeadow*, 6 A. & E. 661; 7 Car. & P. 821.

A plaintiff, who was lessee for an unexpired term of years of a house, of which the defendant was the reversioner, being in prison, and a quarter's rent being in arrear, the defendant took possession of the house, whereupon the plaintiff's wife broke some of the windows, for the purpose of obtaining admission. The defendant gave her into custody, and charged her, under 7 & 8 Geo. 4, c. 30, s. 24, with breaking four panes of glass. No notice of action had been given, and the question of bona fides was not submitted to the jury:—Held, that the defendant was entitled to notice of action, if he bonâ fide believed himself entitled to give the wife into custody; and that, as the question of bona fides had not been left to the jury, there ought to be a new trial. *Horn* v. *Thornborough*, 3 Ex. 846; 18 L. J., Ex. 349.

In an action by a tenant against his landlord for a malicious charge of felony, under s. 45 of 7 & 8 Geo. 4, c. 29, for stealing fixtures let to him, it is not necessary to give a notice of action. *Dowell* v. *Benningfield*, Car. & M. 9.

In an action for imprisoning a party upon a charge of felony under 7 & 8 Geo. 4, c. 29, s. 44, in pulling down part of a house, and selling the materials:—Held, that the defendant was within the protection of s. 75, if he bonâ fide thought he was acting in pursuance of the act; and that the jury was properly directed to find whether or not he did so think. *Rudd* v. *Scott*, 2 Scott (N.R.) 631; 9 L. J., M. C. 97.

An owner of property is not justified in giving a person into custody found (popularly speaking) committing a nuisance against his premises, nor is he entitled to notice of action for having done so, unless he is fairly justified in believing that the person had the intention to soil or deface them within the 2 & 3 Vict. c. 47, s. 54, or the intention to commit damage or injury or spoil to them within the 24 & 25 Vict. c. 97, s. 52. *Bayley* v. *Aldred*, 10 L. T. 523.

Existence of Act unknown.] — In order to entitle a party to notice of action for a thing done in pursuance or in the execution of an act of parliament, it is not necessary that he should, at the time of doing the act, be cognisant of the existence of the act giving him such protection, or that he should be acting strictly in the execution of it. *Read* v. *Coker*, 13 C. B. 850; 1 C. L. R. 746; 22 L. J., C. P. 201; 17 Jur. 990; 1 W. R. 413. S. P., *Danvers* v. *Morgan*, 1 Jur. (N.S.) 1051; 4 W. R. 21.

Honest Belief must be possible.]—Where a statute provides that before an action is commenced against any person for anything done in pursuance of the statute notice of action shall be given, in order to entitle a defendant to such notice, on the ground that "he honestly believed in the existence of those facts which, if they had existed, would have afforded a justification under the statute," the facts of the case must at least be such that he could so honestly believe, and such as to afford evidence to go to the jury that he did so. *Leete* v. *Hart*, 37 L. J., C. P. 157; L. R. 3 C. P. 322; 18 L. T. 292; 16 W. R. 676.

The defendant hearing at night a noise, and seeing a man at the back door of his house, believed that an attempt was being made to break into it, and acting on that belief, and on his wife telling him that the plaintiff was the man, he gave the plaintiff, a respectable neighbour, who happened to be passing the front of the house at the time, into custody. In an action for this false imprisonment, the defendant pleaded not guilty by statute 24 & 25 Vict. c. 96, which by s. 113 requires, in actions for anything done in pursuance of the act, notice of action to be given:—Held, that, an attempt to break into a house not being an offence within the act, the defendant did not believe in a state of facts which, if it had existed, would have afforded a justification under the act, and was therefore not entitled to notice. *Ib.*

The defendant purchased some fruit of the plaintiffs, itinerant vendors, and directed them to take it to his residence, where it would be paid for. The fruit was accordingly taken to his house, and there paid for by his butler on the plaintiffs presenting the defendant's order to that effect. The defendant returned home about three hours afterwards, when, being under the impression that he had himself paid the plaintiffs, and that they had been paid twice, as soon as he learnt that the butler had paid them, he sent a constable after them, who found them seven hours later in the same day at a town five miles from the defendant's residence, and there arrested them on a charge of obtaining money under false pretences. Any person found committing such offence may, by 24 & 25 Vict. c. 96, s. 103, be immediately apprehended without warrant, and s. 113 gives the protection of notice before action for anything done in pursuance of that act:—Held, that the defendant, though he acted bonâ fide, could not believe that he was arresting the plaintiffs immediately they had been found committing the offence with which they were charged, and that, therefore, he was not entitled to the protection of s. 113. *Downing* v. *Capel*, 36 L. J., M. C. 97; L. R. 2 C. P. 461; 16 L. T. 323; 15 W. R. 745.

A. had communicated to B. & Co., who were distillers, a method of rectifying spirits, and they were to pay him an annuity, and sixpence a gallon on all spirits rectified by his method, and to keep an account. A. having a sum due to him, B. & Co. offered to pay it at their solicitor's office, and to produce the account there. A. sent B. & Co. a letter, stating that he should come to the distillery for a sight of the account and for payment, to which G., one of the firm of B. & Co., replied by letter, stating that if A. came to the distillery and either rang or knocked he would be punished. A. went to the distillery (which was within the metropolitan police district), and gently rang the gate-bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman on a charge of having rung the bell, contrary to the 2 & 3 Vict. c. 47, s. 54:—Held, in an action for false imprisonment by A. against G. and H., that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action. *Home* v. *Grimble*, Car. & M. 17.

A woman having been taken into custody on a charge of concealing the birth of her illegitimate child, a justice of the peace made an order for the examination of her person, under which order she was examined by a medical man. In an action against him for an assault, there being no authority at common law or by statute to make the order:—Held, that he was not entitled to notice of action under 11 & 12 Vict. c. 44, s. 9 (which provides for the giving of notice before any action against a justice of the peace for anything done by him in the execution of his office), inasmuch as though he might have acted bonâ fide, in the belief that he had authority to make the order for her examination, there was nothing in fact on which he could ground such belief. *Agnew* v. *Jobson*, 47 L. J., M. C. 67; 13 Cox, C. C. 625.

Servant claiming to have Authority of Owner.] —Where a defendant claims the protection of 7 & 8 Geo. 4, c. 30, as having acted within s. 28 as the owner's servant, or by the owner's authority, in arresting the plaintiff, the jury should be asked not only whether the defendant acted bonâ fide, but also whether he had a reasonable belief that he was servant of, or had the authority of, the owner. *Kine* v. *Evershed*, 10 Q. B. 148; 16 L. J. Q. B. 271; 11 Jur. 673.

Person acting when disqualified.]—A person who is in fact disqualified from being a member of a local authority, but who acts in the bonâ fide belief that he is a member, is entitled to notice of action under s. 264 of the Public Health Act, 1875. *Lea* v. *Facey*, 56 L. J., Q. B. 536; 19 Q. B. D. 352; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756—C. A.

Contractor or Builder.]—The defendant was a contractor engaged in making a sewer for a vestry; one of his men, who was employed to take care of a horse and cart, and who had no right to go home to dinner or leave the horse

and cart, took them to his house and left them outside whilst he was having his dinner; the horse ran away and damaged the plaintiff's railings: — Held, that the defendant was not entitled to notice of action under s. 106 of the Metropolis Management Act, 1862. *Whatman* v. *Pearson*, 37 L. J., C. P. 156; L. R. 3 C. P. 422; 18 L. T. 290; 16 W. R. 649.

The defendant contracted with the metropolitan board of works to make a new sewer to the satisfaction of the engineer of such board, and in the course of carrying out such contract he made a dam across the old sewer to keep back the sewage, and unintentionally neglected sufficiently to pump out the sewage, so that on three separate occasions it entered the plaintiff's house and injured it:—Held, that the defendant was entitled to notice of action under s. 106 of the Metropolis Management Act, 1862, as the injury complained of was the result of "an act done or intended to be done under the powers of such board," by a contractor acting under their direction, within the meaning of such section. *Poulsum* v. *Thirst*, 36 L. J., C. P. 225; L. R. 2 C. P. 449; 16 L. T. 324; 15 W. R. 766.

The defendant contracted with a local board of health to dig wells for them according to a specification prepared by the surveyor, the works to be done to the satisfaction of such surveyor, and the digging to be done entirely under his direction; the surveyor to have power, if he considered the materials or works improper, of making the contractor remove them, or of removing them at the contractor's expense, and of ordering the dismissal of workmen with whom he should be dissatisfied, or of dismissing them himself; the board to have the power of making alterations and additions. The defendant was sued for having left a hole, excavated in working one of the wells in a highway, without light by night, whereby a party, who was driving a carriage along the highway, fell into the hole, and was bruised, and his carriage injured:—Held, that the defendant was entitled to notice of action under the 11 & 12 Vict. c. 63, s. 139. *Newton* v. *Ellis*, 5 El. & Bl. 115; 24 L. J., Q. B. 337; 1 Jur. (N.S.) 850; 3 W. R. 476.

By the Metropolitan Building Act, 18 & 19 Vict. c. 122, s. 108, no writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of the act till one month after notice of action:—Held, that the words "or other person" were restricted to a class, and intended to protect persons of the same class as a district surveyor or persons who had official duties cast upon them by the act, and did not include a builder, who while building a house adjoining the plaintiff's had negligently underpinned the party-wall and thereby caused damage to his house. *Williams* v. *Golding*, 35 L. J., C. P. 1; L. R. 1 C. P. 69; 11 Jur. (N.S.) 952; 13 L. T. 291; 14 W. R. 60; 1 H. & R. 18. See *Breedon* v. *Murphy*, 3 Car. & P. 574.

Person acting under Direction of Vestry.]—By the directions of an officer of the vestry board, the defendant, in the honest belief that such officer was authorised by the board to give such directions, erected a urinal on the wall of the plaintiff, such a work being a thing within the powers of the vestry board to erect under 18 & 19 Vict. c. 120, s. 88. The officer had no express orders from the board to erect this particular work, but the parish afterwards paid the expenses of it:—Held, that the defendant, as he acted bonâ fide under the direction of an officer of the board, in the erection of works which the board was empowered to order by virtue of 18 & 19 Vict. c. 120, s. 88, was a person within the meaning of 25 & 26 Vict. c. 102, s. 106, entitled to notice of action. *Chambers* v. *Reid*, 13 L. T. 703; 14 W. R. 370.

Held, also, that the words in 25 & 26 Vict. c. 102, s. 106, "their or any of their directions," are not to be limited to the "board or vestry," but to be extended to the words following, "clerk, surveyor, contractor, officer," &c. *Ib.*

By the 25 & 26 Vict. c. 102, s. 106, no writ or process shall be sued out against or served upon . . . the metropolitan board of works, or any vestry or district board, or their clerk or any clerk, surveyor, contractor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the metropolitan acts, until one month after notice:—Held, that the section intended only some act done by virtue of the powers vested in the board or vestry and under their authority, and that, therefore, a person who had received notice from a district board to drain into a sewer, and in doing so committed a trespass, was not entitled to notice of action. *Doust* v. *Slater*, 10 B. & S. 400; 38 L. J., Q. B. 159; 20 L. T. 525.

Private Person distinguished from Constables, &c.]—A private person who gives another into custody on a charge of having committed an offence against 7 & 8 Geo. 4, c. 29, is not entitled to notice of action under s. 75, as that section only applies to constables and other officers, and persons of that kind. *Brooker* v. *Field*, 9 Car. & P. 651.

The 7 & 8 Geo. 4, c. 30, s. 41, which makes certain provisions as to actions brought for anything done in pursuance of that statute, applies only to the case of parties exercising particular powers conferred by that statute. *Thomas* v. *Saunders*, 5 B. & Ad. 462.

The 24 & 25 Vict. c. 96 (the Larceny Consolidation Act), s. 113, requiring a month's notice in writing to be given before the commencement of any action or prosecution against any person "for anything done in pursuance of the act," has no application to the ordinary case of a private individual prosecuting another for a felony, and such a person is liable for malicious prosecution without the safeguard of notice provided by that section. *Mercer* v. *Gooch*, 15 L. T. 219.

Constables and Watchmen.]—By an act for improving a town, commissioners were appointed, and were authorised to appoint, by writing, a clerk, and also such surveyors, constables, watchmen, and other officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper. The commissioners were also empowered to appoint such a number of able-bodied men as they should think proper to be employed as watchmen during the night-time; and it should be lawful for such watchmen, and they were required in their stations, to apprehend and secure all malefactors, and all suspected persons who should be found wandering and misbehaving themselves during the hours of keeping watch. The watchmen were to be sworn in as constables, and were to be invested with the like

powers and authorities as any constables were invested with or enjoyed by law. No action should be commenced against any person or persons for anything done or to be done under or by virtue of the act until a month's notice should have been first given in writing to the clerk of the commissioners of the cause of action :—Held, first, that the section requiring notice to be given was not confined to acts done, or directed to be done, by the commissioners, but applied to acts done by constables and watchmen ; secondly, that evidence of the defendants acting as constables and watchmen under the commissioners in the town was primâ facie sufficient to entitle them to the protection, without proof of their appointment ; and, thirdly, that where the watchmen had reasonable ground of suspicion that a felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary for effecting his apprehension, they were protected by the section requiring notice. *Butler* v. *Ford*, 1 C. & M. 662 ; 3 Tyr. 677 ; 2 L. J., M. C. 109.

Action against Company—Action in rem.]—It is provided by s. 8 of 6 & 7 Will. 4, ch. c., that "no action to which the" City of Dublin Steam Packet Company "shall be liable in respect of any damage alleged to be done . . . to . . . any ship on the high seas . . . shall be brought . . . unless one calendar month's previous notice in writing shall have been given . . . to the said company." A damage action in rem having been commenced against a vessel belonging to the City of Dublin Steam Packet Company in respect of a collision on the high seas without any notice of action having been given to the company :—Held, that the action, being in rem, was not an action against the company within s. 8 of 6 & 7 Will. 4, ch. c., and that notice was not required. *The Longford*, 58 L. J., P. 33 ; 14 P. D. 34 ; 60 L. T. 373 ; 37 W. R. 372 ; 6 Asp. M. C. 371—C. A.

The 6 & 7 Will. 4, c. 105, s. 8, which requires notice to be given one calendar month before bringing any action in any of his Majesty's courts against the City of Dublin Steam Packet Company, has reference merely to actions in personam against the company, and not to actions in rem against the company's vessels. *The Mullingar*, 26 L. T. 326.

—— **Treasurer.**]—The 39 & 40 Geo. 3, c. 69, s. 184, directed that the West India Dock company should be sued in the name of their treasurer, and extended the protection of the 24 Geo. 2, c. 44, for privileging justices of the peace in actions brought against them as such, to the lord mayor and aldermen of London, acting under the act beyond the limits of the city ; and directed that no action should be commenced against any person or persons for anything done in pursuance or under colour of the act until after notice in writing :—Held, that the treasurer of the company was a person within the protection of the clause, and being sued for an act done by the company which induced an injury to the plaintiff, was entitled to such notice before action. The notice is necessary in actions for trespasses or torts. *Wallace* v. *Smith*, 5 East, 114 ; 1 Smith, 346.

—— **Commissioners.**]—An action against the Melbourne Harbour trust commissioners is an action brought against a "person" within the meaning of s. 46 of the Melbourne Harbour trust act ; and notice in writing thereof complying in form or in substance with the requirements of the section is necessary. *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Commissioners*, 53 L. J., P. C. 59 ; 9 App. Cas. 365 ; 50 L. T. 337 ; 5 Asp. M. C. 222—P. C. See *Boyd* v. *London and Croydon Ry.*, 4 Bing. (N.C.) 669 ; 6 Scott, 461 ; 6 D. P. C. 721 ; 7 L. J., C. P. 241.

Injunction—No Notice required.]—The court of chancery will grant an injunction to restrain a nuisance being committed or continued by a metropolitan local board, notwithstanding a month's notice of the proceeding has not been given in accordance with the Metropolis Local Management Acts Amendment Act, 1862, s. 106. *Att.-Gen.* v. *Hackney Board of Works*, 44 L. J., Ch. 545 ; L. R. 20 Eq. 626 ; 33 L. T. 244.

Where the principal object of an action against a local board of health is an injunction to restrain an immediate injury, it is not necessary to give a month's notice of the cause of action under s. 264 of the Public Health Act, 1875 ; and it makes no difference that damages are claimed by way of subsidiary relief. *Flower* v. *Low Leyton Local Board*, 46 L. J., Ch. 621 ; 5 Ch. D. 347 ; 36 L. T. 760 ; 25 W. R. 545—C. A.

Sect. 106 of the Metropolis Local Management Acts Amendment Act, 1862, which requires that before any proceeding is instituted against a district board a month's notice shall be served on them by the person intending to take the proceeding, does not apply to actions in equity—per North, J. That section does not apply to an action for an injunction to restrain a nuisance—per Lopes, L.J. (Cotton and Lindley, L.JJ., not dissenting). *Bateman* v. *Poplar Board of Works*, 56 L. J., Ch. 149 ; 33 Ch. D. 360 ; 55 L. T. 374—C. A.

A local board, assuming to act under the authority of s. 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), erected a public urinal partly upon a highway and partly upon a strip of land belonging to the plaintiff, and so near to other adjoining land of the plaintiff as to be a nuisance to her and her tenants, and to depreciate the value of her property :—Held, that the plaintiff was entitled to a mandatory injunction to restrain the board from continuing the urinal upon her land or so near thereto as to cause injury or annoyance to her or her tenants, and that in such a case notice of action under s. 264 is not required. *Sellors* v. *Matlock Bath Local Board*, 14 Q. B. D. 928 ; 52 L. T. 762.

The provision of s. 109 of the Highways Act, 1835, as to notice of action, does not apply where the principal object of the action is an injunction. *Phelips* v. *Hadham District Board*, 1 Cab. & E. 67.

—— **Damages in Substitution for.**]—Where an action against a sanitary authority was bonâ fide and in substance brought for an injunction to prevent them from causing a nuisance in the future by continuing to discharge sewage into a stream, but the judge at the trial thought that under the circumstances an injunction was not then needed, because, though a nuisance was caused by such discharge of sewage in an exceptionally dry season, which at the time of the trial had passed away, it was not likely to recur except in such a season, and he accordingly

refused an injunction, but gave 25*l.* damages :—Held, that he had power to give such damages in substitution for an injunction in accordance with the chancery practice under Lord Cairns' act, though no notice of action had been given as required by s. 264 of the Public Health Act, 1875. *Chapman* v. *Auckland Union*, 58 L. J., Q. B. 504 ; 23 Q. B. D. 294 ; 61 L. T. 446 ; 53 J. P. 820—C. A.

Other Cases where no Notice required.]—The section of the Poor Law Amendment Act giving to the commissioners, &c., protection by way of notice and limitation of action, does not apply to actions resulting from suits in equity against them to restrain acts in the nature of a nuisance. *Bevan* v. *Clifton Union*, 2 W. R. 598.

Clauses in local act providing that person aggrieved by the commissioners appointed to carry it into execution should appeal to the quarter sessions, and that twenty-one days' notice should be given before any action or suit was commenced for anything done in pursuance of the act, do not apply to the case of a person claiming as an incumbrancer of the rates which the act gave authority to assess and levy and instituting his suit in order to give effect to his incumbrance. *Drewry* v. *Barnes*, 3 Russ. 94 ; 5 L. J. (O.S.) Ch. 47 ; 27 R. R. 20.

c. When and How to be Given.

1. Form and Requisites.

Time for Giving.]—A notice of an action against a justice for an act done by him in execution of his office, under an order, in a matter in which he has no jurisdiction, may be given before the quashing of the order, the act itself being the cause of action, and such cause of action being complete before the quashing, although the action itself cannot be brought until after the quashing. *Haylock* v. *Sparke*, 1 El. & Bl. 471 ; 22 L. J., M. C. 67 ; 17 Jur. 731.

Second Writ—One Notice.]—Where the notice stated the nature of the writ intended to be sued out, and also the cause of action ; and a writ was sued out and served, but afterwards discontinued ; and within the time allowed by the statute another writ ejusdem generis was sued out and served, in which another person was joined as defendant : the court, after verdict, held that the notice was sufficient. *Jones* v. *Simpson*, 1 C. & J. 174 ; 1 Tyr. 32 ; 9 L. J. (O.S.) M. C. 45.

Length of Notice.]—In an action against a justice of the peace for anything done by him in the execution of his office, the day both of delivering the notice and that of bringing the action must be excluded. *Young* v. *Higgon*, 6 M. & W. 49 ; 8 D. P. C. 212 ; 9 L. J., M. C. 29 ; 4 Jur. 125.

In a case where one calendar month's notice of action was necessary, notice of action was given on the 28th of a month, and an action commenced on the 29th of the following month :—Held, sufficient. *Freeman* v. *Read*, 4 B. & S. 174 ; 32 L. J., M. C. 226 ; 10 Jur. (N.S.) 149 ; 8 L. T. 458 ; 11 W. R. 802.

The 5 & 6 Will. 4, c. 50, s. 109 (Highway Act), requiring twenty-one days' notice of action against justices or others for anything done under the act, does not impliedly repeal the privilege of justices to have a month's notice under the 24 Geo. 2, c. 44, s. 1. *Reg.* v. *Barton Inhabitants*, 12 A. & E. 470 ; 4 P. & D. 182 ; 4 Jur. 987.

Under the Metropolitan Works Act, 25 & 26 Vict. c. 102, s. 106, a notice of action left with the foreman of a contractor, at a yard of his where there was an office, on the day from which a calendar month expired the day before action, is sufficient, although it did not come to the hands of the defendant until the day afterwards. *Moody* v. *Delhick*, 4 F. & F. 938.

Indorsements.]—The name and place of abode of the plaintiff's attorney should appear on the back of the notice of action (when the notice of action has been served by the attorney) ; and it is not sufficient that they should appear in the body or at the foot of it. *Collins* v. *Hungerford*, 7 Ir. C. L. R. 581.

Where a notice of action was signed by the plaintiff himself, but indorsed by his attorney :—Held, that the notice was sufficient, the indorsement by the attorney being all that the statute requires. *Morgan* v. *Leach*, 10 M. & W. 558 ; 2 D. (N.S.) 522 ; 12 L. J., M. C. 4.

It is sufficient, in indorsing the attorney's name, to put the initial only of his christian name. *Mayhew* v. *Lock*, 2 Marsh. 377 ; 7 Taunt. 63.

It is sufficient, if signed by a firm of two attorneys who are partners, and are employed by the plaintiff ; and if signed T. & W. A. W. this is good, though the christian name of one is T. A., and of the other W. A., if there was no other firm of the same surname in the same place at which the notice bore date. *James* v. *Swift*, 6 D. & R. 625 ; 4 B. & C. 681 ; 2 Car. & P. 237 ; 4 L. J. (O.S.) K. B. 43.

A notice was indorsed by Messrs. England and Shackles as attorneys for the plaintiff ; but before action brought the partnership was dissolved, and the action was brought by Mr. England alone :—Held to be no ground of objection. *Hollingworth* v. *Palmer*, 4 Ex. 267 ; 18 L. J., Ex. 409.

A description of the attorney, as of a place in London, when in fact the place is in Westminster, is bad. *Stears* v. *Smith*, 6 Esp. 138.

When signed thus—"Given under my hand at Durham the 11th day of, &c. Richard Ratcliffe, attorney for, &c." :—Held, insufficient. *Taylor* v. *Fenwick*, 3 Bos. & P. 553, n. ; 7 Term Rep. 635, n. ; 3 Dougl. 178.

An indorsement by an attorney of the place of his office is an indorsement of his place of abode. *Roberts* v. *Williams*, 4 D. P. C. 483 ; 5 Tyr. 583 ; 1 Gale, 315 ; 5 L. J., M. C. 23.

An indorsement with the name of the plaintiff's attorney, and the words, "of Birmingham," as describing the place of his abode, is sufficient. *Osborn* v. *Gough*, 3 Bos. & P. 551.

In Wrong Court.]—A notice of an action in the common pleas was insufficient to support an action in the queen's bench. *Elstob* v. *Wright*, 3 Car. & K. 31.

Description of Occupation.]—A party may describe himself by the addition of what he really is, e.g. "dealer," although in the commitment he is described as a labourer. *Mason* v. *Barker*, 1 Car. & K. 100.

Form of Action.]—The notice need not state the form of action ; it is sufficient to state the cause of action. *Prickett* v. *Gratrex*, 2 New Sess. Cas. 429 ; 8 Q. B. 1020 ; 1 Car. & K. 651 ; 15

L. J., M. C. 145 ; 10 Jur. 566. S. P., *Ford* v. *Abdy*, 5 L. J. (O.S.) M. C. 41.

Cause of Action.]—A notice of action must state the substantial cause of action intended to be relied on clearly and explicitly, and in such a manner as will not be likely to mislead, and so probably prevent a tender of amends. *Taylor* v. *Nesfield*, 3 El. & Bl. 725 ; 2 C. L. R. 1312 ; 23 L. J., M. C. 169 ; 18 Jur. 747 ; 2 W. R. 474.

In an action against a justice of the peace for an act done within his jurisdiction, the notice of action must state that the act was done maliciously, and without reasonable and probable cause, or it will not be sufficient within s. 9 of 11 & 12 Vict. c. 44. *Ib.*

A notice is not vitiated by being in the form of a declaration, and unnecessarily ample, if it expresses the cause of action with sufficient clearness. *Gimbert* v. *Coyney*, M'Clel. & Y. 469 ; 29 R. R. 828. And see *Robson* v. *Spearman*, 3 B. & Ald. 493.

—— **Place and Time.**]—A notice of action does not clearly and explicitly contain the cause of action, if it omits to mention the place where the act complained of was done. *Martins* v. *Upcher*, 1 D. (N.S.) 555 ; 2 G. & D. 716 ; 3 Q. B. 662 ; 11 L. J., Q. B. 291 ; 6 Jur. 582.

A notice to a special constable stated the grievances to be, that he, on the 30th January, at S., arrested and imprisoned the plaintiff on a charge of felony, and took him then in custody to D., detained him twelve hours in custody, and caused him to be taken before certain justices of the peace at D. on the 31st of the said month :—Held, that the time and place of committing the grievances were sufficiently specified. *Jones* v. *Nicholls*, 1 New Sess. Cas. 524 ; 13 M. & W. 361 ; 2 D. & L. 425 ; 14 L. J., Ex. 42 ; 8 Jur. 989.

A notice of action against an officer of the metropolitan police, under 10 Geo. 4, c. 44, s. 41, must specify the time and place of the act complained of. *Breese* v. *Jerdein*, 4 Q. B. 585 ; 2 G. & D. 720 ; 12 L. J., Q. B. 234 ; 7 Jur. 490.

A notice of action accurate in every particular except as to the date, which was wrong only by a day, is a sufficient and valid notice. *Green* v. *Hutt*, 51 L. J., Q. B. 640 ; 46 L. T. 888 ; 46 J. P. 599.

A notice of an action against a vestry for something done, or intended to be done, under the powers of the Metropolis Management Amendment Act, 1862, sufficiently states the cause of action within the meaning of s. 106 of that act, although it contains an inaccurate statement as to the place where the injury complained of occurred, provided such inaccurate statement is not calculated to mislead the defendants. *Martins* v. *Upcher* (3 Q. B. 662) distinguished. *Madden* v. *Kensington Vestry*, 61 L. J., Q. B. 527 ; [1892] 1 Q. B. 614 ; 66 L. T. 347 ; 40 W. R. 390 ; 56 J. P. 471.

A notice of action against a magistrate for acts done in the exercise of his office, not stating the place in which the acts complained of had been committed, is insufficient. *Forbes* v. *Lloyd*, Ir. R. 10 C. L. 552—Ex. Ch.

A notice stating that a trespass was committed in a house described as in "West Square, Lambeth," is sufficient, though the correct legal description would have been "in the parish of St. George the Martyr." *Gibbs* v. *Stead*, 8 B. & C. 528 ; 6 L. J. (O.S.) K. B. 378.

A notice stated the cause of action thus :—"For that you on the 10th day of May, 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, and to be forced and compelled to go along divers public streets and roads to a prison, to wit, at Louth, in, &c., and to be unlawfully imprisoned and kept in prison there for forty days then next following." At the trial, the proof was confined to the imprisonment in the gaol at Louth, under an invalid warrant :—Held, that the notice sufficiently stated the place of the injury so as to enable the plaintiff to recover in respect of such imprisonment. *Jacklin* v. *Fytche*, 14 M. & W. 381 ; 15 L. J., Ex. 102.

Justices convicted A. under 6 & 7 Vict. c. 68, in his absence, of keeping an unlicensed theatre. Immediately after the conviction, he, being in the presence of the justices, asked leave to go to his home. One of the justices said if he went he must go in custody. He was detained for a day and a night. A warrant not returnable on a day certain was issued by the justices. It recited a conviction, adjudging A. to pay a penalty of 5*l.* and 12*s.* costs, and directed the sums to be levied by distress. Under this warrant his goods were seized and sold. A conviction was drawn up, adjudging him to pay a penalty, but silent as to costs ; and there was no evidence that in fact the justices had adjudicated on the costs. The conviction was quashed. Notice of action was given to the justices for that they, "at H., on the 1st day August," &c., imprisoned A., and also for that they "on the said 1st day," &c., seized his goods :—Held, that the notice was sufficiently certain as to averment of place. *Leary* v. *Patrick*, 15 Q. B. 266 ; 4 New Sess. Cas. 258 ; 19 L. J., M. C. 211 ; 14 Jur. 932.

Amount Recoverable.]—In an action against a justice for taking goods, the plaintiff cannot recover more than the value stated in his notice. *Stringer* v. *Martyr*, 6 Esp. 134.

Variance in.]—A notice to a constable, in pursuance of 10 Geo. 4, c. 44, s. 41, mentioned apprehension, detention in custody, and imprisonment, as the cause of action. The declaration contained two counts—one for the cause of action stated in the notice, and the other for taking the goods of the plaintiff. A verdict was given for him upon the first count only :—Held, that the variance was not material. *Breese* v. *Jerdein*, 4 Q. B. 585 ; 2 G. & D. 720 ; 12 L. J., Q. B. 234 ; 7 Jur. 490.

Construction of Notices.] — In construing notices of action under the various statutes requiring them, the court will not subject them to too nice and narrow an examination ; the object being that they should be plain and intelligible to plain men. *Jones* v. *Nicholls*, 1 New Sess. Cas. 524 ; 13 M. & W. 361 ; 2 D. & L. 425 ; 14 L. J., Ex. 42 ; 8 Jur. 989.

A notice of action against bricklayers, for negligence in repairing a public sewer, is not to be construed with the same strictness as is generally required in pleading, provided there is a sufficient cause of action shewn upon the face of it ; therefore a notice under a local act "that the defendant made, altered, repaired, cut, dug, worked, and enlarged the sewer in so negligent, incautious, unskilful, improvident, and improper a manner, that the plaintiff's premises fell, and were greatly damaged, weakened, and destroyed," is a sufficient notice, though the proof was, first,

that the defendant had not propped and shored up the house in the progress of the work; and, secondly, that the immediate cause of the injury was the falling of other houses, which drew the plaintiff's after them. *Jones* v. *Bird*, 1 D. & R. 497; 5 B. & Ald. 837; 24 R. R. 579.

But a notice against a toll-gate keeper, "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll in and by an act of parliament intituled, &c.," is too uncertain, and bad. *Freeman* v. *Line*, 2 Chit. 673.

A notice of an action for breaking and entering the plaintiff's house, and seizing goods, which goods were "lying and being in and upon my dwelling-house," will not support a charge in the declaration of taking the plaintiff's goods. *Elstob* v. *Wright*, 3 Car. & K. 31.

But a notice of action given to the high bailiffs of a county court under 9 & 10 Vict. c. 95, s. 138, which stated that the action would be brought "to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd day of December, 1863, by selling and disposing of certain goods and chattels in and upon the premises," is not bad for not stating whose goods were seized, nor the amount of damages sought to be recovered. *Burton* v. *Le Gros*, 34 L. J., Q. B. 91; 11 L. T. 270; 13 W. R. 46.

In an action against a local board acting under the Public Health Act, 1848 (11 & 12 Vict. c. 63), for not having properly filled up a trench which the board had caused to be made in a road for laying down a sewer, by reason of which that part of the road gave way, and the plaintiff's horse was injured, the notice of action given in compliance with s. 139 stated that the board did by their "labourers, servants, and others on or about the 13th of May last negligently, carelessly, and improperly leave a certain portion of the road or highway in an insufficient and improper state of repair, whereby a horse" of the plaintiff "sank into the road or highway, and was thrown therein," and injured:—Held, that the notice was not limited to a complaint of an injury from non-repair of the road, but was applicable to a cause of action arising from an act of misfeasance, and was therefore a sufficient notice of the cause of action. *Smith* v. *West Derby Local Board*, 47 L. J., C. P. 607; 3 C. P. D. 423; 38 L. T. 716; 27 W. R. 137.

A notice stated that a writ would be issued against the defendant for that he had caused a distress to be levied at the plaintiff's office of business. The declaration was for breaking and entering, and seizing the plaintiff's goods:—Held, that the notice was sufficient. *Hillingworth* v. *Palmer*, 4 Ex. 267; 18 L. J., Ex. 409.

When in the Name of a Party who was Dead.]—A notice in these words:—"I do hereby, as attorney for A. P. and E. P. (the plaintiff), and in pursuance of the statute, give you notice that an action will be commenced against you for recovery of compensation in damages for an illegal seizure and distraint, and for the value of the property seized." A. P. was dead at the time of the service of the notice:—Held, that the notice, being in the name of a party who was dead, was insufficient. *Pilkington* v. *Riley*, 6 D. & L. 628; 3 Ex. 739; 18 L. J., Ex. 323.

Statement of Names.]—If a notice of action against a magistrate for wrongful distress under a conviction states the person to whom the warrant is directed, it must state it correctly. *Aked* v. *Stocks*, 4 Bing. 509; 1 M. & P. 346; 6 L. J. (O.S.) C. P. 100; 29 R. R. 614.

One Notice to Several Persons.]—A separate notice to each of several persons intended to be sued is sufficient to found a joint action against all for acts committed in pursuance of an act of parliament, which provided that no plaintiff shall recover in an action for anything done in pursuance thereof without notice to the defendant or defendants of such intended action, although none of the other persons who are afterwards joined in the action are named in the notice to either of them. *Agar* v. *Morgan*, 2 Price, 126; 19 R. R. 567, n.

A notice of action against a magistrate is sufficient to warrant a writ and proceeding against the magistrate and a constable jointly. *Jones* v. *Simpson*, 1 C. & J. 174; 1 Tyr. 32; 9 L. J. (O.S.) M. C. 45.

Contained in Several Documents.]—The notice of action mentioned in s. 264 of the Public Health Act, 1875, need not be contained in one document; a series of letters will suffice if the cause of action is clearly stated, and the other requirements of the section are complied with. *Lamley* v. *East Retford Corporation*, 55 J. P. 133—C. A.

Where a statute requires a month's notice of action to be given before the commencement of an action, a letter written to the defendant six weeks before action, threatening proceedings unless an apology was made and certain costs were paid, is not such a notice as the statute requires. *Wynyard* v. *Marks*, 15 L. T. 591.

Sufficiency of Notice.]—A letter from the plaintiff's attorney, declaring that he is instructed to take legal proceedings unless goods are delivered up, is not a sufficient notice of action. *Lewis* v. *Smith*, Holt, 27. S. P., *Mason* v. *Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J., Ex. 407.

Where trustees of a paving act were entitled to a certain number of days' notice of action for anything done in pursuance of the act, a notice that, unless the name of the party on whose information they had taken certain steps were given up, proceedings would be taken against them, is bad because conditional, and because it should have specified that the action would be commenced at the expiration of the number of days mentioned in the act. *Norris* v. *Smith*, 2 P. & D. 353; 10 A. & E. 188; 8 L. J., Q. B. 274.

One person acted as clerk to two bodies of public officers. A notice of action was given him addressed to him as clerk to the one body, the cause of action arising under the authority of the other body:—Held, insufficient. *Hider* v. *Dorrell*, 1 Taunt. 383.

A notice signed by "A. E. P., solicitor, acting on the behalf and as the prochein amy of the plaintiff," who was an infant:—Held, sufficient, where notice was required to be given "by the attorney or agent." *De Gondouin* v. *Lewis*, 2 P. & D. 283; 10 A. & E. 117; 9 L. J., Q. B. 148; 3 Jur. 1168.

A notice of action to a bailiff of a county court is not bad because it describes him as having acted under a statute which does not relate at all to county courts, or to the matter

in question; if it gives him notice of the action and of the cause thereof it is sufficient, and such a reference to a wrong statute may be rejected. *Macgregor* v. *Galsworthy*, 3 Car. & K. 8.

A plaintiff having, after notice of action for extortion by a railway company in carrying his goods, served the company with a demand of interest under 3 & 4 Will. 4, c. 42, s. 28:—Held, that an arbitrator, under a submission of all matters in difference, might award the plaintiff interest, notwithstanding the notice of action did not contain a demand of interest. *Edwards* v. *G. W. Ry.*, 11 C. B. 588; 21 L. J., C. P. 72.

Particulars of demand in a plaint in a county court were, first, for unlawfully entering premises and seizing cattle under colour of a distress; secondly, for unlawfully selling three other cattle not distrained; thirdly, for not having the cattle so sold appraised before selling them; and, fourthly, for continuing on the premises and proceeding to sell the cattle after an abandonment of the distress. A notice of action given as under 5 & 6 Vict. c. 54, s. 19 (Tithe Commutation Act), stated that the plaintiff would bring his plaint against the defendant for having on the 11th of March entered his premises and seized three heifers there, and for having continued there several days, and also for that the defendant against the plaintiffs will on the 17th March did seize, sell, and remove from the plaintiff's premises three heifers belonging to him:—Held, that the plaintiff was entitled to go into evidence in support of the fourth item, as it was one for which no notice of action was necessary; or, if necessary, the notice given was large enough to apply to it. *Howard* v. *Remer*, 2 El. & Bl. 915; 23 L. J., Q. B. 60; 2 W. R. 55.

2. Service.

Service of a notice of action to a magistrate by a clerk of the attorney is sufficient, and the notice need not be served by the attorney himself. *Morgan* v. *Leach*, 10 M. & W. 558; 2 D. (N.S.) 522; 12 L. J., M. C. 4.

By 8 & 9 Vict. c. 20, s. 138, any notice, writ, or other proceeding at law or in equity may be served by being left at or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one:—Held, that a notice of action against the Great Western Railway Company for an overcharge for the carriage of goods from Bristol to London, served upon the superintendent of the Bristol station by the plaintiff, who resided at Bristol, was insufficient, inasmuch as the secretary was in London, and the control of the railway was carried on and the ordinary meetings of the directors were held there. *Garton* v. *G. W. Ry.*, El. Bl. & El. 837; 27 L. J., Q. B. 375; 4 Jur. (N.S.) 1036; 6 W. R. 677.

3. Proof.

Necessity for.]—A witness, who served a notice of action, did not know the handwriting of the plaintiff, whose signature the notice purported to bear, and no evidence was given of his handwriting:—Held, sufficient without such proof, as it was enough that the notice should have been served on his behalf. *Forman* v. *Dawes*, Car. & M. 127.

Waiving.]—The mere act of a magistrate cannot waive the necessity of proving a notice of action. Therefore, where a magistrate had sent to the plaintiff a paper writing reciting the notice that had been served on him, and tendering amends in respect of the matter contained in such notice, proof of such notice was still required. *Martins* v. *Upcher*, 1 D. (N.S.) 555; 2 G. & D. 716; 3 Q. B. 662; 11 L. J., Q. B. 291; 6 Jur. 582.

In an action against a justice of the peace for acts done in the execution of his office, the proof of notice of action is a necessary part of the plaintiff's case, and must be given by him, though the want of it is not relied upon in pleading by the defendant. *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 498.

d. Pleading Want of Notice.

Necessity of.]—Where an act provided that a plaintiff should not recover in any action for anything done in pursuance of the act unless twenty-one days' notice of action should be given:—Held, that the defendant must plead the want of such notice, or he could not avail himself of it. *Davey* v. *Warne*, 14 M. & W. 199; 15 L. J., Ex. 253. S. P., *Law* v. *Dodd*, 1 Ex. 845; 17 L. J., M. C. 65.

Under the County Courts Act, 1846, to take advantage of want of notice of action, it must be specially pleaded. *Smith* v. *Pritchard*, 2 Car. & K. 699.

Sufficiency of.]—To an action against a clerk of the pasture-masters of a borough, under a local act, for money received by the pasture-masters to the plaintiff's use, he pleaded that the debt arose out of the sale of a heifer of the plaintiff by the pasture-masters after the passing of the local act and 5 & 6 Vict. c. 97; that the sale of the heifer was a thing done in pursuance of the first-mentioned act; and that no notice of action had been given to the defendant, or to the pasture-masters:—Held, that the plea contained no sufficient averment that the thing complained of was a thing done in pursuance of the powers and authorities given by the local act. *Peck* v. *Boyes*, 7 Scott (N.R.) 436; 6 Man. & G. 726.

In trover, a defendant pleaded that the grievance was committed after the passing of 7 & 8 Vict. c. 19, for regulating bailiffs of inferior courts; that he had been duly appointed to act as bailiff in execution of the process of the Tolzey Court of Bristol, which court has, by charter, jurisdiction for the recovery of debts; and that he at the time of committing the grievance was a bailiff of the court, and that the grievance was a thing done in pursuance of his duty as such bailiff, and that no notice of action was given:—Held, sufficient, and that he was justified, on the ground that he was bailiff de facto. *Braham* v. *Watkins*, 4 D. & L. 42; 16 M. & W. 77; 16 L. J., Ex. 9.

e. Effect of Omission to Give.

Bars Right of Action as well as Costs.]—The proviso in s. 143 of the Turnpike Act, 3 Geo. 4, c. 126, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section; and, therefore, if a party seeking to recover the penalties imposed by that act omits to give the requisite notice, or to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett* v. *Warner*, 1 H. & N. 388; 26 L. J., Ex. 11—Ex. Ch.

II. PARTIES TO ACTIONS AND PROCEEDINGS BY AND AGAINST PARTICULAR PARTIES.

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a. WHO ARE NECESSARY PARTIES.

See the various titles throughout the work.

b. JOINDER OF PARTIES.

See R. S. C., 1883, Ord. XVI.

Plaintiffs—Same Person also Defendant.]—A party cannot be both plaintiff and defendant in an action at law; and therefore, where a plaintiff sued as executor, and the defendant pleaded that the promises were made jointly with the plaintiff, the court held it a good plea in bar. *Moffatt* v. *Van Mullingen*, 2 Chit. 539; 2 Bos. & P. 124, n.; 15 R. R. 506; S. P., *Teague* v. *Hubbard*, 8 B. & C. 345; 6 L. J. (O.S.) K. B. 326. And see *Lloyd* v. *Williams*, 2 M. & S. 484.

Action by A. and two others on a contract, on the deposit of goods by the three with the defendant, not to give them up without the joint order of the three. Breach, that they were given up without such joint order. Plea, that they were given up to A. at his request:—Held, a good plea; for A. being disabled from suing for what he himself procured to be done, could not sue, though joining the others with him. *Brandon* v. *Scott*, 7 El. & Bl. 234; 26 L. J., Q. B. 163; 3 Jur. (N.S.) 362; 5 W. R. 235.

Action by A., B. and C., against D., as one of the indorsers of a promissory note drawn by E. in favour of C., D. and (himself) E., then in partnership, and by them indorsed to A., B. and C. Plea, that C., one of the plaintiffs, was liable as an indorser together with D.:—Held, good. *Mainwaring* v. *Newman*, 2 Bos. & P. 120; 5 R. R. 554.

—— **Interest—What Requisite.**]—A testator bequeathed certain leaseholds to A. for life, with remainder to his children, and directed that A., whom he made his executor, should from time to time, and at the proper periods, renew the leases. He also gave an annuity to B., which he charged on the residue of his personal estate. Some years after the testator's death B. filed a bill against A. to enforce payment of the annuity, and also as next friend of the infant children of A., praying that the leases might be renewed for their benefit:—Held, that B. and the infants were improperly joined as plaintiffs, their respective interests being wholly unconnected with each other, and the bill was on this account dismissed at the hearing. *Anderson* v. *Wallis*, 4 Y. & Coll. 336. Affirmed, 1 Ph. 202.

Several persons having distinct demands, and not being able to sue on behalf of themselves and others, cannot be co-plaintiffs. *Jones* v. *Garcia Del Rio*, Turn. & R. 297; 24 R. R. 64.

A single copyholder is not relieved in equity for an excessive fine, because this is determinable at law; but, to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine which is excessive. *Cowper* v. *Clerk*, 3 P. W. 155.

Bill by one tenant of the manor of A. suggesting a custom for the tenants of that manor to cut turf in the manor of B. Where several persons have the same right and are disturbed, such bills are entertained to avoid a multiplicity of suits, since one or two determinations will establish the rights of all parties, on the footing of one common interest; but in all such bills all parties, or a determinate number, join in the name of the rest. Here only one brings a bill in the general right, and not in a distinct right. Bill dismissed. *Baker* v. *Rogers*, Sel. Ch. Ca. 74.

Certain consignments of oil were made from Colombo to certain persons resident in England. During the voyage several of the casks in which the oil was contained leaked. Some part of the oil which so escaped was wholly lost, but the greater part was collected together and sold in one mass by the captain in the course of the voyage for 750*l*. The consignees then agreed to share the proceeds in proportion to their respective losses:—Held, that, several actions having been brought by the shipholder against the consignees to recover freight and average, they might all join in one bill against him for an account and equitable set-off. *Jones* v. *Moore*, 4 Y. & Coll. 351.

A person, though uniting in himself several characters, having distinct conflicting rights, may maintain a suit as sole plaintiff, but the court will not, in a suit so constituted, decide upon the conflicting interests which his claim embraces, and will decree according to the supposition most favourable to the defendant. *Blease* v. *Burgh*, 2 Beav. 221; 9 L. J., Ch. 226.

Semble, where a party is made a co-plaintiff having no interest in one of the objects sought by his co-plaintiff, and the bill is sustainable only in respect of that object, it must be dismissed. *Denton* v. *Davy*, 1 Moore, P. C. 15.

If, of several co-plaintiffs, some have an interest

in the matter of the suit, and others have no interest, a general demurrer will hold to the whole bill. *Musgrave* v. *Vick*, 5 L. J. (o.s.) Ch. 150.

Bill dismissed for misjoinder, and because, though one plaintiff had an interest to maintain the suit, the other had not, and the interest of the former was not that claimed by the bill. *Barton* v. *Barton*, 3 K. & J. 512.

Persons not having a common interest in the subject of the suit cannot be joined as co-plaintiffs. *Page* v. *Townsend*, 5 Sim. 395.

Parties having adverse or inconsistent rights in the subject matter of a suit cannot be joined as co-plaintiffs. *Fulham* v. *McCarthy*, 1 H. L. Cas. 703; 12 Jur. 757.

Nor can a party who has no interest be joined as a plaintiff with one who has. *Ib.*

—— **Ord. XVI. r. 1.**]—Ord. XVI. r. 1, of the Rules of the Supreme Court of Judicature only applies to cases where it is doubtful in which a number of plaintiffs, or in what number of plaintiffs, and whether jointly or severally, the legal right to relief exists, and also cases in which several plaintiffs having separate rights claim the same relief. *Smurthwaite* v. *Hannay*, 63 L. J., Q. B. 737; [1894] A. C. 494; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485—H. L. (E.) S. P., *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, 64 L. J., P. C. 146; [1895] A. C. 661; 11 R. 508; 73 L. T. 37; 8 Asp. M. C. 23—P. C.

Ord. III. r. 1, of the County Court Rules, 1889 (similar to R. S. C., Ord. XVI. r. 1), does not authorise the joinder of the legal personal representatives of persons, whose deaths are alleged to have resulted from the same act of negligence, as plaintiffs in an action to recover compensation, the cause of action in respect of the death of each person being separate. *Carter* v. *Rigby*, 65 L. J., Q. B. 537; [1896] 2 Q. B. 113; 74 L. T. 744; 44 W. R. 566; 60 J. P. 581—C. A.

—— **Parties supposed to be legally entitled.**]—Sect. 19 of the Common Law Procedure Act, 1860, does not apply where it is clear on the face of the record that it is impossible both plaintiffs should be entitled to recover. *Bellingham* v. *Clark*, 1 B. & S. 332; 4 L. T. 405; 9 W. R. 667.

A. obtained from the Heralds' College a grant of arms, to be borne by him and his descendants and the descendants of his brother; he died without issue, leaving two nephews, the sons of his brother. One of the nephews and another person were appointed executors of his will:—Held, that, even assuming the executors could claim the document by action, the provisions of the above statute did not apply where the two nephews were the plaintiffs so as to enable the nephew executor to recover. *Stubs* v. *Stubs*, 1 H. & C. 257; 31 L. J., Ex. 510.

—— **Joinder in What Cases.**]—Under Ord. XVI. r. 1, an action of libel may be brought by two or more persons jointly, although they are not in partnership or otherwise jointly interested; and in such a joint action a single verdict of 40*s.* having been returned for the plaintiffs, the Court of Appeal refused, on the motion of the defendant, to disturb the verdict. *Booth* v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838—C. A.

Where two owners of distinct properties joined as plaintiffs in a suit to restrain a nuisance, it was held a misjoinder; but by consent the court heard the case as if distinct bills had been filed. *Appleton* v. *Chapel Town Paper Co.*, 45 L. J., Ch. 276.

The plaintiff brought an action for an account of royalties to which he was entitled for user by the defendant company of his patent. The patent was dated in 1873, and the user was alleged to have begun in that year. The statement of claim showed that in the years 1875 and 1876 the plaintiff had assigned shares in his patent to several other persons, retaining himself only one-sixth. The company at the hearing took the objection that the other persons interested in the patent should have been made parties:—Held, that one of several joint owners of a patent can sue for an injunction, and even for an account, without joining the other owners. *Sheehan* v. *G. E. Ry.*, 50 L. J., Ch. 68; 16 Ch. D. 59; 43 L. T. 432; 29 W. R. 69.

—— **In Respect of Wrongs.**]—Different plaintiffs who have different rights may each sue the same defendant in respect of separate injuries, though arising out of one transaction. *Knight* v. *Legh*, 4 Bing. 589; 1 M. & P. 528; 6 L. J. (o.s.) C. P. 128; 29 R. R. 645.

An action cannot be maintained jointly by two where the wrong done to one is no wrong done to the other. *Barratt* v. *Collins*, 10 Moore, 446.

A declaration that an action of trespass was depending wherein A. was plaintiff, and the now plaintiffs were defendants, in which action the plaintiffs appeared by D., their attorney, and the action was defended by him as such attorney; and that the defendants wrongfully, maliciously, and unlawfully upheld and maintained the action on the part of A. against the plaintiffs, by reason whereof they have been injured, prejudiced, and aggrieved in and about their defence in the action, and incurred and been obliged to pay sums of money in and about their defence. At the trial the jury found a verdict for the plaintiffs for the amount only of the bill of costs paid by them to D. as their attorney:—Held, that the action was maintainable jointly by the plaintiffs, the expenses of the defence in the former action being a joint and not a several damage. *Pechell* v. *Watson*, 8 M. & W. 691; 11 L. J., Ex. 225.

Where the defendants contemplated erecting premises which would if completed, it was alleged, interfere with the ancient lights of two messuages, one of which belonged to a husband and the other to his wife, separate actions were brought by husband and wife claiming (inter alia) an injunction and damages. The title of the wife did not appear. On a motion for an injunction, the defendants admitted the right of the plaintiffs, and had previously offered to amend their plans accordingly. They objected, however, to paying two sets of costs:—Held, that, if it should turn out that the wife was not entitled to her separate use, the taxing master should disallow any extra costs occasioned by bringing two actions instead of one. *Heimbs* v. *Newcastle Co-operative Society*, 76 L. T. 109.

Effect of Non-joinder.]—If one of two part owners of a chattel sues alone for a tort, and the defendant does not plead in abatement, the other part owner may afterwards sue alone, and the defendant cannot plead in abatement to such action. *Sedgworth* v. *Overend*, 7 Term Rep. 279.

A defendant pleaded in abatement that the

promises in the declaration alleged were made jointly by him with other persons. The plaintiff proved a separate debt due from the defendant, as well as a joint debt due from him and another:—Held, that the plaintiff was entitled to recover the amount of both debts, and that the defendant might have pleaded in abatement to part of the count, and in bar to the residue. *Hill* v. *White*, 8 Scott, 249; 6 Bing. (N.C.) 26; 8 D. P. C. 13; 9 L. J., C. P. 5.

A plaintiff declared against A., B. and C. for 35*l.* due in respect of work done for them. They pleaded that the work was done for them jointly with D. It appeared that one portion of the work was done for A.; another portion, to the amount of 4*l.*, for A., B., C. and D.; a third for A., B. and D.; and a fourth for A. and B.:—Held, that the plea was an answer to the action. *Hill* v. *Williams*, 6 Bing. (N.C.) 23; 8 Scott, 245; 8 D. P. C. 63; 9 L. J., C. P. 3; 3 Jur. 1077.

A plea in abatement of the non-joinder of co-contractors resident within the jurisdiction, alleging that the contract was made with the defendant and such resident co-contractors, and also with other co-contractors resident without the jurisdiction, is bad; the 3 & 4 Will. 4, c. 42, s. 8, requiring the defendant to state in his plea that all are resident within the jurisdiction, and to verify the residence of all by affidavit. *Joll* or *Gell* v. *Curzon* (*Lord*), 4 C. B. 249; 4 D. & L. 810; 16 L. J., C. P. 172; 11 Jur. 737.

A plea in abatement to an action ex contractu must, to be a good plea, set forth the names of all the parties with whom the defendant was a co-contractor. *Crellin* v. *Brook*, 1 Car. & K. 571.

In scire facias against A. and B. to repeal a patent granted to A. and B., A. cannot plead in abatement that B. assigned all his share and interest in the patent to A. before the writ was sued out, and has not since had any interest therein. *Reg.* v. *Betts*, 15 Q. B. 540; 19 L. J., Q. B. 531; 14 Jur. 912.

If in fact the party having no interest was joined in order that he might collusively prejudice the other defendant, application should be made to the court for remedy, as against an abuse of process. *Ib.*

A plaintiff obtained a judgment in an action against a public officer under 7 Geo. 4, c. 46, and subsequently sued out a scire facias against fifteen persons, whom he charged as members of the company, of which the defendant was the public officer; the sheriff returned as to all the defendants that they had nothing, and were not to be found in his bailiwick; twelve of the defendants voluntarily appeared, and the plaintiff declared against them. Upon demurrer assigning for cause that it did not appear that the then defendants who had not come forward were included in the proceedings:—Held, that such an objection could only be an irregularity, and to be taken advantage of on motion under 4 & 5 Anne, c. 16, and not upon demurrer; that the objection of non-joinder could not be raised upon demurrer, because there was nothing on the face of the record to shew that the defendants in question were alive; and that the writ could not, therefore, be abated on the ground of non-joinder. *Fowler* v. *Rickerby*, 9 D. P. C. 682; 2 Man. & G. 760; 3 Scott (N.R.) 138; 10 L. J., C. P. 149.

Defendants — No Relief claimed.]—It is a general rule that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree; thus a residuary legatee need not be made a party; and for the same reason, in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party. *De Golls* v. *Ward*, cited 3 P. W. 311.

It is not right in any case to make a man a party to a suit unless you can obtain a decree against him. *Petch* v. *Dalton*, 8 Price, 12. S. P., *Leathes* v. *Nemitt*, *Ib.*, 562.

Bill for relief against an award made by some members of the East India Company. The arbitrators and some of the members were made defendants; demurrer to the whole bill allowed, for plaintiff can have no decree against them; they ought to be examined as witnesses. *Steward* v. *East India Co.*, 2 Vern. 380.

A plaintiff cannot make defendant a corporation in whom he shews no liability, and against whom he prays no relief, merely for the purpose of discovery, and a corporation so made a party may demur. *Saunders* v. *Saunders*, 3 Drew. 387; 25 L. J., Ch. 26; 1 Jur. (N.S.) 1008; 4 W. R. 27.

The only case in which a person, against whom no relief is prayed, is allowed to be made a party, is that of the agent of a corporation. *Le Texier* v. *Anspach* (*Margravine*), 15 Ves. 164. But see 2 Ves. 284.

Assignment not discovered.]—A party having an interest in the subject-matter of a suit by virtue of a partnership had parted with his interest prior to the date of filing the bill. The plaintiff, nevertheless, made him a defendant, and he by his answer disclaimed. The plaintiff was ordered to pay such defendant's costs without being entitled to them over, the court being of opinion that the plaintiff might have easily ascertained the fact of the assignment, and it not appearing that he had attempted to do so. *Teed* v. *Carruthers*, 2 Y. & Coll. C. C. 31; 6 Jur. 987.

—— **Joinder when allowed.**]—The proprietor of a copyright must file separate bills against each bookseller taking copies of a spurious edition for sale. *Dilly* v. *Doig*, 2 Ves. J. 486.

There must be separate bills upon distinct invasions of a patent, otherwise a right of fishery, or the custom of a mill. *Ib.*, 487.

The plaintiff was tenant to the father of the defendants of a colliery, under a lease and subsequent agreements. On the father's death, he continued to hold under the defendant, the heir, on the same terms; he filed this bill against the two defendants, as executors of their father, and against the one as heir, for an account under the agreement both in the lifetime of the father and since his death; the defendants demurred separately, as being improperly joined in the suit, and the demurrers were allowed. *Ward* v. *Northumberland* (*Duke*), 2 Anstr. 469.

When an executor has committed a breach of trust by selling the trust property to a purchaser with notice at an undervalue, a bill against the executor and purchaser for administration of the trust and restoration of the property sold is not multifarious. *Pyrah* v. *Woodcock*, 24 L. T. 407; 19 W. R. 463.

A. and B., who were employed by a company, concealed the true state of the company, and thereby were enabled to buy shares in the company at an undervalue:—Held, that B. might be liable for damages to persons who had sold shares to A., though B. had derived no advantage therefrom, and that therefore a bill to impeach a sale

to B. and a sale to A. was not multifarious. *Walsham* v. *Stainton*, 1 De G. J. & S. 678; 3 N. R. 56; 33 L. J., Ch. 68; 9 Jur. (N.S.) 1261; 9 L. T. 357; 12 W. R. 63.

Where the case against one defendant is so entire as to be incapable of being prosecuted in several suits, but yet another defendant is a necessary party in respect of a portion only of that case, such other defendant cannot object to the suit on the ground of multifariousness. *Att.-Gen.* v. *Poole Corporation*, 4 Myl. & C. 17; 8 L. J., Ch. 27; 2 Jur. 934, 1080. Affirmed sub nom. *Parr* v. *Att.-Gen.*, 8 Cl. & F. 409; 6 Jur. 245.

It is difficult to lay down a rule as to multifariousness applicable to all cases, but if a case is an entire case as against one defendant an objection for multifariousness cannot be made by another defendant who is connected only with some portion of the whole case. *Ib.*

—— **Alternative Relief claimed.**]—In an action by a company against L. and T., the claim stated that L., through T., who professed to be, and in fact was, the agent of L., contracted to take a certain number of debentures in the company, which contract L. had failed to perform; and that L. denied that T. was authorised by him to make the contract. The company prayed for specific performance of the contract or for damages against L., or in the alternative, if it should appear that T. had no authority to act as L.'s agent, then for specific performance and damages against T. T. having applied to have judgment entered up in his favour, or to have his name struck out as a defendant:—Held, that, under the circumstances stated in the claim, the company was entitled to join L. and T. as defendants, and to claim alternative relief against them. *Honduras Ry.* v. *Le Fevre*, 46 L. J., Ex. 391; 2 Ex. D. 301; 36 L. T. 46; 25 W. R. 310—C. A.

When a plaintiff claims relief as against each of two defendants in the event of his failing to get relief against the other, he is not bound at the hearing to declare against which of the two he intends to proceed. *Child* v. *Stenning*, 47 L. J., Ch. 371; 7 Ch. D. 413; 38 L. T. 232; 26 W. R. 265. *S. C.* in C. A., 48 L. J., Ch. 392; 11 Ch. D. 82; 40 L. T. 302; 27 W. R. 462.

Where a plaintiff seeking relief in the alternative against two defendants succeeds as against one of them, but his claim against the other is dismissed with costs, the costs of the unsuccessful claim must be borne by the plaintiff, and not by the defendant against whom he succeeds. *Ib.*

A plaintiff seeking alternative inconsistent relief against different defendants has a right to have the first alternative tried out. In such actions counsel for the second defendant may address the court against and cross-examine the witnesses of his co-defendant. *Ib.*

Where the cause of action against one defendant is totally disconnected with that against the other defendants, except so far as it arises out of an incident in the same transaction, there is a misjoinder, and it is not the case contemplated by the Judicature Act, Ord. XVIII. r. 1. *Burstall* v. *Beyfus*, 53 L. J., Ch. 565; 26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418—C. A.

The Judicature Act, Ord. XVI. r. 3, applies to a case where a plaintiff has different causes of action in respect of the same wrong against two defendants, against whom he seeks relief in the alternative. *Child* v. *Stenning*, 46 L. J., Ch. 523; 5 Ch. D. 695; 36 L. T. 426; 25 W. R. 519—C. A.

A plaintiff sued S. in respect of an alleged trespass upon land which had been demised to the plaintiff by W., who had covenanted for quiet enjoyment. By his statement of defence, S. alleged that he had, before the demise to the plaintiff, acquired from W. a right of way over the land demised. The plaintiff then amended his statement of claim, making W. also a defendant, and claiming in the alternative, if the court should be of opinion that S. was entitled to a right of way as against W. and persons claiming through him, damages against W. for breach of his covenant for quiet enjoyment. W. demurred:—Held, that Ord. XVI. r. 3, authorised the plaintiff to make S. and W. defendants to the same action. *Ib.*

Relief in the alternative cannot be given upon inconsistent allegations in the same pleadings. *Evans* v. *Buck*, 46 L. J., Ch. 157.

Where an action was brought by trustees of a settlement to enforce payment of a sum of money against the representative of a covenanting party, and the representative, by her defence and counter-claim, averred that, according to the true construction of the settlement, the sum was not payable, and claimed that if the sum was payable according to the true construction, the settlement might be rectified, making the surviving tenant for life under the settlement a defendant to the counter-claim for that purpose only:—Held, on demurrer by the tenant for life, that she was improperly made a party. *Ib.*

When alternatively to the principal relief a bill prays relief for which some of the parties are not necessary, it is not multifarious. *Wilson* v. *Lloyd*, 42 L. J., Ch. 559; L. R. 16 Eq. 60; 28 L. T. 321.

—— **Actions of Tort.**]—In actions on contracts, the plaintiff is obliged to sue all the contracting parties; but in actions for torts he may sue all the parties implicated, or any one of them. *Scott* v. *Godwin*, 1 Bos. & P. 67. S. P., *Sutton* v. *Clarke*, 6 Taunt. 29; 1 Marsh. 429; 16 R. R. 563.

In trespass against several, the plaintiff can only recover against all for matters in which all are jointly implicated. *Aaron* v. *Alexander*, 3 Camp. 35; 13 R. R. 742.

So in trover. *Nicoll* v. *Glennie*, 1 M. & S. 588.

Two or more defendants, against each of whom a separate cause of action is pleaded, cannot be joined in an action, such a joinder being inadmissible even where there is a joint claim for an injunction, as well as separate claims for damages. Ord. XVI. and the rules thereunder deal only with the joinder of parties, and have no reference to the joinder of causes of action. *Sadler* v. *G. W. Ry.*, 65 L. J., Q. B. 462; [1896] A. C. 450; 74 L. T. 561; 45 W. R. 51—H. L. (E.) Affirming 14 R. 774; 60 J. P. 37—C. A.

—— **Fraud and Misrepresentation.**]—Observations on the practice of making solicitors, agents, and arbitrators parties to a suit, alleging against the principal defendant fraud, in which the co-defendants were not implicated. *Mathias* v. *Yetts*, 46 L. T. 497—C. A.

—— **Joinder for Purpose of Discovery or Costs.**]—The court will not allow the joinder of

solicitors or others as defendants against whom no further relief is sought beyond discovery or payment of costs. *Burstall* v. *Beyfus*, 53 L. J., Ch. 565; 26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418—C. A. S. P., *Barnes* v. *Addy*, 43 L. J., Ch. 513; L. R. 9 Ch. 244; 30 L. T. 4; 22 W. R. 505; and *Hutchins* v. *Hutchins*, Ir. R. 10 Eq. 453.

The practice of making the agents of a party defendants when nothing but costs is prayed against them, as it deprives him of their evidence, is improper, and should be met by directing an issue. *Atwood* v. *Small*, 6 Cl. & F. 232.

In an action against a corporation, where an officer of the corporation against whom no relief was claimed was made a defendant for the purpose of discovery:—Held, that, inasmuch as, under Ord. XXXI. r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as defendant, and that his name should be struck out. *Wilson* v. *Church*, 9 Ch. D. 552; 39 L. T. 413; 26 W. R. 735.

A vestry, incorporated under the Metropolis Management Act, 1855, having resolved to incur certain unauthorised expenditure, an action for an injunction was commenced by the Attorney-General, at the relation of a ratepayer, against the vestry and the movers and seconders of the resolution, passed by the vestry and some of their supporters. On motion on which the individual defendants were unrepresented, the vestry consented to a perpetual injunction without costs, and the plaintiffs then moved for judgment against the individual defendants in default of pleadings, and asked that they might be ordered to pay the costs of the action. The statement of claim did not ask for costs against the vestry:—Held, that it was irregular to make the individual members of the vestry defendants for the sole purpose of making them pay costs, and that, as no costs were asked against the vestry, there was no necessity for an indemnity to the vestry, from costs occasioned to it by the individual defendants having led the vestry astray, and that the action, therefore, must be dismissed as against the individual defendants, but without costs on either side. *Att.-Gen.* v. *Bermondsey Vestry*, 51 L. J., Ch. 848; 46 L. T. 852; 30 W. R. 872. Affirmed, 52 L. J., Ch. 567; 23 Ch. D. 60; 48 L. T. 445; 31 W. R. 463; 47 J. P. 453—C. A.

The rule, that officers of a corporation may be made co-defendants to a bill against the corporation, applies to a bill of discovery, as well as to a bill for relief, and members of the corporation may be joined with the officers. *Glascott* v. *Copper Miners of England*, 11 Sim. 305; 10 L. J., Ch. 30; 5 Jur. 264.

A nominal defendant (clerk to a board of health) must answer the plaintiff's bill in his official capacity. *Deeks* v. *Bailey*, 21 L. T. 581.

An application to remove his name from the record on the ground of want of interest refused. *Ib.*

—— **Solicitor.**]—Solicitors who were made parties with other defendants to an action, the statement of claim in which showed no reasonable cause of action as against them:—Held, entitled under Ord. XXV. r. 4, to an order dismissing the action as against them with costs, and striking their names out of the proceedings. *Burstall* v. *Beyfus*, 53 L. J., Ch. 565; 26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418—C. A.

To make solicitors or others parties to an action without seeking any relief against them, except payment of costs or discovery, is vexatious. *Ib.*

An agreement had been come to between A. and B. The agreement was broken by B., and, as the claim alleged, the breach was accompanied by false instructions to counsel given by solicitor, and by the solicitor's false statements upon oath:—Held, on an action for injunction consequent upon the breach by B., that on the claim as alleged there was no right of action against the solicitor for costs. *Blackburn Union* v. *Brooks*, 26 W. R. 57.

J., of K., caused a sum in S. S. stock, belonging to another person of the same name, to be transferred into his own name, and then into the name of a broker for sale, and who accordingly sold it for him; in a bill against the representative of J., of K., and the S. S. company, the solicitor for the broker is not a necessary party. *Harrison* v. *Pryse*, Barnard. 324.

Generally it is not necessary to make an attorney a party because he has title-deeds in his possession, although it may become so under particular circumstances. *Fenwick* v. *Reed*, 1 Mer. 114.

If a motion is intended to lay the foundation for a subsequent application against the solicitor of some of the parties, the solicitor in his personal capacity ought to be made a party to that motion. *Van Sandau* v. *Moore*, 1 Russ. 441; 4 L. J. (o.s.) Ch. 177.

One of two solicitors, in partnership, obtains an order in the name of a client; the partnership is dissolved, and the client and the other partner come as co-petitioners to discharge the order, and for other relief:—Held, that it was a misjoinder for such other partner to unite in it. *Sangar* v. *Gardiner*, C. P. Coop. 119.

—— **Architect—No Cause of Action shown.**]—The architect of the defendant company was made a party to the action, but the statement of claim showed no cause of action as against him:—Held, that his name must be struck out of the proceedings, and the costs paid by the plaintiffs, including the costs of an affidavit made by the architect upon the application for such an order. *Amos* v. *Herne Bay Pavilion Co.*, 54 L. T. 264.

—— **Contractor.**]—Contractors should not usually be joined as defendants in an action against their employers for damages done in carrying out their contract. *Serff* v. *Acton Local Board*, 55 L. J., Ch. 569; 54 L. T. 379.

—— **Witnesses.**]—A mere witness cannot be made a defendant for discovery of what he is examinable to, unless he is interested. *Plummer* v. *May*, 1 Ves. 426.

General rule that a mere witness is not to be made a party; exceptions in the cases of arbitrators, and attorneys, and corporations, whose officers and servants are made parties. *Dummer* v. *Chippenham Corporation*, 14 Ves. 252.

A mere witness cannot be made a defendant to a bill for discovery. *Portugal (Queen)* v. *Glyn*, 7 Cl. & F. 466; West, 258.

Where witness is made party merely for purpose of discovery, it is demurrable. *How* v. *Best*, 5 Madd. 19.

Rule that mere witness, having no interest, ought not to be made party, is not without

exception. *Whitworth* v. *Davis*, 1 Ves. & B. 550.

It is a principle in equity that a witness, as such, shall not be made a party. *Mulock* v. *Malone*, Wall. Lyn. 5.

It is improper to join as defendants in a bill of discovery parties who may be examined as witnesses at law, the only exception to the rule being that of a bill against the devisee and witnesses of a bill. *Jones* v. *Maund*, 3 Y. & Coll. 347.

Bill for discovery in aid of an action; demurrer by mere witness allowed, though discovery would be more beneficial than an examination at law, and notwithstanding a charge of interest in defendant as to which he may be called by plaintiff, waiving the objection, and if called against him, may be examined on the voir dire. *Fenton* v. *Hughes*, 7 Ves. 287.

Want of Parties.]—Since the Judicature Acts there is no such thing as a demurrer for want of parties. The proper course is to take out a summons under Ord. XVI. r. 13, to have the necessary party or parties added. *Werdermann* v. *Société Générale d'Electricité*, 45 L. T. 514; 30 W. R. 33—C. A. S. P., *Abouloff* v. *Oppenheimer*, 30 W. R. 429. See also *Sheehan* v. *G. E. Ry.*, 50 L. J., Ch. 68; 16 Ch. D. 59; 43 L. T. 432; 29 W. R. 69.

Order staying Proceedings.]—Pleas in abatement being abolished, an order staying proceedings in an action until others are joined as co-plaintiffs is purely a matter of discretion. *Roberts* v. *Holland*, 62 L. J., Q. B. 621; [1893] 1 Q. B. 665; 5 R. 370; 41 W. R. 494.

Duty to point out Parties required.]—Case of joint liabilities, in which it is incumbent on the defendant, who objects that other persons are necessary parties, to point out who are the persons he requires to be brought before the court. *Wilson* v. *Goodman*, 4 Hare, 63.

Upon an objection for want of parties, not necessary to point them out by name, if described so as to enable the plaintiff to make them parties. *Att.-Gen.* v. *Jackson*, 11 Ves. 369.

No general rule whether demurrer for want of parties should state the parties. *Pyle* v. *Price*, 6 Ves. 781.

A demurrer for want of parties must either name or else sufficiently describe the proper parties, for the purpose of enabling the plaintiff to amend his bill by adding them. A demurrer ore tenus for want of a particular party is good, notwithstanding that a demurrer generally for want of parties has previously been overruled. Observations upon *Pyle* v. *Price* (6 Ves. 779) and *Att.-Gen.* v. *Poole Corporation* (4 Myl. & C. 17). *Pratt* v. *Keith*, 3 N. R. 406; 33 L. J., Ch. 528; 10 Jur. (N.S.) 305; 10 L. T. 15; 12 W. R. 394.

If a plea for want of parties points out the class of persons who ought to be made parties, it is not necessary to aver that they are living. *Barlow* v. *Sewell*, 7 L. J., Ch. 126; 2 Jur. 151.

—— **Liability of Plaintiff for Costs.**]—A plaintiff is not justified in adding persons as defendants to a suit merely because the original defendant insists, by his answer, that they are necessary parties; persons so added having been dismissed, the plaintiff was ordered to pay the costs. *Williams* v. *Page*, 24 Beav. 654; 4 Jur. (N.S.) 102; 6 W. R. 235.

Defect of Parties may be cured or waived.]—If person named defendant, but who has never been served with subpœna or appeared to bill, appears by counsel, and consents to be bound by decree, the defect is cured. *Capel* v. *Butler*, 2 Sim. & S. 457; 4 L. J. (O.S.) Ch. 69. See also *White* v. *Hall*, 1 Russ. & M. 332; *Pitt* v. *Brewster*, Dick. 37; *Banister* v. *Way*, Dick. 686; and dicta of Lord Thurlow in *Harford* v. *Browning*, 1 Cox, 307.

A defect of parties may be cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the absent party could have claimed; those rights being such as do not affect the rights of defendants. *Harrey* v. *Cooke*, 4 Russ. 34; 6 L. J. (O.S.) Ch. 84.

If at the hearing plaintiff waives the relief he prays against a particular person, the objection for want of his being a party will have no weight. *Pawlet* v. *London* (*Bishop*), 2 Atk. 296.

Striking out Defendant.]—When the court is of opinion that a defendant is an improper party to an action, it will order the name of such defendant to be struck out of the record before the hearing, notwithstanding he may have filed his defence. *Vallance* v. *Birmingham and Midland Land Corporation*, 2 Ch. D. 369; 24 W. R. 454.

—— **Under General Liberty to amend.**]—Under an order to strike out the name of one defendant and giving general liberty to amend, the plaintiff is not justified in striking out the name of another defendant. *Wymer* v. *Dodds*, 48 L. J., Ch. 568; 11 Ch. D. 436; 40 L. T. 420; 27 W. R. 675.

When striking out Parties, or Discontinuance, is Proper Course.]—*See post*, DISCONTINUANCE, cols. 221, 222.

—— **Application at Trial.**]—The judge on a trial has power to strike out the name or names of one or more of several defendants, although such defendant or defendants may have let judgment go by default. *Greaves* v. *Humfries* or *Humphreys*, 4 El. & Bl. 851; 24 L. J., Q. B. 190; 1 Jur. (N.S.) 473; 3 W. R. 371: *Johnson* v. *Goslett*, 18 C. B. 728; 25 L. J., C. P. 274; 4 W. R. 655.

In case of a misjoinder of defendants in an action on contract, an amendment of striking out the name of the defendant or defendants misjoined, if made at all, must be made at the trial, and cannot be made afterwards. *Robson* v. *Doyle*, 3 El. & Bl. 396; 2 C. L. R. 671; 18 Jur. 652.

—— **Misjoinder not by Mistake.**]—The 15 & 16 Vict. c. 76, s. 37, which enables the court or judge, in the case of the misjoinder of a defendant in an action on contract, to amend such misjoinder as a variance at the trial, does not apply where the party whose name is sought to be expunged has been joined, not by mistake or by inadvertence, but designedly for the purpose of seeking to fix him with liability. *Wickens* v. *Steel*, 2 C. B. (N.S.) 488; 26 L. J., C. P. 241; 3 Jur. (N.S.) 671; 5 W. R. 610.

Costs of Non-joinder or Misjoinder.] — *See* COSTS.

c. UNAUTHORISED PROCEEDINGS.

Authority of Solicitor and Liability for Costs.]—*See* SOLICITOR.

Application by whom.]—A motion to take a bill off the file, the suit having been instituted without the plaintiff's authority, cannot be made by the defendant. *Wheeler* v. *Bulwer*, Hayes, 479.

Mental Incapacity.]—A bill may be taken off the file, if filed in the name of a plaintiff who is in a state of mental incapacity, semble. *Wartnaby* v. *Wartnaby*, Jac. 377.

Where one of several co-plaintiffs was of imbecile understanding at the time of the filing of the bill, and his name was used without authority, the court would not order the bill to be taken off the file. Aliter, if he were the sole plaintiff. *Branagan* v. *Gorges*, 7 Ir. Eq. R. 225.

Quære, could the court under such circumstances order the imbecile plaintiff's name to be struck out of the bill. *Ib.*

The court, upon the motion of a defendant, supported by affidavits, suggesting that the bill had been filed without any authority from the person named as the plaintiff, such person being so imbecile as to be unable to give any authority for the purpose, and that the suit was instituted for litigious purposes in the name of the plaintiff, but by another defendant in the suit, referred it to the master to inquire whether any authority was given by the plaintiff for the filing of the bill, and whether the institution of the suit was for his benefit, and whether it was for his advantage that the same should be prosecuted. On the master's reporting in the negative, and that the bill was filed under the authority of one of the defendants, the court ordered the bill to be taken off the file, and the costs of the other defendants to be paid by the defendant who had instituted the suit. *Blake* v. *Smith*, Younge, 594.

Other Cases.]—Under peculiar circumstances a bill filed in the name of a company without its sanction was allowed to remain on the file, in order that the shareholders might have an opportunity of considering whether they would adopt the suit. The opinion of the shareholders can only be obtained through a general meeting. *East Pant Du United Lead Mining Co.* v. *Merryweather*, 4 N. R. 541; 2 H. & M. 254; 10 Jur. (N.S.) 1231; 13 W. R. 216.

A subordinate officer of a foreign government cannot, without its authority, file a bill in the name of his government against the superior officer in this country. *Liberia Republic* v. *Imperial Bank*, 25 L. T. 866.

A petition for the appointment of new trustees and a vesting order was presented in the names of several co-petitioners, and an order made. Upwards of a year afterwards an application was made to the court by persons who had been joined as co-petitioners that the order might be rescinded on the ground that they had only recently heard of the petition, which was in no way authorised by them:—Held, that the order made could not be rescinded by the court, but should be amended by striking out the names of the applicants as co-petitioners, and treating them as not having been served with the petition. *Savage, In re*, 15 Ch. D. 557; 29 W. R. 348.

Staying Proceedings when unauthorised.]—*See* STAYING PROCEEDINGS, infra, col. 301.

Indemnity for Costs.]—An action having been brought in the names of the executors of the surviving trustee under a deed of separation to recover from the husband arrears of certain payments alleged to be due to the wife thereunder, the executors obtained a judge's order to stay the proceedings on the ground that the action was brought without their sanction; the court directed that the action might proceed upon an indemnity against costs being given to the executors to the satisfaction of the master, it appearing from the affidavit of the wife (unanswered) that the testator, though he had not executed the deed, had consented to become a trustee, and had acted in the trust. *Orchard* v. *Coulsting*, 6 Scott (N.R.) 843.

And the master having fixed the indemnity at 300*l.*, the court refused to interfere. *S. C.*, 7 Scott (N.R.) 414.

An official assignee of a bankrupt or an insolvent who has been made a plaintiff in an action without his authority is entitled to an indemnity from costs. *Laws* v. *Bott*, 16 M. & W. 300; 16 L. J., Ex. 279.

Motion to strike out Plaintiff's Name—Discontinuance.]—A company, named as a co-plaintiff in an action, served a notice of motion on the solicitors who had issued the writ for an order that the name of the company might be struck out of the writ, and that the solicitors might be ordered to pay the company's costs, on the ground that the writ had been issued without its authority. Before the motion could be heard the solicitors served a notice that the plaintiffs wholly discontinued the action:—Held, notwithstanding the discontinuance, that the court had jurisdiction to make the order asked for. *Gold Reefs of Western Australia* v. *Dawson*, 66 L. J., Ch. 147; [1897] 1 Ch. 115; 75 L. T. 575; 45 W. R. 285.

Execution for Costs—Repayment.]—Semble, where money has been recovered under an execution from a person improperly made plaintiff in respect of costs ordered to be paid by him without his knowledge, the court will order it to be repaid. *Fricker* v. *Van Grutten*, 65 L. J., Ch. 823; [1896] 2 Ch. 649; 75 L. T. 117; 45 W. R. 53—C. A.

d. ADDING PARTIES.

See R. S. C., 1883, Ord. XVI. r. 2, et seq.

1. Plaintiffs.

Duty of Court.]—Where an action appears to the court to be defective for want of parties, it is the duty of the court, under r. 11 of Ord. XVI., to order the necessary parties to be added. *Van Gelder* v. *Sowerby Bridge Flour Society*, 59 L. J., Ch. 583; 44 Ch. D. 374; 63 L. T. 132; 38 W. R. 625—C. A.

Substitution.]—The court cannot substitute one plaintiff for another under Rules of Court, 1875, Ord. XVI. r. 13, except by the first plaintiff's consent, and where he admits that he has commenced his action improperly; but in a proper case the court will add a plaintiff and give him the conduct of the action. *Emden* v. *Carte*, 50 L. J., Ch. 492; 17 Ch. D. 169; 44 L. T. 344; 29 W. R. 600.

Addition of—Bonâ Fide Mistake.]—A plaintiff can only be added under Ord. XVI. r. 2, where there has been a bonâ fide mistake. *Clowes* v. *Hilliard*, 46 L. J., Ch. 271 ; 4 Ch. D. 414 ; 25 W. R. 224.

"Bonâ fide mistake" in Ord. XVI. r. 2, includes a mistake of law as well as of fact. *Duckett* v. *Gover*, 25 W. R. 455.

An action to restrain the flooding of land had been brought in the names of A. L., a married lady, who was tenant for life, her husband, and the two trustees of her marriage settlement. The husband had no interest in the land under the settlement, and the trustees were merely releasees to uses. Before the hearing A. L. died, and the case was argued on behalf of the plaintiffs, on the basis that the legal estate was in the trustees. The defendant's counsel at the hearing argued that there was no person to represent the land before the court, and the plaintiffs applied to join, as co-plaintiff, the only child of the marriage, a minor, who was entitled to remainder: —Held, that the minor was rightly joined as a plaintiff. *Cupples* v. *Strahan*, 29 L. R., Ir. 120 —C. A.

A plaintiff claimed an injunction or damages against the defendant for an alleged violation of a covenant restraining her from building in a particular manner. After the commencement of the action the plaintiff was advised that there was something in her title which might act as a personal bar to her obtaining relief ; and she accordingly applied for leave to amend by making the owner of a neighbouring house, who, she alleged, was entitled to the benefit of the same covenant, a co-plaintiff :—Held, that, as the real question was the effect of the covenant, the amendment ought to be allowed. *Walcott* v. *Lyons* (28 Ch. D. 584) distinguished. *Ayscough* v. *Bullar*, 58 L. J., Ch. 474 ; 41 Ch. D. 341 ; 60 L. T. 471 ; 37 W. R. 529—C. A.

A shareholder brought an action on behalf of himself and the other shareholders against the company's solicitors and vendor to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as defendants instead of plaintiffs. A demurrer to the statement of claim by the defendants, other than the company, on the ground that the action could only be maintained by the company, was allowed ; but the plaintiff obtained leave, under Ord. XVI. r. 2, to amend his writ and statement of claim by adding the company as plaintiffs, the production by him of any authority from the company to sue in their name being held to be unnecessary. *Duckett* v. *Gover*, 46 L. J., Ch. 407 ; 6 Ch. D. 82 ; 25 W. R. 554.

—— **Old Practice.**]—A new plaintiff with a distinct title cannot be introduced into a suit by amendment. *Peek* v. *Spencer*, 39 L. J., Ch. 538 ; L. R. 5 Ch. 548 ; 22 L. T. 459 ; 18 W. R. 558.

When a cause, being brought to a hearing, is ordered to stand over to amend by adding parties, a new plaintiff cannot be added ; and if a new plaintiff be added improperly, and no other step taken, the court will permit the record to be re-amended by striking out the name of the newly-added plaintiff, and making him a defendant. *Soper* v. *Myers*, 3 L. J. (O.S.) Ch. 48.

Under an order made at the hearing, that the cause should stand over, with liberty to the plaintiff to amend his bill by adding parties, as he should be advised, or showing why he was unable to bring all proper parties before the court, the plaintiff is not entitled to add parties as co-plaintiffs, and introduce new statements and charges in the bill relating to such co-plaintiffs. *Milligan* v. *Mitchell*, 1 Myl. & C. 433 ; 7 L. J., Ch. 37. And see *S. C.*, 3 Myl. & C. 72.

Adding Co-plaintiff—Original Plaintiff having no Right to Sue.]—The tenant for life of a trust fund brought an action against the trustees to make them liable for an improper investment. The trustees by their defence alleged that they had made the investment in question at the request of the plaintiff. The plaintiff thereupon applied for leave to amend by adding as co-plaintiff his son, who had a reversionary interest in the fund:—Held, that Ord. XVI. r. 11, does not authorise the allowing a plaintiff who has no right to sue to amend by joining as co-plaintiff a person who has such a right. *Walcott* v. *Lyons*, 54 L. J., Ch. 847 ; 29 Ch. D. 584 ; 52 L. T. 399—C. A.

When a plaintiff company based its right of action upon a deed by which the effects of a company that had been wound up had passed to the plaintiff company, leave to add as plaintiffs the directors of the old company was not allowed on the court holding that the deed had not the effect contended for. *New Westminster Brewery Co.* v. *Hannah*, 24 W. R. 899.

Action in Name of Dead Man.] — When an action is commenced by mistake in the name of a dead man, the court has no power to amend by striking out his name and substituting the names of his executors. *Clay* v. *Oxford*, 4 H. & C. 690 ; 36 L. J., Ex. 15 ; L. R. 2 Ex. 54 ; 12 Jur. (N.S.) 944 ; 15 L. T. 286 ; 15 W. R. 109.

Incapacity of Plaintiff pending Action.]—The plaintiff, subsequently to the commencement of the action, became incapable from infirmity of transacting business. The plaintiff's brother took out on behalf of the plaintiff a summons for leave to amend by adding himself as next friend:—Held, that, in the absence of evidence that the action was commenced without the plaintiff's sanction, the plaintiff's summons must be allowed. *Cardwell* (*Lord*) v. *Tomlinson*, 54 L. J., Ch. 957 ; 52 L. T. 746 ; 33 W. R. 814.

Covenant with Separate Covenantees.]—The plaintiff and two other persons conveyed to the defendants certain pieces of land, and by the deed of conveyance the defendants entered into a separate covenant with each of the vendors, his heirs and assigns, to make a road over the property conveyed, and to allow the vendors, their respective heirs, tenants, and assigns, to use the road. In an action by the plaintiff alone for specific performance of the covenant :—Held, that the other two covenantees ought to be added as parties. *Dix* v. *G. W. Ry.*, 55 L. J., Ch. 797 ; 54 L. T. 830 ; 34 W. R. 712.

Agreement not to Trade — Assignment of Goodwill.]—The plaintiffs in March, 1886, employed the defendant as brewer's traveller, under an agreement restraining him from becoming employed in the sale of beer, spirits, tobacco, or cigars within a limited area for two years after leaving the plaintiffs' service without the plaintiffs' written consent. The plaintiffs in March,

1887, assigned their business of brewers, with the goodwill, to a company, agreeing verbally with the company that they should employ the plaintiffs' travellers. The defendant entered the company's service, and left them in September, 1887, and became employed in a similar business. The plaintiffs brought an action against the defendant for an injunction:—Held, that leave might be given to the plaintiffs at the trial to add the company as co-plaintiffs without putting the plaintiffs on terms as to costs. *Showell* v. *Winkup*, 60 L. T. 389.

Doubt as to Parties.]—Plaintiffs contracted with a vestry to pave a public road with asphalte and to keep the pavement in repair for fifteen years, the pavement when laid to be the property of the vestry. Shortly after the pavement was completed defendants, acting under statutory powers, laid down a tramway along the pavement, but so constructed and maintained their tramway as to occasion unnecessary damage to the pavement. It being doubtful whether an action commenced by the plaintiffs against the defendants on the above facts was brought in the name of the right plaintiffs, the court, under Rules of Court, Ord. XVI. r. 2, ordered the vestry to be added or substituted as plaintiffs, on the terms that the vestry was to be indemnified by the original plaintiffs for all costs and expenses. *Val de Travers Asphalte Paving Co.* v. *London Tramways Co.*, 48 L. J., C. P. 312; 40 L. T. 133.

Remaindermen — Executor.]—An action was brought to compel the defendants specifically to perform an agreement into which they had entered to accept a lease of a coal-mine from the plaintiff. When the agreement was entered into, and when the action was commenced, it was supposed that the plaintiff was tenant for life of the property under the will of her husband, and that she had a power of leasing. After notice of trial had been given the plaintiff died, and her executor obtained the common order of revivor. After this it was discovered that the plaintiff was tenant for life of the property under her marriage settlement, and that she had no power of leasing. She had signed the agreement "for myself and those entitled after me," though this did not appear in the statement of claim. The persons entitled in remainder, of whom the executor was one, desired to adopt the action and to be added as co-plaintiffs, alleging that the agreement had been entered into with their knowledge and approbation:—Held, that r. 13 of Ord. XVI. applied, and that the remaindermen must be added as co-plaintiffs with the executor in his representative capacity. *Long* v. *Crossley*, 49 L. J., Ch. 168; 13 Ch. D. 388; 41 L. T. 793; 28 W. R. 226.

Personal Representative.]—When a plaintiff filed her bill as being the legal personal representative of the person through whom she claimed title, and it was afterwards discovered that she was not the legal personal representative, though she was beneficially interested in a share of the subject-matter of the suit, which was a debt contracted upwards of fifty years before the bill was filed, leave was given, at the hearing of the cause, to add the legal personal representative as co-plaintiff; and the bill being amended by so doing, and by introducing sufficient statements to show the title of the new plaintiff, and also the beneficial interest of the original plaintiff:—Held, that such amendments were proper to be allowed in the discretion of the judge. *Maughan* v. *Blake*, 37 L. J., Ch. 109; 17 L. T. 278; 16 W. R. 66.

Where Original Plaintiff going Abroad.]—In an action for an injunction to restrain the defendants from using certain premises as a small-pox hospital, application was made under Ord. XVI. r. 13, by the plaintiff to join another person, with his consent, who was an inhabitant of the same neighbourhood, on the ground that since the action was brought the original plaintiff had given up business, and was going abroad. The application was refused on the ground that the cause of action was injury to the plaintiff's own property only, and it was not "necessary, in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action," that any other person should be added as plaintiff within Ord. XVI. r. 13. *Dalton* v. *St. Mary Abbotts, Kensington*, 47 L. T. 349.

Receiver — Constitution of Action.]—H., a partner in a firm of solicitors, received money from R., a client, for the purpose of investment; but the money was not invested. On the death of another partner, his executors brought a partnership action, and H. was appointed one of the receivers. H., without the knowledge of his co-receiver, gave R. a memorandum stating that he held the title-deeds of certain property, on which the firm had an equitable mortgage, on behalf of R. as security for her money, and he subsequently placed the deeds in a box marked with R.'s name. R. afterwards obtained possession of the box and deeds and claimed to retain them. H. was subsequently removed from the receivership, and L. appointed in his place. The action was originally brought by the receivers against R. alone, but was amended by adding H. and the executors of the deceased partner as defendants:—Held, that the action was properly constituted by making the new receivers plaintiffs and R. a defendant. *Hills* v. *Reeves*, 31 W. R. 209—C. A.

Trustee—Cestui que Trust.]—Ejectment in the name of one who was a cestui que trust, having an equitable estate only. At the trial an application was made to the judge to amend by adding the names of two trustees, who had the legal estate. He allowed the amendment:—Held, rightly allowed. *Blake* v. *Done*, 7 H. & N. 465; 31 L. J., Ex. 100; 7 Jur. (N.S.) 1306; 5 L. T. 429; 10 W. R. 175.

A declaration contained two counts; the first was for damages for breach of an agreement whereby the plaintiff let furniture to the defendant; and the second was for money awarded by a valuer to be paid by the defendant to the plaintiff for damage done by him to the furniture. The agreement in the first count was made by a trustee for the plaintiff (who was then a married woman) with the defendant, and the plaintiff was not a party to it; but she was a party to the submission to arbitration on which the second count was founded, and the trustee was not. The plaintiff having obtained an order from the master, under the C. L. P. Act, 1852, s. 34, to add the trustee as a plaintiff:—Held, that he had power to make the order, and that he had properly exercised his discretion in making it. *De Gendre* v. *Bogardus*, 41 L. J.,

C. P. 107; L. R. 7 C. P. 409; 26 L. T. 733; 20 W. R. 663.

Statute of Limitations.]—A debt having been contracted with the firm of A., B. and C., an action was brought by B. and C., after the death of A., to recover it. The plaintiff's attorney having discovered, after notice of trial, that eight other persons were partners in the firm when the debt was contracted, the court allowed the plaintiffs to amend the writ of summons and subsequent proceedings by adding the names of the eight other persons as plaintiffs. It was sworn that the Statute of Limitations would be a bar to a fresh action. *Carne* v. *Malins*, 6 Ex. 803; 2 L. M. & P. 498; 20 L. J., Ex. 434.

Amendment of Character in which Plaintiff Sues.]—In an action for work done and materials provided by an administratrix of a coach-builder, it appeared that upon his death his widow took out administration, and caused carriages to be prepared for the defendant, the materials used being part of the estate of her deceased husband, with the exception of one shaft. After this work had been done the widow died, and the administratrix took out administration de bonis non:—Held, that the cause of action was part of the estate of the intestate, and not of the widow, and therefore passed to the administratrix de bonis non, and that the declaration might be amended at nisi prius by stating that she sued, not as administratrix of the deceased, but as administratrix de bonis non. *Moseley* v. *Rendell*, 40 L. J., Q. B. 111; L. R. 6 Q. B. 338; 23 L. T. 774; 19 W. R. 619.

Consent of Plaintiff on being added.]—A person cannot be added as plaintiff without his consent in writing, even although he be indemnified against costs. *Tryon* v. *National Provident Institution*, 55 L. J., Q. B. 236; 16 Q. B. D. 678; 54 L. T. 167; 34 W. R. 398.

The case of trustees and cestui que trust is not excepted from the general rule of Ord. XVI. r. 11, so as to enable the court or a judge to dispense with the consent in writing of the trustee upon the application of a cestui que trust to amend by adding his trustee as co-plaintiff in an action in respect of the trust property. *Besley* v. *Besley*, 57 L. J., Ch. 464; 37 Ch. D. 648; 58 L. T. 510; 36 W. R. 604.

In ejectment, the evidence showing title in a party not joined, he cannot be joined without his consent, nor can the claimants recover without proof of the transfer of his title to them. *Frampton* v. *Williams*, 2 F. & F. 603.

The court will not add a party to the record under s. 19 of the 23 & 24 Vict. c. 126, who is a trustee for a person who objects to his being so added. *Sturgis* v. *Smith*, 5 L. T. 586.

In an action by the equitable assignee of a debt, or chose in action, an application under Ord. XVI. r. 2, to add the name of the assignor as plaintiff will not be granted where there is no proof of his consent, or that an indemnity has been tendered to him. *Turquand* v. *Fearon*, 48 L. J., Q. B. 341; 4 Q. B. D. 280; 40 L. T. 191; 27 W. R. 396.

—— **"Own Consent in Writing."**]—The consent of a person to be added as a plaintiff, or the next friend of a plaintiff, in an action must, under r. 11 of Ord. XVI. of the Rules of Court of 1883, be "his own consent in writing"—that is, it must be his consent in writing, and must be signed by him; and a written consent on his behalf by his solicitor, signed by the solicitor, though written and signed in his presence, is not sufficient to bind him. *Fricker* v. *Van Grutten*, 65 L. J., Ch. 823; [1896] 2 Ch. 649; 75 L. T. 117; 45 W. R. 53—C. A.

The consent required by Rules of Court, 1875, Ord. XVI. r. 13, to be given by a person whom it is proposed to add as plaintiff need not have been in writing, but a statement by the solicitor acting for the existing plaintiff that he has authority from the proposed new plaintiff to consent on his behalf would have been accepted by the court. *Cox* v. *James*, 51 L. J., Ch. 184; 19 Ch. D. 55; 45 L. T. 471; 30 W. R. 228. *See* now Ord. XVI. r. 11.

Under Ord. XVI. r. 11, of the Rules of Court, 1883, no person can be added as a plaintiff to an action without his written consent. The plaintiff brought an action upon a contract against the defendant, who insisted that one L. should be joined as a co-plaintiff as being a party to the contract, or, in the alternative, that all proceedings in the action should be stayed until he was so joined:—Held, that, inasmuch as L. had not consented to have his name added as a co-plaintiff, the court had no right by a roundabout process to make an order which would practically override the provisions of Ord. XVI. r. 11. *Jackson* v. *Krüger*, 54 L. J., Q. B. 446; 52 L. T. 962.

Motion to strike out Name of Plaintiff added without Authority—Who may make.]—On a motion to strike out the name of a company which had been added by amendment as a co-plaintiff on the ground that the company had not authorised the use of its name:—Held, that the motion was wrong, as such a motion could only be made by the company itself, but that the consent of the company must be obtained as necessary to sustaining the action under the rule in *Foss* v. *Harbottle* (2 Hare, 461). *Duckett* v. *Gover*, 46 L. J., Ch. 407; 6 Ch. D. 82; 25 W. R. 554.

Application, how made.]—An alteration in the parties to an action will not be made upon an ex parte application. *Tildesley* v. *Harper*, 3 Ch. D. 277.

No Demurrer for want of Parties.]—Since the Judicature Acts there is no such thing as a demurrer for want of parties. The proper course is to take out a summons under Ord. XVI. r. 13, to have the necessary party or parties added. *Werdermann* v. *Société Générale d'Electricité*, 19 Ch. D. 246; 45 L. T. 514; 30 W. R. 33—C. A.

An objection for want of parties ought to be taken by interlocutory motion, and cannot be entertained at the hearing. *Sheehan* v. *G. E. Ry.*, 50 L. J., Ch. 68; 16 Ch. D. 59; 43 L. T. 432; 29 W. R. 69.

A statement by way of defence, that the plaintiff at the time of bringing the action was a married woman, is no defence, and may be demurred to. *Aboulaff* v. *Oppenheimer*, 30 W. R. 429.

Adding New Plaintiffs at Trial.]—In an action by a company, lessees for a long term of eleven houses, of which ten were unlet and in their possession when the writ was issued, and by their tenant of the remaining house as co-plaintiff, for an injunction and damages in

respect of an alleged nuisance from noise; the tenant, after delivery of the statement of claim and notice of trial, refused to go on with the action as co-plaintiff. The other ten houses having in the meantime been let, the plaintiff company applied at the trial for leave to amend by adding as co-plaintiffs two of the new tenants, who consented to be added. The application was granted, as being within the discretion given by Rules of the Supreme Court, 1883, Ord. XVI. r. 11, of allowing the names of any parties, whether plaintiffs or defendants—"whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"—to be added. *House Property and Investment Co.* v. *Horse Nail Co.*, 54 L. J., Ch. 715; 29 Ch. D. 190; 52 L. T. 507; 33 W. R. 562.

A judge has power, in ejectment, to amend at the trial by adding names of parties in whom the legal estate is vested, so as to raise the real question. *Blake* v. *Done*, 7 H. & N. 465; 31 L. J., Ex. 100; 7 Jur. (N.S.) 1306; 5 L. T. 429; 10 W. R. 175. *S. C.* at nisi prius, 2 F. & F. 575.

Adding Plaintiff after Trial.]—An action in personam was brought in the name of G. S. and others against the owners of the "D. of B." in respect of a collision between that vessel and the "V." At the trial, on the application of the defendants, the judge ordered that the names of the several plaintiffs should be given, and the writ amended. The name of F. was, by mistake, given as the name of the owner of the cargo on board the "V.," and inserted in the writ. The case eventually went, on appeal, to the house of lords, where the "D. of B." was pronounced alone to blame for the collision. After this judgment, but before the reference had been held for the assessment of damages, it was ascertained that F. was not the owner of the cargo, and an application was thereupon made to have the name of A. & Co., the real owners of cargo, added or substituted for that of F.:—Held, that the decree of the court in a damage action pronouncing which vessel is to blame for a collision is not a final judgment where damages remain to be assessed; and that the court had power to make the order asked for. *The Duke of Buccleuch*, 61 L. J., P. 57; [1892] P. 201; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294—C. A.

2. Defendants.

Adding Joint Contractors.]—Upon an application under Ord. XVI. r. 11, by the defendant or defendants on the record, that other defendants be added, the court or judge may exercise a discretion, and the order will not be made unless it is shown that the non-joinder complained of will prejudice the parties to the action, or that "the presence before the court of additional parties is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." *Ledue* v. *Ward*, 54 L. T. 214; 5 Asp. M. C. 571.

Semble, that under Ord. XVI. r. 11, the court has a discretion to order other defendants to be added, but such discretion ought to be exercised as nearly as possible in accordance with the principles upon which a plea in abatement would before the Judicature Act have succeeded or failed. *Wilson* v. *Balcarres Brook Steamship Co.*, 62 L. J., Q. B. 245; [1893] 1 Q. B. 422; 4 R. 286; 68 L. T. 312; 41 W. R. 486; 7 Asp. M. C. 321—C. A.

Where an action is brought against one only of several joint contractors, the defendant is entitled, as of right, under Ord. XVI. r. 11, to have his co-contractors joined as defendants, on the authority of *Kendall* v. *Hamilton* (4 App. Cas. 504). *Pilley* v. *Robinson*, 57 L. J., Q. B. 54; 20 Q. B. D. 155; 58 L. T. 110; 36 W. R. 269.

Where one of two joint contractors is sued alone, the action will not be stayed until the other is joined, if the plaintiff shows that such other, although within the jurisdiction, cannot be found. *Robinson* v. *Geisel*, 64 L. J., Q. B. 52; [1894] 2 Q. B. 685; 9 R. 555; 71 L. T. 70; 42 W. R. 609—C. A.

Since the abolition of pleas in abatement, the proper course for a defendant desirous of raising the objection of the non-joinder as a defendant of some one jointly liable with him is to apply by summons at chambers, supported by an affidavit stating the facts, and showing that the person alleged to be jointly liable is within the jurisdiction, to have the action stayed. *MacArthur* v. *Hood*, 1 Cab. & E. 550.

M. and R. entered into certain contracts with P. to build a mansion, and subsequently assigned to S. & Co. all their share, right, and interest in all moneys then or thereafter to become due and owing under, or which should be or become payable by P. in respect of, any matters connected with or arising out of the said contracts. In an action by S. & Co. against P. for an account, and for payment of what was due to them under the said contracts, P. moved, under Ord. XVI. r. 11, that M. and R. should be added as parties to the action:—Held, that, although the Queen's Bench division had the same jurisdiction as that exercised by the Chancery division in actions taking the shape of a general dealing with the subject-matter, yet it was not within the simplicity aimed at in the Queen's Bench division to join the parties as defendants, no relief being sought against them by the plaintiffs, and that the court would not join them as plaintiffs without notice to them, and hearing them as to their interest and the terms on which the order should be made. *Sanders* v. *Peek*, 50 L. T. 630; 32 W. R. 462.

—— **Foreigner resident out of Jurisdiction.**]—Where an action is brought against one joint contractor only, the other being a foreigner resident out of the jurisdiction, the defendant is not entitled as of right to have the other joint contractor added as a defendant under Ord. XVI. r. 11. *Wilson* v. *Balcarres Brook Steamship Co.*, supra.

Action by One Executor—Absconding Executor.]—One of two executors having absconded, the other executor sued a mortgagor. The court refused, on the application of the defendant, to add the absconding executor as defendant. *Drage* v. *Hartopp*, 54 L. J., Ch. 434; 28 Ch. D. 414; 51 L. T. 902; 33 W. R. 410.

Plaintiff in Doubt from whom Redress to be sought.]—In an action by shipowners against shipbrokers for breach of a warranty of the authority of a principal to charter the plaintiffs' ship, the court has jurisdiction under rr. 7 and 11 of Ord. XVI. to join the principal as a co-defendant in the action. *Smurthwaite* v.

Hannay (63 L. J., Q. B. 737 : [1894] A. C. 494) discussed and explained. *Bennetts* v. *McIlwraith*, 65 L. J., Q. B. 632 ; [1896] 2 Q. B. 464 ; 75 L. T. 145 ; 45 W. R. 17 ; 8 Asp. M. C. 176—C. A.

Action in rem—Compulsory Pilotage—Joinder of Pilot.]—Where an action in rem has been brought against a ship and her owners for damage by collision, and compulsory pilotage has been pleaded, an order ought not afterwards to be made for the joinder of the pilot as a defendant (assuming there was jurisdiction to make the order) if the effect of so doing would be to embarrass the trial of the action. *The Germanic*, 65 L. J., P. 53 ; [1896] P. 84 ; 73 L. T. 730 ; 44 W. R. 394 ; 8 Asp. M. C. 116—C. A.

Change of Character.]—The court being asked to convert an action against the lords of the admiralty for an injunction in respect of alleged trespass into a maintainable action by giving the plaintiffs leave to amend the writ by suing the lords individually, and adding as parties the servants of the admiralty, who were the trespassers, refused such leave and dismissed the action, but without prejudice to any action maintainable by the plaintiffs. *Raleigh* v. *Goschen*, 67 L. J., Ch. 59 ; [1898] 1 Ch. 73 ; 77 L. T. 429 ; 46 W. R. 90.

Necessary Parties—Mining Lease—Lessor.]—In an action by a copyholder to restrain the working of coal under his land by A., who claimed to be entitled to do the acts complained of by virtue of a lease from B., the lord of the manor, B. was by amendment added as a defendant, on the allegation that he claimed the right by himself and his lessees to work the coal, that he justified the acts of A., and that he had received and claimed to be entitled to receive from A. rents and royalties in respect of such wrongful working. On summons by B. under Rules of Supreme Court, 1883, Ord. XXV. r. 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, and that the action might be dismissed as against him :—Held, that the lessor had been properly added as a defendant. *Shafto* v. *Bolckow, Vaughan & Co.*, 56 L. J., Ch. 735 ; 34 Ch. D. 725 ; 56 L. T. 608 ; 35 W. R. 562.

Local Board—Clerk.]—An action having been brought against the clerk of a local board of health, the court allowed the writ of summons and subsequent proceedings to be amended by substituting the board as the defendant instead of the clerk. *Bolingbroke (Lord)* v. *Townsend*, 42 L. J., C. P. 255 ; L. R. 8 C. P. 645 ; 29 L. T. 430.

Libel — Proprietor of Newspaper.]—In an action for libel which had been brought against the publisher of a newspaper, it appearing after issue joined, in answer to interrogatories, that A. B. was the sole proprietor of the newspaper, the court, in the exercise of its discretion, made an order, on the application of the plaintiff under Ord. XVI. r. 13, that A. B. should be added as defendant, the court imposing the terms that when joined as defendant he should have the same rights as he would have had if the action were then commenced. *Edward* v. *Lowther*, 45 L. J., C. P. 417 ; 34 L. T. 255 ; 24 W. R. 434.

Administration Action.]—When in an administration action the title of the plaintiff as a beneficiary was doubtful, and the trustee of the will was the sole defendant, the court, on the application of the trustee, ordered that the person interested in disputing the claim should be made a defendant. *Day* v. *Radcliffe*, 24 W. R. 844.

Bill—Trustee for Company.]—In an action on a bill against the acceptor, he sought to add the name of a company as a defendant under Ord. XVI. r. 13, upon the following grounds : that the acceptance was given for the purchase-money of a ship which he had agreed to purchase of the plaintiff ; that in entering into the agreement for such purchase he had acted as a trustee for the company, to whom the ship was afterwards conveyed in pursuance of the agreement ; and that the plaintiff made fraudulent representations with regard to the ship, by reason of which the company had been put to useless expense, which they claimed to recover from the plaintiff. The court refused the application. *Norris* v. *Beazley*, 46 L. J., C. P. 169 ; 2 C. P. D. 80 ; 35 L. T. 846 ; 25 W. R. 320.

"Questions involved in the Cause or Matter."]—In an action by a shipowner against consignees for sale of a cargo, claiming a declaration of lien upon money deposited by the latter with a dock company under s. 493 of the Merchant Shipping Act, 1894, the court has jurisdiction to add as defendants the shippers of the cargo who wish to raise a counterclaim in respect of alleged breaches of the contract of affreightment. *Montgomery* v. *Foy, Morgan & Co.*, 65 L. J., Q. B. 18 ; [1895] 2 Q. B. 321 ; 14 R. 575 ; 73 L. T. 12 ; 43 W. R. 691 ; 8 Asp. M. C. 36—C. A.

B. agreed to purchase freehold hereditaments of A., who purported to sell under a power of sale contained in a mortgage to A. by C., as trustee and executor of the will of D. After acceptance of the title, and preparation of the conveyance, B. received formal notice from unpaid residuary legatees of D. of a claim by them to the property contracted to be sold. In an action by A. for specific performance of the agreement, a motion by B. that the residuary legatees, who had given notice of their claims, might be added as defendants to the action, was refused with costs, as no question arose which, for the purpose of being effectually adjudicated upon and settled, required that these residuary legatees should be added as parties. *Harry* v. *Davey*, 45 L. J., Ch. 697 ; 2 Ch. D. 721 ; 34 L. T. 842 ; 24 W. R. 576.

The lessee for a term of years under a lease containing a covenant to repair agreed with D. to sell and assign to him the residue of the term, he undertaking to indemnify the lessee, without mentioning her assigns, in respect of any breach of covenant. D. entered into possession under that agreement, but no deed of assignment to him was executed, and upon the lessee's death her executors, having distributed her estate, assigned for a nominal consideration the residue of the term to her son, who henceforth received the rent from D. and paid it to the lessors. At the expiration of the term the lessors sued the son for breach of the covenant to repair, and he claimed indemnity from, and brought in D., as third party. The action was referred to an official referee, who, upon the application of the defendant, made an order adding the lessee's executors as defendants in order to enable them

to claim indemnity from D. Neither the plaintiffs nor the executors objected to this order being made, but D. opposed it :—Held, upon these facts, that the official referee in adding the executors as defendants rightly exercised his discretion under Ord. XVI. r. 11. *Byrne* v. *Brown*, 58 L. J., Q. B. 410 ; 22 Q. B. D. 657 ; 60 L. T. 651—C. A.

Infringement of Patent — Application by Maker of Machine used by Defendant.]—A patentee brought an action against the purchaser of a machine for infringement without joining the maker. The maker, who, though resident abroad, had taken out a patent in England for his machine, applied, under r. 11 of Ord. XVI., to be added as a defendant, upon the ground that he would be prejudiced by the action :—Held, that the application did not come within r. 11. *Moser* v. *Marsden*, 61 L. J., Ch. 319 ; [1892] 1 Ch. 487 ; 66 L. T. 570 ; 40 W. R. 520—C. A.

Foreclosure—Mortgagor in Possession.]—A mortgage was created of certain land by A., who subsequently went into liquidation. The trustee in the liquidation sold the equity of redemption to B. An action was brought by the mortgagee against B. for foreclosure. The security was insufficient, and it was necessary to obtain possession as soon as possible. On demanding possession, however, the mortgagee found that A. was in possession and refused to go out. The mortgagee asked for leave to amend the writ in the action by adding the name of A. as a defendant, and by including, as part of the relief sought, a claim for recovery of possession of the mortgaged property :—Held, that the leave could not be granted. *Sutcliffe* v. *Wood*, 53 L. J., Ch. 970 ; 50 L. T. 705.

Husband and Wife.]—In an action against a husband for goods sold to the wife dum sola, it is not competent to the judge at nisi prius to amend the record by making the female a co-defendant. *Garrard* v. *Giubilei*, 11 C. B. (N.S.) 616 ; 31 L. J., C. P. 131 ; 8 Jur. (N.S.) 540 ; 5 L. T. 609 ; 10 W. R. 213. Affirmed, 13 C. B. (N.S.) 832 ; 31 L. J., C. P. 270 ; 8 Jur. (N.S.) 1077 ; 10 W. R. 565—Ex. Ch.

Mortgagee of Tenant.]—The mortgagee of a tenant who has incurred a forfeiture cannot be heard on an application for relief under 23 & 24 Vict. c. 126, s. 2, and cannot be made a party to the action of ejectment under Ord. XVI. r. 13, of the Judicature Act, 1875. *Mills* v. *Griffiths*, 45 L. J., Q. B. 771.

Application not Ex parte.]—An application to add a defendant to an action must not be made ex parte. *Colbeck, In re, Hall* v. *Colbeck*, 36 W. R. 259.

Such an application should, in general, be by summons in chambers. *Wilson* v. *Church*, 9 Ch. D. 552 ; 39 L. T. 413 ; 26 W. R. 735.

Service of Writ.]—When two actions had been consolidated on an application by the plaintiff to add new defendants to the consolidated action before trial, and to make W., one of the present defendants, a party to the action in a representative character, the court, under the Judicature Act, Ord. XVI. rr. 14, 15, ordered that the proposed new defendants should be added without service of any writ, and that W. be made a defendant in his representative character without any further indorsement on any writ, such order to take effect unless the new defendants and W. should respectively show cause to the contrary within eight days after service thereof. *Wortley, In re, Culley* v. *Wortley*, 46 L. J., Ch. 182 ; 4 Ch. D. 180 ; 25 W. R. 295.

Not added at Instance of Third Party.]—A person added as a defendant in an action under Ord. XVI. r. 17, is not entitled under that rule to have another person, against whom he may have a claim, so added. *Walker* v. *Balfour*, 25 W. R. 511.

After Decree.]—A decree was made in 1875 against the corporation of Birmingham, as the sanitary authority of Birmingham, granting a perpetual injunction to restrain them from allowing sewage to flow into a river, the injunction being suspended for five years to give the borough an opportunity to execute certain works. At the expiration of that period the plaintiffs desired to enforce the injunction, but in the meantime the B. T. and R. Board had succeeded to the rights and liabilities of the corporation of Birmingham in respect of the sewage :—Held, that under r. 13 of Ord. XVI. such an amendment could not be made after final decree, and that the decree could only be enforced against the board by an action. *Att.-Gen.* v. *Birmingham Corporation*, 15 Ch. D. 423 ; 43 L. T. 77 ; 29 W. R. 127—C. A.

After Judgment.]—Defendants to an infringement action served a third party notice for indemnity upon the B. Company, who were not parties to the action. The B. Company appeared as third parties in the action, and admitted their liability to the defendants ; and the court ordered that they should have liberty to appear at the trial, and should be bound by the decision of the court on any question as to the indemnity arising between them and the defendants, but not otherwise. The B. Company were not made defendants, and filed no pleadings, but they appeared at the trial as third parties, and the court gave judgment partly in favour of the plaintiffs and partly in favour of the defendants, but made no special order as to the third parties. The plaintiffs appealed, and after judgment had been given allowing their appeal, with costs against the defendants, the plaintiffs asked for an injunction and costs against the third parties (who had appeared on the appeal), and, if necessary, for an order to amend so as to make them defendants :—Held, by Cotton, L.J., that the court had no jurisdiction to give a judgment against these third parties as if they were defendants, and that it would be wrong after judgment on appeal to grant liberty to amend so as to enable the court to give relief against the third parties which was not asked for at the trial ; by Lindley, L.J., that the court had jurisdiction to grant the liberty to amend applied for, but that it should not be exercised in the present case ; and held by the court that under Ord. XVI. r. 54, the court had jurisdiction to order the third parties to pay the costs both of the appeal and in the court below, and that, as the third parties had in reality fought the plaintiffs and failed, an order for the payment of such costs must be made against them as well as against the defendants. *Edison and Swan United Electric Light Co.* v. *Holland*, 58

L. J., Ch. 524; 41 Ch. D. 28; 61 L. T. 32; 37 W. R. 699—C. A.

Where judgment in a foreclosure action has been pronounced, but has not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under Rules of Supreme Court, 1883, Ord. XVI. r. 11, to amend the writ and statement of claim by making the puisne mortgagees defendants. *Keith* v. *Butcher*, 53 L. J., Ch. 640; 25 Ch. D. 750; 50 L. T. 203; 32 W. R. 378.

Order at Trial.]—An order was made at the trial to add as a co-defendant a person to whom the defendant had assigned his interest pendente lite. *Kino* v. *Rudkin*, 6 Ch. D. 160; 38 L. T. 461.

After Verdict.]—An application to amend parties by reason of a misjoinder cannot be entertained after the verdict has been returned. *Wickens* v. *Steel*, 2 C. B. (N.S.) 488; 26 L. J., C. P. 241; 3 Jur. (N.S.) 671; 5 W. R. 610.

e. REPRESENTATION OF PARTIES.

See R. S. C., 1883, Ord. XVI. r. 9.

Plaintiffs—In what Cases.]—Ord. XVI. r. 9, only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter. *Temperton* v. *Russell*, 62 L. J., Q. B. 300; [1893] 1 Q. B. 435; 4 R. 302; 68 L. T. 425; 41 W. R. 321; 57 J. P. 518—C. A.

—— **Same Interest.**]—A writ was issued by the plaintiff, "on behalf of himself and numerous parties having the same interest," under Ord. XVI. r. 9. The claim was by the plaintiff, on behalf of himself and the other owners of a ship, against the defendants for freight and dues for the use of the ship. The defendants applied to add the names of the other owners as plaintiffs, under Ord. XVI. r. 13, on the ground that the case was not within r. 9, and also in order that the defendants might have the liability of the other owners, as plaintiffs, for costs:—Held, that the action was rightly brought by a single plaintiff under r. 9, and that the case was not within r. 13. *De Hart* v. *Stephenson*, 45 L. J., Q. B. 575; 1 Q. B. D. 313; 24 W. R. 367.

The plaintiffs sued the defendants, who were the presidents and officers of certain trade unions, "as well on their own behalf as on behalf of and as representing all the members of each of the societies to which they respectively belong," for maliciously and wrongfully inducing certain persons to break their contracts with the plaintiff, and claimed damages and an injunction:—Held, that the members of the trade unions had not "the same interest in one cause or matter" within the meaning of Ord. XVI. r. 9, and that the words above set out must be struck out. *Temperton* v. *Russell*, supra.

A plaintiff, in order to enable him to file a bill on behalf of himself and other persons, must have had a common interest with such persons. *Fawcett* v. *Lawrie*, 1 Dr. & Sm. 192; 8 W. R. 699.

Where the absent partners in a numerous partnership are to be bound by proceedings taken in a suit in their absence, it is necessary that the parties who represent them on the record should have interests identical with those of the absent parties; and the court in such case, in making a decree which is to bind absent parties, must ascertain by strict proof that the parties by whom the cause is conducted have the interests which they allege that they have, and upon which their title to sustain the suit is founded. *Clay* v. *Rufford*, 8 Hare, 281; 19 L. J., Ch. 295; 14 Jur. 803.

An action oy certain members of a church-building committee, on behalf of themselves "and all others the subscribers" to the building fund, against a former member of the committee for an account, cannot be maintained. *Strickland* v. *Weldon*, 54 L. J., Ch. 452; 28 Ch. D. 426; 52 L. T. 247; 33 W. R. 545.

—— **Question of Convenience and Discretion.**]—Where a class of persons entitled is numerous, it is a question of convenience whether the court will require them all to be made parties. *Harvey* v. *Harvey*, 4 Beav. 215. S. P., *Cockburn* v. *Thompson*, 16 Ves. 321.

An order made at the hearing of a cause, and giving the plaintiffs leave to amend for the purpose of adding parties, showing why they were unable to bring all proper parties before the court, is sufficiently complied with by an amendment stating that the plaintiffs sue on behalf of themselves and all persons (other than the defendants) who fill a particular character, and alleging that the persons filling that character are so numerous, that if they were individually made parties, the suit could not be effectually prosecuted. *Milligan* v. *Mitchell*, 1 Myl. & C. 511; 7 L. J., Ch. 37; 1 Jur. 888.

Liberty to sue on behalf of oneself and other persons who are too numerous to be brought upon the record is dependent neither upon the discretion of the court, nor upon the disposition of such persons to concur in the suit. *Williams* v. *Salmond*, 2 Kay & J. 463; 2 Jur. (N.S.) 251; 4 W. R. 64.

But if such persons have an interest which might be affected in case the suit were allowed to proceed, as on their behalf at the instance of the plaintiff, or if full justice cannot be done to the defendants without having all such persons personally upon the record, the court will not allow the suit to proceed. *Ib.*

—— **Plaintiff barred from Suing.**] — Some individuals of a class may file a bill on behalf of themselves and the others of that class praying an account, though the plaintiffs have executed separate releases which would bar their right, the bill charging that those releases were obtained fraudulently. *Williams* v. *Smith*, 7 L. J. (O.S.) Ch. 129.

Semble, that when a bill is filed by two stockholders, entitled to separate sums of stock, on behalf of themselves and all other holders of the same stock, praying relief, if it should appear that one of the plaintiffs is not entitled to relief by reason of some equitable circumstances peculiar to himself, the court may nevertheless, in that suit, give the relief sought, and is not bound to dismiss the bill. *Corballis* v *Grand Canal Undertakers*, 3 Ir. Eq. R. 29.

Defendants—in what Cases.]—By the rules of a labour protection league it was provided that any member who became permanently disabled by an accident was entitled to have a levy made for his benefit on all the members of the league. The plaintiff brought an action against two officers of the league to enforce his rights under the rules:—Held, that the two officers were

rightly ordered to represent all the members of the league under Ord. XVI. r. 9, and that the fact of their opposing such order was immaterial. *Wood* v. *McCarthy*, 62 L. J., Q. B. 373; [1893] 1 Q. B. 775; 5 R. 408; 69 L. T. 431; 41 W. R. 523.

An intended husband told his intended wife that he wished every farthing of her property to be settled on her. She then expressed herself willing that he should have a life interest if he survived her, upon which he said he would have counsel employed. Nothing, however, was done until the evening before the marriage, when the intended husband, who was a retired solicitor, began to prepare the settlement of all the lady's property and a small portion of his own, and brought it to her at five o'clock on the morning of the wedding. From her evidence it appeared that he did not explain the settlement to her, nor was any other solicitor employed in her behalf. There were several mistakes in the deed, and it was evident that it had been hastily prepared. The husband having died, the wife for the first time discovered that the settlement gave a moiety of her property after her death to her husband absolutely. The wife then commenced an action against the trustees of the settlement and one of the several next of kin of the husband for the rectification of the settlement by omitting the words giving the moiety to the husband:—Held, that the court had power to decide the question between the parties then before the court. *Lovesy* v. *Smith*, 49 L. J., Ch. 809; 15 Ch. D. 655; 43 L. T. 240; 28 W. R. 979.

Bill by a legatee wrongly described by the testator, for his legacy, one of the next of kin being a party: a decree was made without requiring the other next of kin, who were numerous, to be brought before the court. *Bradwin* v. *Harpur*, Ambl. 374.

When upon the construction of a will questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, the court made an order under Ord. XVI. r. 9a, appointing persons to represent the various classes of representatives of which some or one might be held to be entitled, before the questions of construction came on to be decided. *Peppitt, In re, Chester* v. *Phillips*, 46 L. J., Ch. 95; 4 Ch. D. 230; 35 L. T. 902; 25 W. R. 211.

Semble, that where a bill seeks to disturb a settlement and release executed by a majority of the members of an association, on the footing of an account stated as to the whole affairs of the association, submitted to all its members, the principle of allowing an individual to represent a class cannot well be applied. *Stupart* v. *Arrowsmith*, 25 L. J., Ch. 153; 2 Jur. (N.S.) 153; 4 W. R. 219.

Where appointees are numerous they may be represented as defendants to a suit by some on behalf of the rest. *Milbank* v. *Collier*, 1 Colly. 237.

Appointees being very numerous, and bill filed by some on behalf of all, court will dispense with general rule requiring all appointees to be parties. *Manning* v. *Thesiger*, 1 Sim. & S. 106; 1 L. J. (O.S.) Ch. 28. S. P., *Saunders* v. *Richardson*, 2 Drew. 128; 2 Eq. Rep. 540; 2 W. R. 245.

The directors of a joint-stock company, consisting of upwards of 500 members, made certain calls, which the majority of the shareholders paid, but which six of them, alleging that the calls were fraudulently made, refused to pay, and filed their bill, on behalf of themselves and all other the shareholders except the defendants, against the directors, trustees, and secretary of the company, praying for an account of the debts and assets of the partnership, a receiver, an injunction to restrain the defendants and all officers and servants of the company from dealing with the partnership property, an account of the debts and liabilities of the company, and to have the property applied towards the payment of its debts and liabilities:—Held, that some at least of the absent shareholders who had paid up the disputed calls ought to be made parties to the suit. *Richardson* v. *Larpent*, 2 Y. & Coll. C. C. 507; 7 Jur. 691.

In a representative action by a plaintiff on behalf of himself and all other bondholders:—Held, that a dissentient bondholder — it not appearing that there were any others who dissented — should be added as a defendant, but not in a representative character. *Wilson* v. *Church*, 9 Ch. D. 552; 39 L. T. 413; 26 W. R. 735.

The plaintiff, a bondholder of a railway company, sued "on behalf of himself and all the bondholders of the company other than the defendant B.," but did not obtain an order under Ord. XVI. r. 9, that B. should be sued as representing all bondholders who dissented from the plaintiff's claim. One of the bondholders took out a summons whereby he stated that neither the plaintiff nor the defendant B. properly repre-ented the interests of himself and certain other bondholders, and applied to be made a defendant:—Held, that the applicant was entitled to be made a defendant, to represent the bondholders who dissented from the plaintiff's view. *Fraser* v. *Cooper*, 51 L. J., Ch. 575; 21 Ch. D. 718; 46 L. T. 371; 30 W. R. 654.

Trustees—Cestui que Trust.]—Ord. XVI. r. 7, of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the Partitions Acts, 1868 and 1876. *Simpson* v. *Denny*, 10 Ch. D. 28; 27 W. R. 280.

Where the trusts of a will are not completed, the surviving trustee is the proper person to bring an action for a debt due to the testator's estate, and the cestuis que trust need not be parties. *Cross, In re, Harston* v. *Tenison*, 51 L. J. Ch. 645; 20 Ch. D. 109; 45 L. T. 777; 30 W. R. 376.—C. A.

In an action for sale and partition, the plaintiffs were trustees for sale of two-thirds of leasehold property, and the defendants were trustees for sale of the remaining third part after the death of a tenant for life. The cestuis que trustent not being parties:—Held, that the trustees for sale sufficiently represented their cestuis que trustent, and a sale and partition were directed without notice to the parties beneficially interested. *Stace* v. *Gage*, 47 L. J., Ch. 608; 8 Ch. D. 451; 38 L. T. 843; 26 W. R. 605.

To entitle a third person not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract. By a deed of separation between husband and wife, the husband covenanted with the trustees to pay them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters. On one

of the two youngest daughters subsequently attaining sixteen the husband refused any longer to maintain her, whereupon she brought an action by her next friend against the husband and the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs:—Held, that upon the construction of the deed the plaintiff was not in the position of cestui que trust under the covenant so as to entitle her to maintain the action, but liberty was given to her to amend by adding the trustees, the wife, and the other daughters, or any of them, as plaintiffs. The trustees refused to be joined as plaintiffs, and the statement of claim was amended by making the wife a co-plaintiff:—Held, that she had such an interest as entitled her to sue, the deed being an arrangement between the husband and wife, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, and if they refused to sue, she could sue in equity. *Gandy* v. *Gandy*, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803—C. A.

—— **Refusal of Trustee to sue — Special Circumstances.**]—By his will the testator appointed executors, and bequeathed, amongst other legacies, the sum of 10,000*l.* to J. M. J. M. settled 8,000*l.*, part of such legacy, upon his children, and E. B. and J. H. were appointed trustees of the settlement. The 8,000*l.* was paid by the executors of the testator's will to E. B., one of the trustees of the settlement, upon his sole receipt, and the same was subsequently converted by him to his own use. He absconded and was made bankrupt, and a trustee in bankruptcy was appointed. An action was then commenced by C. M., one of the children of J. M., against the executors of the testator's will, and also against the trustee in bankruptcy of E. B. and J. H., to recover the 8,000*l.* The plaintiff by his statement of claim alleged that, although he had requested the defendant J. H. so to do, such defendant had refused to take or concur in any proceedings for the recovery of the 8,000*l.* from the estate of the testator, or from his executors. A summons was taken out on behalf of the defendants, the executors of the testator, asking that the action might be dismissed with costs as against them, on the ground that the statement of claim disclosed no reasonable cause of action against them:—Held, that, although a mere refusal to sue on the part of a trustee did not entitle a cestui que trust to sue in his own name, yet the circumstances of this case were special enough to render it proper that he should so sue. But held that, in order to guard against a multitude of actions, all the other cestuis que trust must be made defendants to this action. *Meldrum* v. *Scorer*, 56 L. T. 471.

See also TRUST.

How far Decision Binding on Person Represented.]—When a general right is fairly contested and established against a representative class, parties not actually parties are still bound by representation, so far as the general right is tried and established. *Sewers Commissioners* v. *Gellatly*, 45 L. J., Ch. 788; 3 Ch. D. 610; 24 W. R. 346.

The plaintiffs filed a statement of claim, seeking to carry out against the defendant a decree establishing a general right of common. The defendant demurred on the grounds, first, that he was no party to the original suit, and therefore not bound by the decree; and, secondly, that under an act of parliament the plaintiffs were prohibited from taking proceedings, except such as were supplemental to the original suit the decree in which they sought to enforce), without the leave of a certain body, and that they did not state that they had obtained such leave:—Held, that the defendant was bound by the decree, so far as it established a general right of common. *Ib.*

Held, however, that (the proceedings being original and not supplemental), the demurrer must be allowed on the second ground, with liberty for the plaintiffs to amend by obtaining leave, and that in case they obtained such leave the costs of the demurrer should be reserved. *Ib.*

Where a court of equity directs an issue in a cause in which there are many parties, and selects some to have the conduct of the trial, giving all leave to attend, all are bound by the result. *Malone* v. *Malone*, 8 Cl. & F. 179; West, 637; 2 Dr. & Wal. 491, 536; 3 Ir. Eq. R. 536.

Interlocutory Proceedings—Inquiry in Chambers—Adding as a Defendant.]—Two actions were brought, raising the question of the amount of remuneration payable to the trustees of a railway company reorganisation scheme, in each of which actions the plaintiff sued on behalf of himself and all holders of certificates for bonds and shares under such reorganisation scheme. By an order made on the 15th July, 1881, in one of the actions, an inquiry was directed as to what sum, in addition to 6,000*l.* in the statement of claim mentioned, was fit and proper to be allowed to the defendants as a quantum meruit for their services in connection with the reconstruction of the railway company. The plaintiff in the other action applied that he might be at liberty to attend such inquiry, and to contend that no further sum, beyond the 6,000*l.*, ought to be allowed, and that he might, if necessary, be added as a defendant to the action. The evidence on the inquiry was closed, and everything was complete for decision:—Held, that it was not usual in a representative action to allow a person fairly represented to attend subsequent proceedings, unless such person was joined as a party to the action, and thereby made liable to costs; that the court would not be justified in adding the applicant as a defendant to the action, because, not only had he supported the motion upon which the order directing the inquiry was made, but it was too late for him to come forward and thrust himself into the litigation, especially when it was considered that the inquiry which he desired to attend was directed by an interlocutory order made so long ago as to be incapable of being disturbed by appeal. *Conybeare* v. *Lewis*, 48 L. T. 527.

Service and Indorsement of Writ.]—When two actions had been consolidated, on an application by the plaintiff to add new defendants to the consolidated action before trial, and to make W., one of the present defendants, a party to the action in a representative character, the court under Ord. XVI. rr. 14, 15, ordered that the proposed new defendants should be added without service of any writ, and that W. be made a defendant in his representative character without any further indorsement on any writ, such order

to take effect unless the new defendant and W. should respectively shew cause to the contrary within eight days after service thereof. *Wortley, In re, Culley* v. *Wortley*, 46 L. J., Ch. 182; 4 Ch. D. 180; 25 W. R. 295.

Foreclosure Action — Persons interested in Equity of Redemption.]—In a foreclosure action an order had been made in chambers, under Ord. XVI. r. 9, authorising two of a large class of persons, all having the same interest in the equity of redemption, to defend in the action on behalf and for the benefit of the others:—Held, that a foreclosure order could not be made unless all the persons interested in the equity of redemption were parties to the action. *Griffith* v. *Pound*, 59 L. J., Ch. 522; 45 Ch. D. 553.

Power to consent to Judgment.] — Persons authorised by the court to defend an action on behalf of others having the same interest cannot consent to judgment against them; the proper course in case there is no defence is to submit on their behalf to judgment. *Rees* v. *Richmond*, 62 L. T. 427.

Title of Action — Creditors' Administration Action.]—Where neither the title of the writ nor of the statement of claim in a creditor's administration action shew that the plaintiff is suing "on behalf of himself and all other creditors" of the deceased, the title of the statement of claim must be amended by adding those words. It is not sufficient that a statement to that effect should appear in a paragraph of the statement of claim. *Tottenham, In re, Tottenham* v. *Tottenham*, 65 L. J., Ch. 549; [1896] 1 Ch. 628; 74 L. T. 376; 44 W. R. 539.

f. ABSENT PARTIES.

Interlocutory Application.]—In an interlocutory application with which some of the parties to the action who had no interest in such application were not served, an order nisi was made to be binding on the absent parties three days after service unless they shewed cause. *Wilson* v. *Church*, 9 Ch. D. 552; 39 L. T. 413; 26 W. R. 735.

Compromise in Relation to a Trust—Jurisdiction.]—Ord. XVI. r. 9a, of the R. S. C. 1883, which enables the court, in proceedings concerning a trust, to sanction a compromise so as to bind persons who are not parties to the proceedings, gives no jurisdiction to bind persons, however few in number, who have expressly dissented from the compromise. Compromise sanctioned as against absent persons, who had expressed no opinion, on provision for payment to dissentients of the maximum amount which they could in any event be entitled to claim. *Cullingham* v. *Sloper*, 64 L. J., Ch. 149; [1894] 3 Ch. 716; 12 R. 87; 71 L. T. 456—C. A.

Out of the Jurisdiction.]—Where the defendants who have appeared are only interested in two-thirds of the mortgaged property, the persons entitled to the other third being merely named as defendants out of the jurisdiction, a mortgagee cannot obtain a decree for the sale or foreclosure either of the whole property or of the two-thirds. *Caddick* v. *Cooke*, 1 N. R. 463; 9 Jur. (N.S.) 454; 7 L. T. 844; 11 W. R. 395.

The court may proceed with a cause so far as a final order can be made, notwithstanding the absence of an interested party who is out of the jurisdiction; but where the suit was brought to enforce a charge upon the produce of the estate of an absent party, in the hands of his agents and consignees, in performance of an agreement to which the consignees were parties, the court refused to direct an account to be taken of the amount of such produce received by the consignees; for as the absent party would neither be bound by the account of what was due to the plaintiff in respect of the charge on the estate, nor be compelled by the decree for payment of what was so found due, to allow in the accounts of his consignees the payments to be made by them in pursuance of such decree, the accounts of the receipts of the produce of the estate by the consignees could not be taken for any final purpose. *Kirwan* v. *Daniel*, 7 Hare, 347.

Where a plaintiff is abroad on foreign service with his regiment, the defendant who might have pushed on the proceedings, cannot, on the plaintiff's return some years afterwards, discharge the bill on account of the delay. *Mullins* v. *Townsend*, 2 Dow & Cl. 430; 5 Bli. (N.S.) 567.

Where the person whose interests are sought to be affected by the decree is out of the jurisdiction of the court, the suit cannot proceed in his absence. *Brown* v. *Blount*, 2 Russ. & M. 83.

Where a defendant is out of the jurisdiction, and cannot be made to appear, it amounts to the same thing as if the process had been taken out for want of an appearance, and carried on to a sequestration. *Darwent* v. *Walton*, 2 Atk. 510.

Interpleader upon opposite claims; interpleader, all the defendants, but one, residing out of the jurisdiction, in Scotland. The plaintiff, after a reasonable time, having used due diligence to bring them in, being decreed to give up the subject to the only defendant appearing, protected afterwards against the others by injunction; and order that service on the attorney should be good. *Stevenson* v. *Anderson*, 2 Ves. & B. 407; 13 R. R. 126.

Stock was invested in the names of two persons upon trust, as was alleged, for the petitioners. The only evidence of the trust was the statements in the petition and verifying affidavits of a letter written by the donor for the purposes of the application. One of the alleged trustees being resident in some place unknown out of the jurisdiction, a petition was presented, praying that the stock might be transferred to the petitioners; but the court refused to make the order in his absence, though it was stated that he declined to act, and the other trustee submitted to act as the court should direct. *Dunbar, In re*, 2 Jo. & Lat. 120; 8 Ir. Eq. R. 71.

There is no need to make persons parties who are out of jurisdiction of court, but it is usual to apply to reserve liberty to alter decree as to them. *Att.-Gen.* v. *Balliol College*, 9 Mod. 407.

In order to dispense with a person being made a defendant, it is not sufficient to allege that he absconded a year before the bill was filed. *Penfold* v. *Nunn*, 5 Sim. 405.

Where a bill was brought to recover the arrears of an annuity, and the grantor was alleged to be and in fact was out of the jurisdiction:—Held, that the cause must stand over till he should be made a party. *Smyth* v. *Chambers*, 4 Y. & Coll. 40.

Intervention.]—A party permitted to intervene as a defendant in a cause after it had been

heard, on further directions, he having been out of the jurisdiction during the previous proceedings, and now submitting to be bound by them. *White* v. *Hall*, 1 Russ. & M. 332. See also *Pitt* v. *Brewster*, Dick. 37; *Banister* v. *Way*, Dick, 686; *Capel* v. *Butler*, 2 Sim. & S. 457; 4 L. J. (O.S.) Ch. 69; and dicta in *Harford* v. *Browning*, 1 Cox, 307.

Representation by Persons having same Interest.]—*See* REPRESENTATION OF PARTIES, supra, cols. 663 et seq.

Saving Rights of.]—Equity will not permit a decree to be made use of to evict the interests of persons not parties, and who were tacitly protected by it. *Foley* v. *Gough*, 1 Ball & B. 448.

A decree always guards the rights of persons not parties to the suit, for it gives relief on the terms that such persons be not prejudiced. *Shine* v. *Gough*, 1 Ball & B. 447.

Objection that a person having the same interest with plaintiff is not a party, overruled; plaintiff taking his relief with a saving of the rights of such absent person. *Moore* v. *M'Kay*, 2 Moll. 137.

A decree made in the absence of a material party, but without prejudice to his rights and interests. *Willats* v. *Busby*, 5 Beav. 193; 10 L. J., Ch. 1.

A. executed a voluntary settlement of real estate in favour of his wife and children, and afterwards contracted to sell it for valuable consideration. The purchaser filed a bill for specific performance against the vendor, his wife and children, and the trustees in whom the legal estate was vested. One of the children was out of the jurisdiction, and did not appear. The court decreed a specific performance, and ordered the trustees to convey to the purchaser saving the rights of the absent party. *Ib.*

The court may, under the 40th General Order of August, 1841, make the decree, saving the right of an absent party, as where neither a representative nor assets of an executor. *Daubuz* v. *Peel*, 1 Coop. C. C. 365.

And see the cases of objection for want of parties collected and discussed. *Ib.*

On a devise of real and personal estate charged with the testator's debts and legacies, upon trust for his nephew for life (the only son of the testator's only brother), in strict tail male, remainder to the nephew's first and other sons, remainder to testator's own right heirs, and in the event of failure of heirs of his brother, and of the estate going over to right heirs more remote, then he charged the estates with payment of a sum to his niece; the nephew died without issue, having survived his father:—Held, in a suit by the niece, the administrator of the nephew, limited for the purposes of the suit, was a sufficient representative of the personal estate of the nephew in the cause, and that the heir of the surviving trustee appointed by the testator and the personal representative of the testator should properly be parties; but that the defendant not having objected to their being necessary parties, the court, under the 40th Order, August 1841, would make a decree saving their rights. *Faulkner* v. *Daniel*, 3 Hare, 199.

To a suit for the execution of a trust, created for the benefit of the plaintiffs and other specified creditors, against the trustees (the fund having been brought into court), the person who created the trust, or his personal representative, is a necessary party; and it is not a case in which the court will, under the 40th Order of August, 1841, make a decree saving the rights of such party when absent, although the defendants say that the trust fund is insufficient for the purposes for which it was created, and that there is, therefore, no surplus to be paid to the absent party. *Kimber* v. *Ensworth*, 1 Hare, 293; 11 L. J., Ch. 151; 6 Jur. 162.

Semble, the 40th Order of August, 1841, enabling the court to make a decree saving the rights of absent parties, does not apply to cases where the security of an absent party might be prejudiced by the decree, or where the effect of the decree might be to transfer the legal interest in property in which the absent party is equitably interested. *Ib.*

Where it appeared, by a statement in an answer, that C., who was not a party to the suit, had an interest in the subject-matter of the suit, but the objection on account of C.'s absence was not taken by any of the answers:—Held, that this was a case within the 40th of the General Orders of August, 1841, and the court made a decree in the suit saving the rights of C. *Feltham* v. *Clark*, 1 De G. & Sm. 307.

Decree made under the 40th Order of August, 1841, without prejudice to the rights of absent parties. *Maybery* v. *Brooking*, 7 De G. M. & G. 673; 25 L. J., Ch. 87; 2 Jur. (N.S.) 76; 4 W. R. 155.

—— **In Administration Suits.**]—*See* EXECUTOR AND ADMINISTRATOR.

Undertaking to make Party.]—Where the personal representative of one of several trustees who had committed a joint breach of trust was not before the court, the decree pronounced upon an undertaking to make him a party. *Att.-Gen.* v. *Newbury Corporation*, C. P. Coop. 72.

Effect of.]—The court will only decree the usual preliminary inquiries where the absence of a necessary party is suggested by the answer of an accounting party, and who at the hearing objects to a more extensive decree. *Bass* v. *Wellsted*, 7 Jur. 618.

The court will neither decide a question between a class of persons and a party claiming adversely to that class, nor decree the distribution of a fund amongst a class of persons without evidence that all the members of such class are parties to the proceeding. *Hawkins* v. *Hawkins*, 1 Hare, 543; 11 L. J., Ch. 428; 6 Jur. 638.

A decree obtained without making parties those whose rights are affected thereby, is fraudulent and void as to those parties; and a purchaser under it with notice of the defect is not protected by it. *Giffard* v. *Hort*, 1 Sch. & Lef. 386.

After the trustees of a charity had put in their answer in a suit, and before the hearing, one trustee died, and another resigned. New trustees were appointed in their stead, but were not made parties to the cause before the hearing. After the cause was heard, and judgment pronounced, an information was filed against the new trustees, praying the benefit of the former proceedings against them, and that they might be removed as persons not duly qualified. The new trustees, by their answer, made a case to shew that the decree, if enforced, would be prejudicial to the charity, and insisted that it ought not to be made against them:—Held, that the new trustees came in under the founder, and not under the trustees

for whom they were substituted; that the issue on the information was not merely whether the new trustees were bound or not by the decree; that having been trustees at the time of the decree, they ought to have been made parties; that not having been parties, they were not so bound by the former proceedings as to be precluded from making a case, by way of defence to the suit; and that the statement in their answer of further facts for that purpose was therefore not impertinent. *Att.-Gen.* v. *Foster*, 2 Hare, 81; 12 L. J., Ch. 44; 6 Jur. 1032.

g. Change of Parties.

1. On Death.

a. *When Cause of Action Survives.*

Generally.]—Where the cause of action is money due, or a contract to be performed, gain or acquisition by the labour or property of another, or a promise by a testator expressed or implied, the action survives against the executor; otherwise, if it is a tort, or arises ex delicto, supposed to be by force and against the peace. *Hambley* v. *Trott*, Cowp. 375.

Injury to Freehold Property.]—The plaintiff, in an action for a mandatory injunction and damages for obstruction of light to freehold property, died more than six months after the commencement of the action, and three months after her death B. J., her executor and devisee, obtained the common order, under Ord. XVII. r. 2, to carry on proceedings against the defendant. The defendant moved to discharge the order on the ground that the cause of action did not survive:—Held, that the plaintiff's equitable right to a mandatory injunction devolved to B. J. as her devisee, and that B. J., as her executor, was at least entitled to continue the action for the recovery of damages in respect of injury committed during a period of six months prior to the plaintiff's death. *Jones* v. *Simes*, 59 L. J., Ch. 351; 43 Ch. D. 607; 62 L. T. 447.

After judgment for the plaintiff upon a special case in an action to recover damages for injury to land by working the mines beneath, the defendant died. The judgment directed that the damages should be assessed by an arbitrator, upon certain principles laid down by the court:—Held, that the defendant's widow, who was also his executrix, would not be added as a defendant under Ord. L. r. 4, and that the maxim actio personalis moritur cum personâ applied. *Chapman* v. *Day*, 49 L. T. 436—C. A. Reversing 31 W. R. 767.

Injury to Personal Estate.]—Whenever the pleadings in an action, whether founded on contract or on tort, shew that injury has been done to a man's personal estate as distinguished from his person or reputation, the action, in case of the death of the plaintiff, survives to and may be continued by his legal personal representative. *Twycross* v. *Grant*, 48 L. J., C. P. 1; 4 C. P. D. 40; 39 L. T. 681; 27 W. R. 87—C. A.

Semble, that even if the injury can only be inferred this is still sufficient. *Ib.*

The position of an administrator is the same in this respect as that of an executor. *Ib.*

An action for defamation, either of private character or of a person in relation to his trade, comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives:—Held, therefore, that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. *Hatchard* v. *Mège*, 56 L. J., Q. B. 397; 18 Q. B. D. 771; 56 L. T. 662; 35 W. R. 576; 51 J. P. 277

Mandamus to enforce Statutory Duty.]—An action for a mandamus to compel a local authority to make such sewers as may be necessary for effectually draining their district in pursuance of s. 15 of the Public Health Act, 1875, survives to the executors of an owner of premises within the district dying after the commencement of the action. *Peebles* v. *Oswaldtwistle Urban Council*, 65 L. J., Q. B. 499; [1896] 2 Q. B. 159; 74 L. T. 721; 44 W. R. 513; 60 J. P. 516—C. A.

Liability ex Contractu implied by Foreign Law—Waste.]—A testator, domiciled in England, died leaving considerable property in that country. He was also entitled as "possessor" to the usufruct of three estates in Austria, Hungary and Croatia, held under three family settlements or fidei-commisse. Every fidei-commiss was subject to the jurisdiction of the land court of the district in which the property was situate, and on every change of possession (which could take place only on succession) the successor made a declaration to the court that he took possession. It was a fundamental principle of Austrian, Hungarian, and Croatian law that the "possessor" was bound to maintain the subject-matter of the fidei-commiss, and transmit it to his successor in the state in which he received it; and upon his death his allodial estate was liable for dilapidations. A creditor's action was brought in England by the successor under the fidei-commisse, against the executrix and trustees of the testator for administration of his real and personal estate, the plaintiff claiming damages for dilapidations. The executrix objected that no claim could be maintained in England in respect of any act or default committed abroad, unless such act or default shewed a good cause of action both in the foreign country and in England, and that, the claim being in the nature of a claim for waste, no action would lie in England:—Held, that the action rested on an implied contract or obligation and not on tort, and that the maxim actio personalis moritur cum personâ did not apply. *Batthyany* v. *Walford*, 56 L. J., Ch. 881; 36 Ch. D. 269; 57 L. T. 206; 35 W. R. 814—C. A.

Infringement of Trade-mark or Patent.]—An action by the registered owner of a trade-mark claiming an injunction restraining infringement and fraudulent imitation, and the usual consequential relief, is not extinguished by the death of the plaintiff, but survives to his personal representatives. *Oakey* v. *Dalton*, 56 L. J., Ch. 823; 35 Ch. D. 700; 57 L. T. 18; 35 W. R. 709.

Where there are two assignees of a patent, and

one of them dies, the action for an infringement in his lifetime descends to the survivor, who is entitled to recover the whole damages. *Smith* v. *L. & N. W. Ry.*, 2 El. & Bl. 69; 17 Jur. 1071.

Sale by Father of Infant's Property—Compensation.]—According to the law of Peru, a father is entitled to administer the estate of his infant child, and to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold (as it was alleged, improperly) a part of her property for much less than it proved to be worth. After his death the daughter claimed compensation out of his estate for the loss occasioned by this disadvantageous sale:—Held, that the father stood in such a fiduciary position towards the daughter that the rule actio personalis moritur cum personâ did not apply to the demand, and that, as the sale had been made without justification, the father's estate must account for the amount which would have been received from the property had it been retained in specie. *Concha* v. *Murrieta*, 40 Ch. D. 543; 60 L. T. 798—C. A.

Action by Director against Co-directors for Contribution—Death of one Defendant.]—L. and two others were directors of a company, and on various occasions authorised loans to be made out of the funds of the company. The company afterwards brought an action against another director for such unauthorised loans, and recovered judgment against him, which he discharged. He then brought an action for contribution against the three directors, of whom L. died after the commencement of the action, and his administrator was made a defendant:—Held, that the action survived against L.'s estate. *Ramskill* v. *Edwards*, 55 L. J., Ch. 81; 31 Ch. D. 100; 53 L. T. 949; 34 W. R. 96.

Breach of Promise of Marriage—Special Damage.]—No action lies for damages for breach of promise of marriage against the personal representatives of the promisor, unless in respect of special damage—that is, actual loss to the temporal estate of the promisee, flowing directly from the breach, or which may reasonably be supposed to have been in the contemplation of both parties at the time of the promise as the probable result of the breach of it. *Finlay* v. *Chirney*, 57 L. J., Q. B. 247; 20 Q. B. D. 494; 58 L. T. 664; 36 W. R. 534; 52 J. P. 324—C. A.

Misrepresentation.]—The plaintiff advanced money on a mortgage of certain property on the faith of certain representations made to him by the solicitor who negotiated the mortgage for him that the security offered was a good one. These representations were untrue, and were known by the solicitor, when he made them, to be so. The misrepresentation was not discovered until after the solicitor's death, and shortly after that the plaintiff commenced this action against the solicitor's executors to recover the amount lent, and the arrears of interest:—Held, that although the plaintiff would have had a good claim against the solicitor himself if he had been alive, yet that never having asserted it in his lifetime, he could not now, after the death of the person who was to blame for the loss, assert it against his representatives. *Young* v. *Wallingford*, 52 L. J., Ch. 590; 48 L. T. 756; 31 W. R. 838.

By the law of Scotland, if there is a pecuniary loss occasioned by a fraudulent misrepresentation, and the party guilty of it dies, an action can be maintained against his executor if he is lucratus—that is, possessed of assets. *Davidson* v. *Tullock*, 6 Jur. (N.S.) 543; 8 W. R. 309.

Tort—Action against Sole Partner in Firm.]—The plaintiff brought his action for damages and an injunction against the firm of T. & Co. for torts committed by the firm. The firm consisted of T. alone, who died more than six months after the commencement of action, and the action was continued against his executors:—Held, that T. having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his executors; although the action had been commenced in the lifetime of the testator, and although the executors continued the business in the name of the firm. *Kirk* v. *Todd*, 52 L. J., Ch. 224; 21 Ch. D. 484; 47 L. T. 676; 31 W. R. 69—C. A.

—— **Property or Proceeds Appropriated.**]—By a decree in 1870 it was declared that H. and F., and the estate of their deceased partner, were liable to the plaintiffs for minerals taken by them under the plaintiff's farm, and that H. and F. were liable to compensate the plaintiffs for user of all roads and passages under the farm, and inquiries were directed—1. As to the quantity of minerals taken and their value. 2. What quantity of minerals had been carried by the defendants through the roads or passages under the farm. 3. What, upon the result of the second inquiry ought to be paid by the defendants as wayleave for the user of the roads and passages. 4. Whether the farm, and the mineral property of the plaintiffs under it, had sustained any and what damage by reason of the way in which the defendants had worked under the farm. Pending these inquiries F. died, and his executrix moved to stay proceedings under the second, third, and fourth inquiries:—Held, by Pearson, J., that the fourth inquiry must be stayed; but that, as the estate of F. had derived profit from the trespasses to which the second and third inquiries related, it was liable after his death, and that those inquiries must be prosecuted. But held, on appeal, by Cotton and Bowen, L.JJ. (dissentiente Baggallay, L.J.) that proceedings under the second and third inquiries must also be stayed, for that, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property, or the proceeds or value of property, belonging to another person have been appropriated by the deceased person and added to his estate. *Phillips* v. *Homfray*, or *Fothergill* v. *Phillips*, 52 L. J., Ch. 833; 24 Ch. D. 439; 49 L. T. 5; 32 W. R. 6—C. A.

—— **Extraordinary Traffic — Recovery of Expenses — Summary Procedure.**]—The summary procedure provided by s. 23 of the Highways and Locomotives (Amendment) Act, 1878, for recovery of expenses incurred in repairing damage to roads caused by extraordinary traffic from the person by whose order it has been conducted is founded on tort. Proceedings under the section cease on the death of the person in whose lifetime and by whose order

the damage was caused. *Story* v. *Sheard*, 61 L. J., M. C. 178; [1892] 2 Q. B. 515; 67 L. T. 423; 41 W. R. 31; 56 J. P. 760.

—— **Arbitration purporting to bind Representatives.**]—When an action of tort dying with the person is referred to arbitration by an order made by consent, and with a stipulation that the award shall bind the representatives in case of the death of either party, and the plaintiff dies before the award, the action abates and the plaintiff's executors cannot be substituted. *Bowker* v. *Evans*, 54 L. J., Q. B. 421; 15 Q. B. D. 565; 53 L. T. 801; 33 W. R. 695—C. A.

Distress.]—A. had his goods distrained on for rent (no rent being due), and was obliged to pay 9*l.* 13*s.* to procure the distress to be withdrawn. A. died, and his executrix brought an action for the taking the goods; and the declaration stated that the goods were detained till A. paid 9*l.* 13*s.*, whereby his personal estate was diminished:—Held, that, on this declaration, the executrix could only recover damages to the amount of 9*l.* 13*s.* *Lockier* v. *Paterson*, 1 Car. & K. 271.

Personal Injuries.]—A plaintiff in an action for a personal injury died before verdict:—Held, that his legal representatives could not enter a suggestion of the death under s. 137 of 15 & 16 Vict. c. 76, and proceed with the action. *Flinn* v. *Perkins*, 32 L. J., Q. B. 10; 8 Jur. (N.S.) 1177; 7 L. T. 364; 11 W. R. 95.

An action for personal injuries is within the 15 & 16 Vict. c. 76, s. 139. Therefore, where a plaintiff in such an action died between verdict and judgment:—Held, that judgment signed within the time prescribed by that section was regular. *Kramer* v. *Waymark*, 4 H. & C. 427; 35 L. J., Ex. 148; L. R. 1 Ex. 241; 12 Jur. (N.S.) 395; 14 L. T. 368; 14 W. R. 659.

Of Member of Corporation.]—A suit by a corporation does not become defective on the death of some of the members; otherwise, of a suit by the members in their individual characters. *Blackburn* v. *Jepson*, 3 Swanst. 138.

In suit by dean and chapter upon abatement by death of dean, the suit may be revived by his successor by mere bill of revivor. *Pakenham* v. *Casey*, 8 Ir. Eq. R. 524.

Of Husband or Wife.]—If the bill be brought by husband and wife for a demand in her right, and the husband dies, it is in nature of a chose in action and survives, and the cause does not abate. *Pary* v. *Juxon*, 3 Ch. Rep. 40.

Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action:—Held, that it thereby abated. *Checchi* v. *Powell*, 6 B. & C. 253; 9 D. & R. 243; 5 L. J. (O.S.) K. B. 122.

Where a sole plaintiff (a married woman) in a suit for a partition and for the apportionment of mortgage debts, died, leaving two co-heiresses, and her husband tenant by the curtesy who then became bankrupt, the common order for revivor was made. *Gibbons* v. *Eydon*, 18 L. T. 899.

Of Partners.]—Semble, that where one of several partners, plaintiffs, dies, the suit survives to the others. *Anderson* v. *Wallis*, 4 Y. & Coll. 336. Affirmed, 1 Ph. 202.

Of Co-plaintiff—Joint Tenant.]—Where joint tenants file a bill, and one dies, his interest survives the other, and therefore there is no abatement. *Wright* v. *Dorset*, 3 Ch. Rep. 66. Sed quære as to tenants in common. *S. C.*, 1 Eq. Abr. 1.

—— **Next of Kin.**]—Suit ordered to be revived on the application of two surviving plaintiffs against the same defendants, one of the co-plaintiffs, who claimed as next of kin, having died, after application, without legal representation. *Ure* v. *Lord*, 2 Dr. & Sm. 263; 34 L. J., Ch. 225; 10 Jur. (N.S.) 1042; 11 L. T. 263; 13 W. R. 41.

—— **Tenant for Life and in Fee.**]—Bill by two persons, claiming, one to be tenant for life of an estate, the other to be tenant in fee (subject to the first plaintiff's life estate) of one-third of the entirety, against a defendant, W., who claimed the entirety by an adverse title, and other defendants who claimed the remaining two-thirds under the same title as the second plaintiff, alleging that W. had begun to cut timber on the estate, and threatened to cut the whole, and praying that he might be restrained. The first plaintiff died:—Held, that revivor was not necessary; and that the surviving plaintiff had a sufficient interest in the subject matter to continue the suit. *Wilson* v. *Wilson*, L. R. 9 Eq. 452; 18 W. R. 801.

In a suit for specific performance of a contract for sale to a railway company by a tenant for life of one-third and owner in fee of other two-thirds of real estate, after the cause was set down for hearing on notice of motion for decree the first plaintiff died. An order was made to enable the surviving plaintiffs to prosecute the decree as if the tenant in tail, who had succeeded the deceased plaintiff, had been originally a defendant. *Williams* v. *Llanelly Railway and Dock Co.*, 39 L. J., Ch. 820; L. R. 10 Eq. 401.

b. *Practice.*

Devisee.]—Devisee of a deceased plaintiff may obtain an order to revive under the 15 & 16 Vict. c. 86, s. 52. *Gilbert* v. *Tomlinson*, 6 Jur. (N.S.) 532; 8 W. R. 467.

A sole plaintiff died, having devised the estate which was the subject of the suit:—Held, that the devisee was not entitled to an order to revive under the 15 & 16 Vict. c. 86, s. 52. *Laurie* v. *Crush*, 32 Beav. 117; 1 N. R. 225; 9 Jur. (N.S.) 453; 7 L. T. 662; 11 W. R. 275. S. P., *Dendy* v. *Dendy*, 5 W. R. 221.

An administration suit was instituted by a trustee of a will against the residuary devisees and legatees, one of whom was a co-trustee with the plaintiff. The plaintiff died after decree, and the suit was revived by an original bill against the same parties by a trustee appointed in the place of the original plaintiff. The new plaintiff having died:—Held, that the suit might be revived by the common order at the instance of one of the defendants, who was a residuary devisee and legatee, but was not and did not intend to become a trustee. *Edmonson* v. *Sharp*, L. R. 12 Eq. 198; 19 W. R. 709.

The heir-at-law being made a defendant to a claim filed by a simple contract creditor of a testator, died, having by his will devised the estate sought to be made assets to his son upon

trust for sale, and upon further trust out of the proceeds thereof to pay a legacy to his executors :—Held, on a motion to revive the suit against the devisee and executor of the heir-at-law, that this was a transmission of interest within s. 52 of the 15 & 16 Vict. c. 86, but that the order, being ex parte, is liable to be discharged. *Lowe* v. *Watson*, 1 Sm. & G. 123.

An order to revive, under 15 & 16 Vict. c. 86, s. 52, made, in order to bring before the court the devisee of a defendant who had died before decree. *Durham (Earl)* v. *Legard*, 34 Beav. 442.

In a suit relating to real estate, the sole plaintiff, dying before decree, having devised the estate, the devisee may be brought before the court by the common order, under 15 & 16 Vict. c. 86, s. 52, and a supplemental bill is unnecessary. *Eyre* v. *Brett*, 34 Beav. 441 ; 6 N. R. 181 ; 34 L. J., Ch. 400 ; 13 W. R. 732, 763.

A sole plaintiff having died after decree, an order to revive against his devisee was made. *Ledford* v. *Bedford*, 35 Beav. 342.

Death of both Parties—Ex parte Application.]—Where plaintiff and defendant die, pending an action which survives as between the respective personal representatives, the court will, upon ex parte application, order the action to be continued in the names of their respective personal representatives. *Sellors* v. *Goode*, 30 L. R., Ir. 298.

One Party becoming Representative of Other.]—When a sole plaintiff dies before decree, and a defendant becomes his legal personal representative, the common order to revive cannot be made. *Bates* v. *Bates*, 41 L. J., Ch. 280 ; L. R. 13 Eq. 138.

Where there is a sole plaintiff in a suit and a sole defendant, and the defendant dies, having appointed the plaintiff his sole executor, an order to revive may be obtained by the plaintiff, as executor, against the persons beneficially interested, who have been summoned to attend the proceedings in chambers. *Pedder* v. *Pedder*, 29 L. J., Ch. 64 ; 5 Jur. (N.S.) 1145 ; 1 L. T. 19 ; 8 W. R. 15.

A sole plaintiff died after decree, leaving a co-defendant his executor, who proved the will and obtained an order to revive, thus becoming plaintiff and co-defendant ; his name was struck out as co-defendant. *Greene* v. *Greene*, Ir. R. 5 Eq. 224.

Sole Petitioner.]—When a sole petitioner dies after an order made on the petition directing inquiries, and whilst those inquiries are pending, the court will order the petition to be continued and carried on by the representatives of the petitioner. *Atkins's Estate, In re*, 45 L. J., Ch. 117 ; 1 Ch. D. 82 ; 24 W. R. 39.

Infant's next Friend.]—When the next friend of an infant plaintiff dies pending the action, a new next friend may be appointed on an ex parte motion in court. *Daly* v. *Daly*, 9 L. R., Ir. 383.

Executor—Libel.]—An executor may, under 17 Car. 2, c. 8, s. 1, enter up judgment on a verdict obtained by his testator in an action for libel. *Palmer* v. *Cohen*, 2 B. & Ad. 966.

—— **Arbitration purporting to bind Representatives.**]—Where an action of tort dying with the person is referred to arbitration by an order made by consent, and with a stipulation that the award shall bind the representatives in the case of the death of either party, and the plaintiff dies before the award, the action abates, and the plaintiff's executors cannot be substituted. *Bowker* v. *Evans*, 54 L. J., Q. B. 421 ; 15 Q. B. D. 565 ; 53 L. T. 801 ; 33 W. R. 695—C. A.

Order to continue Proceedings before Probate.]—Where, after an order directing the trial of issue of fact before a jury, one of the plaintiffs died within fourteen days of the date fixed for the trial, the court, on the application of his executors, made an order continuing the proceedings, the executors undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained. *Hughes* v. *West*, 13 L. R., Ir. 224.

One Co-Plaintiff dying before Judgment—Application after Judgment.]—An action for damages was brought by several plaintiffs having separate causes of action. Two of the plaintiffs died before the trial, but no application was made to put off the trial, and judgment was given for the defendants and the action dismissed. The executors of the deceased plaintiffs applied under Ord. XVII. r. 4, for an order to carry on the action against the defendants :—Held, that the order ought not to be made : Cotton, L.J., holding that the court had no jurisdiction to make such an order after final judgment : and Lindley and Lopes, L.JJ., holding that, whether the court had jurisdiction or not, it was not necessary or desirable to make such an order in the present case. *Arnison* v. *Smith*, 58 L. J., Ch. 335 ; 40 Ch. D. 567 ; 60 L. T. 206 ; 37 W. R. 405—C. A.

Order by whom Obtained.]—Order made on the application of the sole defendant appointing a person to represent the estate of the plaintiff, who had died insolvent and apparently intestate, in order that the defendant might have an opportunity to move for dismissal of the action for want of prosecution. *Wingrove* v. *Thompson*, 11 Ch. D. 419 ; 27 W. R. 910.

A person served with notice of an administration judgment, and having obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of the sole plaintiff. *Burstall* v. *Fearon*, 53 L. J., Ch. 144 ; 24 Ch. D. 126 ; 31 W. R. 581.

Claim ordered to stand over for the plaintiff to obtain administration to or bring the representative of A. B. before the court. No steps having been taken, ordered that plaintiff bring a proper representative before the court, and within fourteen days set down the claim for hearing, or in default that stand dismissed with costs. *Pearce* v. *Wrigton*, 24 Beav. 253.

Application where and to Whom made.]—Semble, that applications for an order to carry on proceedings under the Judicature Act, 1875, Ord. L. r. 4, may be made to a judge at chambers. *Crane* v. *Loftus*, 24 W. R. 93.

An order to revive under Judicature Act, Ord. L. r. 4, is an order of course. *Roffey* v. *Miller*, 24 W. R. 109.

A sole petitioner having died, an order was

made ex parte for her representatives to carry on the petition. *Atkins's Estate, In re*, 45 L. J., Ch. 117 ; 1 Ch. D. 82 ; 24 W. R. 39.

Sole Defendant in Administration Action.]—In a creditor's action for administration against an executrix, a decree had been made and a summons taken out for a receiver ; but pending the summons the sole defendant died. The court, on the application of the plaintiff, appointed an interim receiver whose powers were to extend for ten days after the appointment of an administrator de bonis non, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator and to accept short notice of motion to discharge the receiver. *Parker, In re, Cash* v. *Parker*, 48 L. J., Ch. 691 ; 12 Ch. D. 293 ; 40 L. T. 878.

Of Defendant—Adding Party.]—An action was brought against three defendants claiming damages in respect of their alleged conspiracy and false representations. Before the action could come on for trial one of the defendants died. Administration was taken out to his estate. The plaintiff did not apply for an order of course to continue the proceedings against the administrator, but he obtained in chambers an order giving him leave to amend the writ and statement of claim by adding the administrator as a defendant, and by making allegations that the estate of the intestate had been benefited by reason of the matters complained of in the action. The administrator was served with notice of the summons on which this order was made, but did not appear on the hearing, and the order was drawn up on the production of an affidavit of service of the summons on him. The order as drawn up was dated as of a day prior to the date of the filing of the affidavit. The writ and statement of claim, having been amended in pursuance of the order, were served on the administrator. He then entered a conditional appearance and moved to discharge the order for irregularity :—Held, that the order had been regularly made under Ord. XXVII. r. 1, and Ord. XVI. r. 13, but that the administrator ought not to have been served with the summons ; that the order must be amended by striking out the affidavit of service, and must bear date the day on which the affidavit was filed. *Ashley* v. *Taylor*, 48 L. J., Ch. 406 ; 10 Ch. D. 768 ; 39 L. T. 573 ; 27 W. R. 228.

—— **Application by Successors to compel Plaintiff to proceed.**]—Where an action has abated as against a defendant before judgment, and the plaintiff has refused or neglected to make his successors in interest parties to the action, the old practice still prevails, and the proper course is for the defendant's successors to apply for an order against the plaintiff that he obtain an order to prosecute the proceedings against them within a limited time, or that, in default, the action may stand dismissed as against them without costs. *Motion* v. *King*, 29 W. R. 73.

—— **Revivor—Counterclaim.**]—On the death of a defendant who has delivered a counterclaim, it is necessary that his representatives, if they wish to prosecute the counterclaim against the plaintiff in the original action, should obtain an order of revivor against him. An order of revivor of the original action obtained by the plaintiff against them does not authorise them to prosecute the counterclaim against him. *Andrew* v. *Aitken*, 51 L. J., Ch. 784 ; 21 Ch. D. 175 ; 46 L. T. 689 ; 30 W. R. 701.

One of Several Defendants in Same Interest—Absence of Personal Representative.]—Pending an action to make several defendants liable for a breach of trust, H. S., one of the defendants, died before decree, having made his will, appointing executors, who had not proved the will. It appearing that the liability of the surviving defendants was the same as that of H. S., the court made an order that the suit should proceed in the absence of a personal representative of H. S. *Hibernian Joint Stock Co.* v. *Fottrell*, 13 L. R., Ir. 335.

Appointment of Representative.]—Bill and interrogatories served on E., who took no notice of them. Bill consequently ordered to be taken pro confesso against him. Judgment drawn up accordingly. Upon attempting to serve E. with judgment, it was found that he was dead at date of the decree, leaving no legal representative. Ordered, that upon filing an affidavit verifying the circumstances under which the application was made E.'s widow be served with notice that within six weeks from the date of such service the court would appoint a representative, and direct payment, unless in the meantime the widow appeared to contest. *Alford* v. *Espinach*, 36 L. T. 367.

The defendant to a foreclosure action died insolvent before foreclosure absolute ; there was no legal representative of his estate ; an order was made in chambers appointing one of his next of kin to represent his estate for the purposes of the action. The court refused to make the foreclosure absolute in the absence of a properly constituted representative of the mortgagor. *Aylward* v. *Lewis*, [1891] 2 Ch. 81 ; 64 L. T. 250 ; 39 W. R. 552.

No Legal Personal Representative—Proceeding in Absence.]—On the true construction of Ord. XVI. r. 46, it is necessary, in order to bind the estate of a deceased person who has no legal personal representative, that the order of the court should state that the judge has proceeded in the absence of any person representing or entitled to represent the estate of the deceased person, or has appointed some person to represent such estate. *Richerson, In re, Scales* v. *Hayoe*, 62 L. J., Ch. 708 ; [1893] 3 Ch. 146 ; 3 R. 643 ; 69 L. T. 590 ; 41 W. R. 583.

Proposed New Party resident outside Jurisdiction—Ex parte Application.]—Upon the death of an accounting party in an action, the court may, upon an ex parte application under Rules of Court, 1875, Ord. L. r. 4, make an order that the action be continued between the continuing parties and the executor of the will of the deceased party, notwithstanding that such executor is resident in and has proved the will in Ireland. For the purposes of making such an order, the court will require an affidavit shewing the circumstances under which the order is applied for. *Jameson* v. *Marshall*, 46 L. T. 480. But see *Morrice* v. *Smart*, 73 L. T. Jour. 398, Oct. 14, 1882.

Death of Sole Defendant after Notice of Trial—Trustee in Bankruptcy—Proceedings to bind Official Receiver.]—The sole defendant to an

action who was a trustee in bankruptcy died after the action was set down for trial. The plaintiff amended the writ and statement of claim by making the defendant's executors and the official receiver in bankruptcy parties. All the new defendants appeared, and the executors put in a defence; the official receiver took no steps beyond appearance. The plaintiff then gave the official receiver and the executors notice that the action had been restored to the paper for trial, but did not give fresh notice of trial nor serve the official receiver with notice of motion for judgment. At the hearing the executors appeared, but the official receiver did not:—Held, on the merits, that the plaintiff was entitled to the relief sought, but the official receiver having been made a party, a motion for judgment against him must be made upon notice served upon him in the usual way. *Johnston* v. *English*, 55 L. J., Ch. 910; 55 L. T. 55; 35 W. R. 29.

Representative — Amending Pleading.]—An heir-at-law will not be allowed to take the answer of his ancestor off the file on the ground that it contains admissions made in ignorance of facts since discovered, and to file a supplemental answer in place of it. *Towne* v. *Horne*, 2 Jur. 936.

Enforcement of Order.]—An order for payment of a sum of money by one defendant to another was enforced pending an abatement to the suit by the death of the plaintiff. *Jones* v. *Williams*, C. P. Coop. 488.

Amending Order—Death of Sole Trustee Intestate.]—Upon the death of a sole surviving trustee intestate, the court made an order for the appointment of new trustees, and ordered certain lands forming part of the estate to vest in the new trustees "for the estate therein now vested in the heir-at-law of the deceased trustee." After the order had been passed and entered administration was taken out to the estate of the deceased trustee. Upon motion that the order of the court might be altered by substituting the legal personal representative for the heir-at-law of the intestate trustee in accordance with s. 30 of the Conveyancing and Law of Property Act, 1881, the court made a new order, that, notwithstanding the previous order, the land should vest in the new trustees "for all the estate therein now vested in the legal personal representative" of the deceased trustee. *Pilling's Trusts, In re*, 26 Ch. D. 432; 32 W. R. 853.

Service of Order.]—A defendant, after appearing to a bill, died. The residence of his personal representative could not be discovered. Substituted service of an order to revive the suit allowed to be made on the solicitor who had originally appeared for the deceased and on the proctors who had solicited probate. *Kent* v. *Metropolitan Ry.*, 16 L. T. 171.

Of Appellant after Appeal set down—Order of Revivor.]—A defendant, P., gave notice of appeal from a judgment, and set it down. After this he died, and his executrix obtained an order of course at the Rolls that the appeal might be carried on and prosecuted by her in like manner as it might have been carried on and prosecuted by P. if he had not died:—Held, that the order was sufficient, and that the executrix was entitled to proceed with the appeal. *Ranson* v. *Patton*, 17 Ch. D. 767; 44 L. T. 688—C. A.

Execution on Judgment.]—When a change had taken place by death in the parties entitled to execution on a judgment, the executors of the party who obtained the judgment obtained leave to issue execution on an ex parte application. *Mercer* v. *Lawrence*, 26 W. R. 506.

Where judgment is obtained by several executors, and one of them dies after the entering of judgment, the survivors may issue execution in the name of all the plaintiffs, and it is unnecessary to have any order for leave to do so. *Baird* v. *Thompson*, 14 L. R., Ir. 497.

The executors of a deceased plaintiff whose judgment remains unsatisfied cannot (where no order has been made for the proceedings to be continued in their names) apply under Ord. XLII. rr. 8 and 23, for a receiver of a sum due to the defendant under a will, and for an injunction to restrain him from dealing therewith. *Norburn* v. *Norburn*, 63 L. J., Q. B. 341; [1894] 1 Q. B. 448; 10 R. 10; 70 L. T. 411; 42 W. R. 127.

After the death of a judgment debtor the court has no jurisdiction, on the ex parte application of the judgment creditor, to make an order appointing a receiver of the interest of the deceased judgment debtor in real estate, for the purpose of satisfying the judgment debt, when the person on whom the real estate has devolved is not a party to the proceedings. *Shephard, In re, Atkins* v. *Shephard*, 59 L. J., Ch. 83; 43 Ch. D. 131; 62 L. T. 337; 38 W. R. 133—C. A.

An execution on a fi. fa. sued out on the same day as but after the defendant died is irregular. *Chick* v. *Smith*, 8 D. P. C. 337; 4 Jur. 86.

—— **Sequestration.**]—A trustee having failed to comply with an order directing him to pay money into court, a writ of sequestration was issued against his estate and effects, and subsequently the sequestrators were authorised to sell certain chattels in their possession belonging to the trustee. Before any sale was effected the trustee died, and a creditor's action was brought, in which the usual judgment was made, and a receiver appointed. The trustee's estate was insolvent, and the receiver and the administrator of the deceased trustee commenced an action against the sequestrators to restrain them from selling the chattels and moved for an injunction:—Held, on the authority of *Hyde* v. *Greenhill* (1 Dick. 106), that sequestration to compel the performance of a duty is not determined by the death of the person against whose estate and effects sequestration has been issued; and proceedings may therefore be continued against his legal personal representative. *Pratt* v. *Inman*, 59 L. J., Ch. 274; 43 Ch. D. 175; 61 L. T. 760; 38 W. R. 200.

Duty of Plaintiff's Solicitor.] — Plaintiff's solicitor should certify abatement to the registrar in order to prevent the suit coming into the paper. In cases of default, the defendants are entitled to the costs of the day. *Saner* v. *Dearin*, 14 Beav. 651.

Effect of Order—Liability for Costs.] — A defendant having died after issue joined and notice of trial given, a suggestion of his death was made, and his administratrix appeared and pleaded to the suggestion. The plaintiff afterwards applied at chambers for leave to discontinue on payment of the costs of the pleas to the

suggestion, but the judge made the usual order on payment of costs:—Held, that the order was right, for that 15 & 16 Vict. c. 76, s. 138, put the administratrix in the same position as if she had been the original defendant in the action. *Benge* v. *Swaine*, 15 C. B. 784; 2 C. L. R. 1382; 23 L. J., C. P. 182.

When a legal personal representative of a party to a suit, either during the original proceedings before the court of first instance, or after decree for the purposes of appeal, has elected, and obtained an order, to continue the suit, he is personally liable for the costs, without prejudice to any right he may have to recover them from the estate which he represents. *Boynton* v. *Boynton*, 27 W. R. 141—C. A. Affirmed, 4 App. Cas. 733; 41 L. T. 450; 27 W. R. 825—H. L. (E.)

Costs.]—When a party claims his costs out of a fund paid into court in an old suit, and a second suit is instituted with respect to the fund, which latter suit afterwards abates, the proper course for the claimant to adopt is to present a petition, entitled in both suits, stating the special facts of the case, and praying relief accordingly. *Harris* v. *Rich*, 43 L. J., Ch. 440.

—— **Reviving Order for Payment of.**]—The provision abolishing the rule that there shall be no revivor for costs, contained in 33 & 34 Vict. c. 28, s. 19, does not apply where the abatement took place before the passing of the act. *Doggett* v. *Eastern Counties Ry.*, 40 L. J., Ch. 292; L. R. 6 Ch. 474; 24 L. T. 309; 19 W. R. 497.

Upon application made by the representative of a plaintiff, who predeceased his co-plaintiff:—Held, that he was not the proper person to make the application. *Ib.*

A decree for the delivery of the possession of lands and title-deeds and payment of money was made, with costs to be paid by the defendants. One of them having performed all that he was directed by the decree to do, except paying the costs, died before the costs were taxed:—Held, that there could be no revivor for the costs. The general rule is, that there can be no revivor for untaxed costs; and whether the abatement is caused by the death of the party to pay, or the party to receive the costs, is immaterial. *Bowyer* v. *Beamish*, 2 Jo. & Lat. 228; 8 Ir. Eq. R. 63. *Morgan* v. *Scudamore* (2 Ves. J. 313; 3 Ves. 195). *Barry* v. *Stawell* (Fl. & K. 1; 3 Ir. Eq. R. 18, 146) observed upon.

The general rule being, that there shall be no revivor for costs alone, yet where the costs have been taxed previous to the abatement, it seems there is a right to revive merely for the purpose of having them paid; and where the abatement has happened by the death of the party in whose favour the costs were awarded, it is the settled practice of the court that his representative may revive for such purpose. *Lowten* v. *Colchester Corporation*, 2 Mer. 113; 16 R. R. 187.

Entering Judgment nunc pro tunc.]—The proviso, "that it shall be competent for the court, or a judge, to order a judgment to be entered nunc pro tunc," applies only, as formerly, to cases where it is delayed by the act of the court. *Lanman* v. *Audley*, 2 M. & W. 535; 5 D. P. C. 596; 6 L. J., Ex. 136. S. P., *Fishmongers' Co.* v. *Robertson*, 3 C. B. 970; 4 D. & L. 656; 16 L. J., C. P. 118.

The power of the court to enter up judgment nunc pro tunc does not depend in any way upon 17 Car. 2, c. 8, s. 1, but exists at common law, and may be exercised although the death of a party takes place before the term ensuing the verdict, and although also more than two terms intervene between verdict and judgment, if the delay is not of the party seeking to enter up judgment. *Evans* v. *Rees*, 4 P. & D. 36; 12 A. & E. 167; 9 L. J., Q. B. 317.

Or if it appears that the delay was occasioned by the taxation of costs, and no fault is specifically imputed to the plaintiff. *Blewitt* v. *Tregonning*, 4 A. & E. 1002.

After verdict for a plaintiff, with leave reserved to move for a nonsuit, or verdict for the defendant, the defendant died before a motion could be made. The rule nisi was afterwards obtained in his name:—Held, that the rule might still be made absolute to enter the verdict for the defendant; it appeared that the executors authorised the motion, and that the judgment might be given on such verdict under 17 Car. 2, c. 8, s. 1. *Freeman* v. *Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340. S. P., *O'Neill* v. *Bergin*, Ir. R. 10 C. L. 452.

It is only where delay in signing judgment has arisen from the act of the court that judgment can be entered nunc pro tunc, two terms having elapsed since the verdict. *Freeman* v. *Tranah* or *Tranch*, 12 C. B. 406; 21 L. J., C. P. 214; 16 Jur. 1141.

An action for negligence was tried in the sittings out of term. The judge directed a nonsuit upon the ground that there was no evidence of negligence, but stayed execution until the fifth day of the following term, that the plaintiff might move to set aside the nonsuit. The plaintiff died before the next term. In that term a rule was obtained by the defendant to enter judgment of nonsuit nunc pro tunc, so that he might tax costs thereon; but the court, taking into consideration the fact that the nonsuit was only provisional and subject to its approval, and that the action abated before any final judgment could be pronounced, discharged the rule. *Hemming* v. *Batchelor*, 44 L. J., Ex. 54; L. R. 10 Ex. 54; 33 L. T. 16; 23 W. R. 398.

See also cases, JUDGMENT (DATE OF), post, col. 561.

Revivor for Purposes of Appeal.]—By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime then for the husband for his life, and subject thereto for such persons as should be of the wife's own kindred as she should by will appoint, and in default of appointment, for such persons as would be entitled under the Statutes of Distribution in case she had died intestate and unmarried. The marriage was dissolved in 1871, and in 1872 the wife in a suit instituted by her against her late husband and the trustees of the settlement obtained a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the wife disposed of the property as if it were her own absolutely, and died in 1881, in the lifetime of her late husband:—Held, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an

order to revive the suit or to carry on proceedings therein for the mere purpose of appealing against the decree of 1872. *Fussell* v. *Dowding*, 53 L. J., Ch. 924; 27 Ch. D. 237; 51 L. T. 332; 32 W. R. 790.

Where, after his action had been dismissed, the plaintiff died, the court in which the suit had been pending, notwithstanding that the time for appealing had then expired, made an order giving liberty to the plaintiff's personal representative to carry on proceedings, in order that he might be in a position to apply to the court of appeal to entertain an appeal. *Leahy* v. *Tobin*, 19 L. R., Ir. 433.

—— **Discretion of Court—Length of Time.**]—It is in the discretion of the court whether it will allow an action which has become defective by the death of a party or otherwise to be revived. An administration suit in which a decree was made by the court of chancery in the year 1833 having become defective by the deaths of some parties and the bankruptcy of another, and no step having been taken in it for thirty-nine years, an order of revivor was allowed for the purpose of enabling a party to appeal from an order made in the year 1836 (in case the court of appeal should give leave to appeal), the court being of opinion that no person had altered his position, or incurred any liability, or suffered any loss on the faith of the order from which it was desired to appeal. *Curtis* v. *Sheffield*, 51 L. J., Ch. 535; 20 Ch. D. 398; 46 L. T. 80.

Where bill to revive suit for forty years back not allowed. *Price* v. *Morgan*, 2 Ch. Ca. 215.

Suit abated in 1829; bill of revivor filed in 1836; order to revive in 1841:—Held, cause effectually continued. *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 287.

Semble, there is no rule requiring a bill of revivor, for any purpose, to be filed within six years of the abatement. *Ib.*

After a decree, the bar to the right of reviving the suit, which arises from delay in the proceedings, depends altogether on the discretion of the court. *Higgins* v. *Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400.

If a bill of revivor is filed at any time within twenty years, after a decree for an account, the court will not refuse relief, unless there has been such a variation of the rights of parties as to occasion danger of working positive injury and injustice to other persons. *Ib.*

A suit which has been abated for more than twenty years cannot be revived. *Bland* v. *Davison*, 21 Beav. 312.

A suit having become abated by death of a plaintiff upwards of thirty years ago, and other events having subsequently occurred which would have caused abatements, the court, at the instance of a party desiring to wind up the suit and get the fund out of court, made a supplemental order of revivor nunc pro tunc. *Mackenzie* v. *Gear*, 36 L. J., Ch. 507; 15 W. R. 529.

A bill was dismissed on appeal in December, 1867. No steps were taken until November, 1872, when an order nisi for inrolment was granted, notwithstanding the time for inrolment had expired. One of the defendants died in December, 1872. On the 16th January, 1873, the court ordered an inrolment subject to the plaintiff presenting his petition to the House of Lords within a given time. It was then ascertained that by the death of another defendant in 1870 the suit had become abated, and the registrar refused to draw up the order. The common order to revive having been refused, the plaintiff filed a bill of revivor, to which the executors of one of the deceased defendants demurred:—Held, that the court had a discretion to grant a decree for revivor after the time for inrolment had expired, and would exercise it, except under special and extraordinary circumstances of neglect or delay. *Patch* v. *Holland*, 29 L. T. 419.

2. On Bankruptcy.

Sole Plaintiff — Continuance of Action by Trustee.]—Although now an action is not abated by the bankruptcy of a sole plaintiff, he can himself take no further steps in it, but the trustee may obtain an order of course to continue it. *Jackson* v. *N. E. Ry.*, 46 L. J., Ch. 723; 5 Ch. D. 844; 36 L. T. 779; 25 W. R. 518—C. A.

—— **Earnings of Personal Labour by Undischarged Bankrupt.**]—The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge:—Held, that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action. *Emden* v. *Carte*, 51 L. J., Ch. 41; 17 Ch. D. 768; 44 L. T. 636—C. A. Affirming 29 W. R. 600.

—— **After Notice of Trial.**]—After issue had been joined and notice of trial given by a sole plaintiff in an action, he filed a liquidation petition, under which a trustee of his property was appointed. When the action came on for trial no one appeared for the plaintiff or for the trustee, and there was no evidence that any notice of the action had been served on the trustee:—Held, that Ord. L. r. 1, applies only when the cause of action survives or continues in some person who is before the court; that the action had abated, and that the only order which could be made was to strike the action out of the list. *Eldridge* v. *Burgess*, 47 L. J., Ch. 342; 7 Ch. D. 411; 38 L. T. 232; 26 W. R. 435.

—— **Effect of Election by Trustee not to continue Action.**]—Where the trustee of a liquidating debtor elects under the Common Law Procedure Act, 1852, s. 142, not to continue a pending action commenced by the debtor, such election is not a bar to a subsequent action by the trustee in his representative capacity founded on the same cause of action. *Bennet* v. *Gamgee*, 46 L. J., Ex. 33; 2 Ex. D. 11; 35 L. T. 764; 25 W. R. 81. Affirmed, 46 L. J., Ex. 204; 36 L. T. 48; 25 W. R. 293—C. A.

—— **Refusal of Trustee to proceed—Stay of Proceedings.**]—Where the plaintiff is adjudicated bankrupt after action brought, and his trustee declines to proceed with the action, it may be stayed by an order in chambers, and the defendant need not plead the bankruptcy in bar. *Warder* v. *Saunders*, 10 Q. B. D. 114; 47 L. T. 475.

—— **Refusal of Trustee to proceed—Stay of Proceedings — Assignment of Assets.**] — The

plaintiff in an action, after notice of trial given, was adjudicated a bankrupt. The trustee in bankruptcy refused to continue the action, and submitted to an order staying the proceedings. Subsequently the plaintiff having obtained his discharge, took an assignment of the chose in action from the trustee, and thereupon applied in chambers for an order removing the stay, which was refused. Upon appeal:—Held, that the plaintiff could not, as assignee of the cause of action, be in any better position than the trustee, and that, therefore, in the absence of special circumstances which would have enabled the trustee to have the stay removed, the plaintiff was not entitled to the order. *Selig* v. *Lyon or Lion*, 60 L. J., Q. B. 403; [1891] 1 Q. B. 513; 64 L. T. 796; 39 W. R. 254.

The plaintiff in an action having become bankrupt, his trustee in bankruptcy elected not to continue the action, and thereupon an unconditional order was obtained by the defendants staying further proceedings. B. having purchased the trustee's interest, commenced a second action for the same relief as that asked by the former action. Upon motion to dismiss the second action, as an abuse of the process of the court, and as frivolous and vexatious:—Held, that the action ought not to be dismissed in a summary way as frivolous and vexatious, as the motion gave rise to a question that required consideration, namely, whether the order staying the proceedings in the former action was equivalent to a judgment for the defendants. *Bean* v. *Flower*, 73 L. T. 371—C. A.

—— **Abatement—Reassignment by Trustee.**]—After the defence in an action had been delivered the plaintiff was adjudicated bankrupt, and the right of action passed to the official assignee. The bankrupt obtained his discharge, and the official assignee reassigned to the bankrupt the right of action:—Held, that the cause of action continued, and that the action did not become abated by reason of the bankruptcy. *Barker* v. *Johnson*, 60 L. T. 64.

—— **Adoption of Proceedings.**]—The assignee of a bankrupt need not adopt the suit in the form in which it has been instituted by the bankrupt, although he elects to prosecute the demand; he may file a new original bill. *Poole* v. *Franks*, 1 Moll. 78.

—— **Executor and Residuary Legatee.**]—In an administration suit, where the plaintiff, who was an executor and a residuary legatee, had become a bankrupt, the court, at the application of the plaintiff as executor, ordered the suit to be revived against his trustee in bankruptcy, as representing his beneficial interest. *Laidler* v. *Laidler*, 21 W. R. 822.

—— **No Notice of Bankruptcy given.**]—When a plaintiff becomes bankrupt or insolvent, if the assignee does not proceed with the suit, the bill will be dismissed without costs, and the common form of order will not be departed from, though the plaintiff has taken steps in the suit without giving notice of the bankruptcy or insolvency, and so led the defendant to incur costs subsequently to and without notice of it. *Meiklam* v. *Elmore*, 4 De G. & J. 208; 28 L. J., Ch. 515; 5 Jur. (N.S.) 904; 7 W. R. 645.

—— **Deed of Assignment—Pending Suit.**]—A registered deed of assignment in trust for creditors executed by the plaintiff pending the suit does not cause an abatement as upon bankruptcy, so as to deprive the defendant of his right to move to dismiss for want of prosecution. *Pickering* v. *Cape Town Ry.*, L. R. 7 Eq. 224.

Liability for Costs.] — Assignees who are brought before court by supplemental bill may be liable to costs of whole suit. *Whitcomb* v. *Minchin*, 5 Madd. 91.

When a plaintiff becomes bankrupt or dies, and his assignees or representatives carry on the suit, they can only do so upon payment of all costs which he had been ordered and was liable to pay. *Cook* v. *Hathway*, 21 L. T. 484.

A plaintiff, after the hearing of a cause, but before judgment was given, became bankrupt, and obtained his order of discharge; and in the same interval a motion by the defendant for the revivor of the suit by the assignees of the plaintiff was refused. The bill having been dismissed, with costs, with liberty to the defendant to apply in respect of them, a motion by him, that the plaintiff might personally pay the costs, was refused. *Boucicault* v. *Delafield*, 10 Jur. (N.S.) 1063; 13 W. R. 65—L.JJ. Affirming 10 L. T. 902.

One of Several Defendants jointly and severally liable.]—When two of five defendants, jointly and severally liable to the plaintiff, had become bankrupt:—Held, that the action might proceed against the other three defendants without bringing the trustees in bankruptcy of the two bankrupt defendants before the court, or giving them notice of the proceedings. *Lloyd* v. *Dimmack*, 47 L. J., Ch. 398; 7 Ch. D. 398; 38 L. T. 173; 26 W. R. 458.

Receiving Order—Pending Action—Adding Official Receiver.]—The making of a receiving order against a party to an action does not cause a "change or transmission of interest or liability" so as to make it necessary or desirable that the official receiver should be added as a party to the action. Proceedings actually pending against the debtor at the date of the receiving order are dealt with by s. 10 of the Bankruptcy Act, 1883, not by s. 9. *Berry, In re, Duffield* v. *Williams*, 65 L. J., Ch. 245; [1896] 1 Ch. 939; 74 L. T. 306; 44 W. R. 346; 3 Manson, 11.

Sole Defendant—After Issue joined.]—After issue joined in an action by the indorsees against the acceptor of a bill of exchange in which the defence was that the plaintiffs took the bill without value, and after notice that the defendant had been defrauded of it, the defendant, who was a sole defendant, filed a petition in liquidation, and a trustee was appointed. The bankruptcy court refused to restrain the action, but restrained the plaintiffs from enforcing any judgment they might obtain in the action either against the property or person of the debtor, and the trustee declined to admit the plaintiff's claim:—Held, that the bankruptcy court was the proper court in which the plaintiffs ought to prove their debt, and that there was no ground for making an order under Ord. L. r. 2, that the trustee be made a party to the action or be served with notice thereof. *Barter* v. *Dubeux*, 50 L. J., Q. B. 527; 7 Q. B. D. 413; 44 L. T. 596; 29 W. R. 622—C. A.

—— **After Demurrer set down.**]—Where a defendant became bankrupt after a cause was

set down for argument on demurrer, the court refused to strike it out of the paper at the suggestion of the plaintiff, although the assignees refused to give security for costs. *Flight* v. *Glossop*, 4 D. P. C. 135 ; 1 Hodges, 222.

—— **After Notice of Trial.**]—A defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee, and served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial :—Held, that it was not necessary for the plaintiff to file the pleadings or a notice of motion for judgment as against the trustee under r. 6 of Ord. XIX. of the Rules of Court, 1875. *Chorlton* v. *Dickie*, 49 L. J., Ch. 40 ; 13 Ch. D. 160 ; 41 L. T. 467 ; 28 W. R. 228.

—— **Confession of Defence.**]—When a defendant is adjudicated bankrupt after action brought upon an act of bankruptcy which occurred before action brought, the plaintiff may confess that the property claimed was in the order and disposition of the defendant at the date of the act of bankruptcy, and sign judgment under Ord. XX. r. 3. for his costs. *Champion* v. *Formby*, 47 L. J., Ch. 395 ; 7 Ch. D. 373 ; 26 W. R. 391.

—— **Trustee's Liability to Costs.**] — The plaintiff brought an action against H. for an injunction to restrain the infringement of a patent. H. put in a defence alleging want of novelty, and denying the infringement, and then filed a petition for liquidation of his affairs by arrangement. The plaintiff obtained an order of course by which the trustees in liquidation were added as defendants to the action, and served it on them. The trustees never moved to discharge the order. At the hearing H. did not appear, but the trustees appeared and cross-examined the plaintiff's witnesses as to infringement ; and Kay, J., found that there had been an infringement, directed an account of the profits, allowed the plaintiff to prove in the liquidation for the amount of the profits made by H., and gave the plaintiff costs as against all the defendants. On appeal (besides the points taken in the court below, that the claim was for unliquidated damages not provable in the liquidation, and that the trustees ought not to be ordered to pay costs) the trustees argued that there was no jurisdiction to make the order adding them as defendants :—Held, that the decision of Kay, J., was right and must be affirmed, and that the trustees, having submitted to the order making them parties and examined witnesses, had rendered themselves liable, at the discretion of the judge, to all the costs of the action. *Watson* v. *Holliday*, 52 L. J., Ch. 543 ; 48 L. T. 545 ; 31 W. R. 536—C. A. Affirming 20 Ch. D. 780.

The defendant in an action became bankrupt, but no order was made under Ord. XVII. r. 4, making the trustee a party ; the trustee, however, elected to go on with the action and appeared by counsel at the trial :—Held, that he had made himself a party to the action and was liable to the plaintiffs for costs. *London School Board* v. *Wall*, 8 Morrell, 202—C. A.

Where a trustee in bankruptcy had been substituted for the bankrupt as a defendant in an action against the bankrupt, and had asked for a statement of claim :—Held, that by so doing he had adopted the action as it stood, and must personally pay the costs of an appeal from an interlocutory order which had been made against the defendant before his bankruptcy, although he had given notice to the plaintiff that he did not intend to proceed with the appeal. *Borneman* v. *Wilson*, 54 L. J., Ch. 631 ; 28 Ch. D. 53 ; 51 L. T. 728 ; 33 W. R. 141—C. A.

Application to strike off Trade-mark — "Action."]—The registered owner of a trade-mark having, since notice of an application to strike the trade-mark off the register, gone into liquidation, leave was given under Ord. L. r. 4, to serve notice of the application on the trustees in liquidation. The term "action" in Ord. L. does not confine the operation of that order to proceedings in actions. *Rowe's Trade-mark, In re*, 48 L. T. 388.

3. In Case of Infants.

a. *On Birth pending Suit.*

Before Judgment or Decree.]—Before issue joined, an infant tenant in tail, born pendente lite, may be made a party by amendment. *Greer* v. *Mercer*, 3 Ir. Eq. R. 385.

A tenant in tail coming in esse before issue joined, may be made a party by amendment of the bill. *Knox* v. *Knox*, 2 Ir. Eq. R. 33.

Where a suit involves a question in which the children of the plaintiff are interested, and a child is born after the bill is filed, the court will, on the objection taken at the hearing, order the cause to stand over, with liberty to amend by bringing the child born since the institution of the suit before the court. *Leyland* v. *Leyland*, 6 L. T. 149 ; 10 W. R. 149.

Sect. 52 of 15 & 16 Vict. c. 86, enables the court to make an order to the effect of the usual supplemental decree where the object is to bring before the court the trustees under a settlement of the property of an infant plaintiff made after the institution of the suit. *Atkinson* v. *Parker*, 2 De G. M. & G. 221.

Before decree, a supplemental order may be obtained under s. 52 of 15 & 16 Vict. c. 86, against an infant who has been born since the filing of the bill, and is a necessary party to the suit. *Pickford* v. *Brown*, 1 Kay & J. 643. S. P., *Barrett* v. *White*, 3 W. R. 526.

An infant can be bound by proceedings in a suit taken after his birth by obtaining the usual supplemental order, and then taking out a summons calling upon the infant to shew cause why he should not be bound by the proceedings taken after his birth. *Occleston* v. *Fullalove*, 32 L. T. 428.

The provisions of the 15 & 16 Vict. c. 86, s. 61, extend to a special case. *Palmer* v. *Flower*, 41 L. J., Ch. 193 ; L. R. 13 Eq. 250 ; 25 L. T. 816 ; 20 W. R. 174.

When, after an administration suit had been instituted, a child was born who took an interest in the property :—Held, that there was jurisdiction to make an order under 15 & 16 Vict. c. 86, s. 52, bringing the child before the court and directing that he should be bound by the previous proceedings in the suit. *Egremont* v. *Thompson*, L. R. 4 Ch. 448 ; 17 W. R. 900.

When proceedings had been taken in a suit after it had become defective by the birth of children :—Held, that there was no jurisdiction to make a supplemental order under 15 & 16 Vict. c. 86, s. 52, bringing before the court the

children who were infants, and directing that they should be bound by the proceedings; but that a bill was necessary for the purpose. *Auster* v. *Haines*, 38 L. J., Ch. 385; L. R. 4 Ch. 445; 17 W. R. 900. Reversing 20 L. T. 152.

A bill to revive a suit which had become abated and defective by the marriage of one of the female plaintiffs and the birth of children should be an original bill in the nature of a supplemental bill against the new defendants, and should allege the facts stated in the original bill, but against the original defendants should be merely a supplemental bill. *Hildyard* v. *Field*, 25 L. T. 784; 20 W. R. 198.

In an administration suit, before an order on further consideration, two children of one of the parties were born who were interested in a fund impounded to answer certain liabilities, but were not made parties, and the suit being about to be wound up, it was sought to bring those children before the court by supplemental order:—Held, that a supplemental bill must be filed. *Garrett* v. *Lancefield*, 11 W. R. 869.

Where trustees have power to invest a fund in land, and, a suit being instituted, such investment is directed in chambers, the court will not make an order to revive against infants not parties, but in esse at the time of the order in chambers, without being satisfied that everything is for their benefit. *Freeman* v. *Whitbread*, 12 W. R. 619.

After Judgment or Decree.]—Where an infant, who is a necessary party to an action, has come into existence after the date of the judgment, and proceedings have been taken under the judgment since the birth of the infant, but before an order under Ord. XVII. r. 4, adding the infant as party, has been applied for, the proper course is to obtain an order prefaced with a direction that the action be continued against him, and that an inquiry be made whether it is for his benefit that he should be bound by such proceedings, and that if it be so certified he is to be bound thereby. If it should not be so certified it is open for the plaintiff to proceed by supplemental action. *Peter* v. *Thomas-Peter*, 53 L. J., Ch. 514; 26 Ch. D. 181; 50 L. T. 176; 32 W. R. 409, 515.

After decree in an administration suit an infant was born, who shortly after his birth became interested in possession, and was a necessary party, but was, by inadvertence, overlooked. Sales were made and approved, and upon the investigation of one of the titles the omission was discovered:—Held, that it was not a case for revivor; and a supplemental order was made, that the proceedings should be of the same force and effect as if the infant had been made a party immediately after his birth. *Walker* v. *Walker*, L. R. 9 Eq. 663; 22 L. T. 201.

After decree in an administration suit children were born who were interested in the estate to be administered. Subsequently to their birth, two orders were made in the suit without the children being brought before the court:—Held, that the proceedings which had taken place since the children's birth could not be made binding upon them by a supplemental order. *Scott* v. *Duncombe*, 39 L. J., Ch. 644; L. R. 9 Eq. 665; 22 L. T. 540.

After a decree was made in an administration suit the number of a class interested in the residue of the estate of the testatrix was increased by the birth of a child of one of the tenants for life. Some proceedings were taken in the suit after his birth:—Held, that the infant could not be bound by the proceedings by means of the common order to revive, but that a supplemental bill must be filed. *Askew* v. *Rooth*, 44 L. J., Ch. 200; 31 L. T. 819.

When an infant interested in an action is born after decree, an order may be obtained binding the infant by all proceedings up to the time of his birth, and then a summons may be taken out calling on the infant to shew cause why he should not be bound by the proceedings subsequent to his birth. *Scruby* v. *Payne*, 34 L. T. 845.

Where there is a gift in a will to all the children of A., and A. marries a second time and has another family, a common administration suit having been in the meantime instituted and decree taken, the second family can be brought before the court by supplemental order in a particular form. *Robinson* v. *Frampton*, 12 Jur. (N.S.) 933; 15 L. T. 172; 15 W. R. 54.

Upon the birth of a child who is a necessary party as one of a class entitled, the usual supplemental order may be obtained after decree. *Grunwell* v. *Garner*, L. R. 8 Eq. 355; 20 L. T. 693.

The court knowing the facts of a cause recently heard, will make an order that an infant born pending the suit should be bound by the decree, though it was made in her absence, as a party to the suit. *Jebb* v. *Tugwell*, 24 L. J., Ch. 670.

b. *On Attaining Twenty-one.*

Abatement.]—Infant coming of age does not abate suit brought by administrator during minority. *Anon.*, Cary, 22.

An infant suing by prochein ami comes of age; afterwards publication passed, and the cause came on to be heard; it was objected that the suit was abated; but the court overruled the objection, and proceeded to hear the cause: and in such cases the course is to proceed to hearing without any change in the proceedings. Cur. Can. 464.

Bill by administrator durante minori ætate abates by infant coming of age; therefore supplemental bill is necessary. *Stubbs* v. *Leigh*, 1 Cox, 133.

By the infant's coming of age, administration durante minori ætate ceases, and suit by such administrator is thereby determined for that the infant cannot go on therewith, but must begin anew, unless a decree to account were had, in which case the infant on a bill brought for that purpose may be allowed to go on therewith. *Jones* v. *Basset*, Pre. Ch. 174.

The next friend of a sole plaintiff, an infant, ought not to take proceedings in the cause in the name of such plaintiff after the plaintiff has attained the age of twenty-one. *Brown* v. *Weatherhead*, 4 Hare, 122; 9 Jur. 787.

Striking out Name.]—A co-plaintiff, who was an infant when the suit was instituted, moved, on coming of age, that his name might be struck out of the bill. Motion granted. *Acres* v. *Little*, 7 Sim. 138.

Bill filed by two infants; one attained twenty-one before decree; her name as a co-plaintiff struck out on her application, with the costs of the application. *Guy* v. *Guy*, 2 Beav. 460; 9 L. J., Ch. 289; 4 Jur. 313, 500.

An infant feme covert was, by her next friend,

made a co-plaintiff in a bill against her husband and others:—Held, that, upon her coming of age and disapproving of the suit, she was entitled to have her name struck out of the record as co-plaintiff, but the application having been made very soon after her attaining twenty-one, and it being suggested that it was made under the influence of the husband, the court postponed making the order for a short period, and ascertained from the lady herself, in the absence of her husband, her wishes on the subject. *Cooke* v. *Fryer*, 4 Beav. 13; 5 Jur. 287.

Upon motion of an infant co-plaintiff, who obtained his majority after decree, the court ordered his name to be struck out as plaintiff, and to be introduced as defendant in any future proceedings, if the next friend asked for it. *Bicknell* v. *Bicknell*, 2 N. R. 98; 9 Jur. (N.S.) 633; 8 L. T. 377; 11 W. R. 657.

Infant coming of age may dismiss bill filed for him, but cannot make prochein ami pay costs unless he prove suit improperly instituted. *Anon.*, 4 Madd. 461.

New Defence.]—Where a decree has been made against an infant defendant who put in the common answer by his guardian, the general rule is, that such defendant on coming of age has the privilege of putting in a new answer, stating a different case, and of going into evidence in support of that case. The privilege does not extend to foreclosure suits. *Kelsall* v. *Kelsall*, 2 Myl. & K. 409.

An infant defendant, on attaining twenty-one, discharged the solicitor who had acted for her in the suit. Afterwards that solicitor was served with a subpœna for her to hear judgment. He returned the subpœna to the plaintiff's solicitor, and stated at the same time that the defendant had come of age, and that he was no longer employed for her. Some months afterwards the cause was heard, but without the defendant having been served with a subpœna to hear judgment, or anyone appearing for her at the hearing, and a decree was made in which she was described as an infant:—Held, that she was entitled to put in a new answer to the bill. *Snow* v. *Hole*, 15 Sim. 161; 10 Jur. 347.

An order directing an issue "with the consent of all parties in the cause" is erroneous so far as it purports to be with the consent of an infant party. Quære, whether, if the infant gave consent, he is bound by it. But if the order for the issue was a right order, to be made if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not, especially as he was relieved from the effect of the consent by being allowed, on coming of age, to make a new defence. Quære, whether it is clear on the authorities that an infant defendant in a case such as this is entitled after coming of age to put in a new answer and make a new defence. *Malone* v. *Malone*, 8 Cl. & F. 179; West, 637; 6 Jur. 177; 3 Ir. Eq. R. 536, 546; 2 Dr. & Wal. 491, 536.

Application to repudiate.]—An infant plaintiff coming of age during the progress of the cause, and disapproving of the proceedings, cannot appear in the proceedings by counsel other than those who appear for the plaintiffs generally; he can only complain of or repudiate the proceedings by a special application. *Ballard* v. *White* 2 Hare, 158; 7 Jur. 506.

Revivor pendente lite.]—Where a testator appointed his two infant sons trustees on their attaining the age of twenty-one, and an administration action was commenced on the elder son attaining twenty-one, in which the infant son was made a plaintiff, and the elder son was made defendant, on the younger son attaining twenty-one, and becoming a trustee, and thus changing his interest and liability, the court, on an ex parte application under Ord. XVII. r. 4, of the Rules of Court, 1883, made him a co-defendant. *Goold, In re, Goold* v. *Goold*, 51 L. T. 417.

A testator in an administration suit died, leaving an infant his sole executor. Thereupon letters of administration were granted to the guardian of the infant for the use of the latter, and until he should come of age. Subsequently the usual order for administration was made on the summons of the creditors of the estate. On the infant's attaining majority he refused to prove the will, and thereupon letters of administration, with the will annexed, were granted to another creditor:—Held, that the suit, which had thus become abated, might be revived by substituting the last-named creditor for the infant's guardian as defendant. *Taylor, In re, Sewell* v. *Ransford*, 27 L. T. 816; 21 W. R. 244.

4. On Lunacy.

Change of Status.]—A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely abated by a change in his status. *Beall* v. *Smith*, 43 L. J., Ch. 245; L. R. 9 Ch. 85; 29 L. T. 625; 22 W. R. 121.

If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the crown, the suit should be continued only with the sanction of the court in lunacy. *Ib.*

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void, and a contempt of the court in lunacy. *Ib.*

Staying Proceedings.]—A suit being properly instituted, the proceedings not to be stayed on the ground of the plaintiff's subsequently becoming imbecile. *Wartnaby* v. *Wartnaby*, Jac. 377.

Committee.]—A sole plaintiff became lunatic, and a committee was appointed after issue joined and before decree. The committee applied for a supplemental order under s. 52 of the 15 & 16 Vict. c. 86, and the order was made. *Danger* v. *Stewart*, 3 L. T. 770; 9 W. R. 266.

Where a plaintiff becomes a lunatic before decree, and a committee has been appointed, an order of revivor and supplement may be obtained under 15 & 16 Vict. c. 86, s. 52, for the purpose of joining the committee as co-plaintiff. *Timpson* v. *L. & N. W. Ry.*, 11 W. R. 558; 1 N. R. 562.

Where the plaintiff, a person of unsound mind, not so found, suing by a next friend, becomes a lunatic during the progress of the action, and a committee is appointed, the committee may obtain an order under Judicature Act, Ord. L. r. 4, for leave to continue the action. *Green's Estate, In re, Green* v. *Pratt*, 48 L. J., Ch. 681; 41 L. T. 30.

—— **Change of.**]—After decree in suit, in which lunatic and his committee were defendants, committee died, and new one was appointed:—Ordered, on motion, that new committee be named as such in all future proceedings in the cause. *Lyon* v. *Mercer*, 1 Sim. & S. 356.

On the change of the committees of defendants in a suit, it was ordered upon a motion that the names of the new committees respectively might be substituted in future proceedings for the names of the former committees. *Saumarez* v. *Saumarez*, 9 L. J., Ch. 317.

In a suit to which a lunatic and his committee were defendants, the court declined, before decree, to make an order on motion substituting a new committee as defendant. *Rudd* v. *Speare*, 3 De G. & Sm. 374.

5. On Marriage.

Effect of.]—Infant plaintiff a ward of court having married, proceedings stayed till husband shall appear. *Brummell* v. *M'Pherson*, 7 Ves. 237.

Administrator durante minore ætate obtains a decree to account, the infant marries, and a new administration during her minority is granted to the husband. *Coke* v. *Hodges*, 1 Vern. 25.

Upon the marriage of female plaintiff, revivor alone will not do, where the interests of third person, viz. trustees and the issue, must be brought forward, making a supplemental bill necessary. *Merrewether* v. *Mellish*, 13 Ves. 161.

An answer filed when the cause was abated by the intermarriage of co-plaintiffs, will be taken off the file for irregularity. *Nash* v. *Hayes*, 2 Hog. 286.

A female plaintiff applied by her next friend that proceedings in a cause instituted before November, 1874, might be carried on against her husband, whom she had married since the order made on further consideration:—Held, that it was not necessary to apply to the court, but that the order might be obtained from the registrar. *Darcy* v. *Whittaker*, 33 L. T. 778; 24 W. R. 244.

A feme sole entitled to property, which in the event of her marriage would be settled for her separate use, filed a bill for purposes connected with such property. After replication, but before decree, she marries. The court made an order, giving leave to the plaintiff to name A. B. her next friend, and reviving the suit against her husband. *Trezevant* v. *Broughton*, 5 W. R. 517.

A bill to revive a suit which had become abated and defective by the marriage of one of the female plaintiffs and the birth of children should be an original bill, in the nature of a supplemental bill against the new defendants, and should allege the facts stated in the original bill, but against the original defendants should be merely a supplemental bill. *Hildyard* v. *Field*, 25 L. T. 784; 20 W. R. 198.

A female petitioner after the preparation and stamping of the petition married:—Held, that a petition was within s. 53 of 15 & 16 Vict. c. 86, and that amendment only, and not a petition, was necessary. *Robinson* v. *Hewetson*, 1 Drew. 307; 1 W. R. 100.

A suit for administration was instituted in the name of three infants by their next friend. After this one of them, a female, married before decree. The next friend and the other parties to the suit were unaware of the marriage, and she and her husband were unaware of the existence of the suit until after a decree had been made. The vice-chancellor declined to make an order of revivor, considering that the defect could not be remedied without a supplemental bill; but, the defendants consenting, an order of revivor was made by the lords justices. *Griffin* v. *Morgan*, L. R. 4 Ch. 351; 19 L. T. 809; 17 W. R. 342.

Bill filed by feme covert, stating her to be a spinster, her solicitor being ignorant of the marriage till after the decree. On motion by consent, the husband obtained leave to prosecute the decree under terms. *Farrer* v. *Wyatt*, 5 Madd. 449.

On the abatement of a suit by the marriage of a female plaintiff, who is also next friend of infant plaintiffs in the suit, a defendant is entitled to an order that the suit may be revived within a limited time, or that the bill may be dismissed as against him, with costs. *Crispe* v. *Braddy*, 9 L. J., Ch. 108.

Where a feme plaintiff marries, and the husband dies before revivor, a bill of revivor is unnecessary, but the subsequent proceedings ought to be in the name and description acquired by the marriage. *Godkin* v. *Ferrers (Earl)*, Mitf. Pl. 47.

The court will make a supplemental order bringing the trustees of the marriage settlement of an infant plaintiff who has married during the pendency of the suit, and after a decree before the court. *Atkinson* v. *Parker*, 2 De G. M. & G. 221; 22 L. J., Ch. 20; 16 Jur. 1005; 1 W. R. 43.

Where, upon an administration decree, funds had been ordered to be carried to the separate account of A., an infant, and upon A.'s marriage the funds had been settled, with the approval of the court, as belonging to A. absolutely:—Held, that the parties beneficially interested were entitled to file an original bill for the purpose of obtaining a declaration of their rights, and that in such a case it would not have been proper to file a bill of revivor, the order to carry to a separate account not being equivalent to a decree finally determining the rights of the parties. *Noble* v. *Stow*, 5 Jur. (N.S.) 1115; 7 W. R. 709.

When the interest of a sole plaintiff has determined by marriage after decree, an order of revivor may be made. *Hobson* v. *Shearwood*, 15 W. R. 887.

A defendant feme sole at the time of filing her answer, having subsequently married, and the plaintiffs having taken no step in the cause for more than two months, she and her husband moved to dismiss the bill:—Held, that the plaintiffs must enter the rule to proceed within eight days, and in default thereof that the bill be dismissed with costs. *Church* v. *Nugent*, 1 Dr. & Wal. 259; Sau. & Sc. 554.

6. On Assignment and Transmission of Interest.

Assignment before Action.]—F. commenced an action against the firm of W. & Co., to recover from them lithographic stones, which the firm claimed to be their property. Before the issue of the writ, F. had assigned his property in the stones to J. W., and the suit was subsequently, by leave of the court, amended by making J. W. a co-plaintiff:—Held, by the Master of the Rolls, that F. was properly retained as a plaintiff; but on appeal (per Law, C.), semble, that the order giving leave to amend should not, under the circumstances, have been made. *Foster* v. *Ward*, 9 L. R. Ir. 447—C. A.

A local authority, having compulsory powers of purchase, gave notice to a landowner to treat, and the amount of compensation was assessed by a jury. Before completion the landowner conveyed the land to the plaintiffs, subject to the claim of the local authority:—Held, that the plaintiffs could maintain an action against the local authority for the specific performance of the contract arising out of the notice to treat and subsequent assessment of value, without joining as plaintiff the landowner to whom the notice was given. *Burr* v. *Wimbledon Local Board*, 56 L. T. 329; 35 W. R. 404.

Assignment pendente lite.]—A trustee in bankruptcy commenced an action to obtain a declaration that a deed, which purported to be an absolute conveyance of real estate by the bankrupt, was in fact a mortgage, and to redeem such mortgage; and subsequently sold and assigned his interest in the subject-matter of the action to C., who claimed to carry on the action in the name of the original plaintiff:—Held, on the application of the defendant, that C. was bound to mend the title of the action so as to shew that he was the real plaintiff, and to introduce such averments in the statement of claim as would disclose his title. *Seear* v. *Lawson* or *Chatterton* v. *Lawson*, 50 L. J., Ch. 139; 16 Ch. D. 121; 43 L. T. 716; 29 W. R. 109—C. A.

The trustee in bankruptcy of a man who had conveyed away some real property absolutely, commenced an action against the grantee to have it declared that the conveyance was a mortgage, and that the deed ought to stand as a security only for the money advanced. The action had proceeded no further than the issue of the writ, when the trustee sold and assigned the subject-matter of the action to a purchaser for value:—Held, that the assignee from the trustee in bankruptcy was entitled to continue the action. *Seear* v. *Lawson*, 49 L. J., Bk. 69; 15 Ch. D. 426; 42 L. T. 893; 28 W. R. 929—C. A.

The assignee of the interest of a defendant in the subject-matter of an existing suit in which an order has been made, is not entitled to institute a fresh suit in respect of such interest. *Lambert* v. *Turner*, 1 N. R. 12; 8 Jur. (N.S.) 1223; 7 L. T. 521; 11 W. R. 51.

Some of the plaintiffs, who had an equitable interest only in the property in question, mortgaged their interests pending the suit:—Held, at the hearing, that the mortgagee was a necessary party. *Solomon* v. *Solomon*, 13 Sim. 516; 7 Jur. 806.

Where parties to an administration suit have, pendente lite, mortgaged their shares, the mortgagees may be made parties to the suit by a supplemental order, under s. 52 of 15 & 16 Vict. c. 86. *Brandon* v. *Brandon*, 9 L. T. 570; 3 N. R. 287.

In a foreclosure suit, when the plaintiff, after the chief clerk's certificate, transferred the mortgage to a new mortgagee:—Held, on an ex parte application by the new mortgagee with the consent of the original mortgagee, that an order of revivor and supplement could be made. *Bibby* v. *Naylor*, L. R. 17 Eq. 14; 22 W. R. 52. S. P., *James* v. *Harding*, 3 Eq. R. 757; 3 W. R. 474.

On an ex parte application by the three continuing mortgagees and the new mortgagee with the consent of the other original mortgagee, an order of revivor and supplement was made under 15 & 16 Vict. c. 86, s. 52. *Ingham* v. *Waskett*, 40 L. J., Ch. 399; L. R. 11 Eq. 283; 24 L. T. 55; 19 W. R. 427.

Where, after a bill filed, but before subpœna, the defendant assigned the subject-matter:—Held, that the assignee was a necessary party, and the court would, if necessary, restrain any further assignment. *Powell* v. *Wright*, 7 Beav. 441.

Assignment after Decree.]—In an administration suit where, after decree, the sole plaintiff assigned all his interest to a stranger, the common order to revive the suit was made at the instance of the assignee, the plaintiff consenting. *Mallock* v. *Still*, L. R. 15 Eq. 293.

Where one of two plaintiffs had assigned his interests after decree, and the chief clerk's certificate had been made after the assignment, the common order of revivor was made against the assignee without prejudice to any question whether he was to be bound by the certificate. *Vibart* v. *Vibart*, L. R. 6 Eq. 251; 16 W. R. 997.

If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute. *Campbell* v. *Holyland*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128.

An order for revivor will be made, where the object is to continue accounts of trustees, against one of whom, as a defendant, accounts were directed by the decree in the original suit; the order at the same time constituting such trustee, together with his co-trustees appointed pendente lite, co-plaintiffs. *Williamson* v. *Jeffries*, 10 L. T. 330; 12 W. R. 402.

Where after a decree a mortgage of the subject-matter of the suit was created, subsequently to which an order was made upon further consideration, without the new mortgagees being made parties:—Held, that s. 52 of the 15 & 16 Vict. c. 86, applied, and that a supplemental bill was not necessary in order to bring the subsequent mortgagees before the court. *Freeman* v. *Pennington*, 31 L. J., Ch. 216; 5 L. T. 514; 10 W. R. 184—L.JJ.

"Devolution of Estate by Operation of Law."]—A garnishee order was made absolute in favour of judgment creditors of W. attaching a judgment debt recovered by W. against S.:—Held, that this was a devolution of estate by operation of law within Ord. L. r. 2 (1875), and that the judgment creditors of W. were entitled to be added as co-plaintiffs in the action of W. against S., but not to have the conduct of the action. *Wallis* v. *Smith*, 51 L. J., Ch. 577; 46 L. T. 473.

Transmission before Decree.]—An order of revivor may be made under 15 & 16 Vict. c. 86, s. 52, at the instance of a plaintiff against a co-plaintiff on whom a new interest has devolved. *Foster* v. *Bonner*, 33 L. J., Ch. 384.

Where the interest of the sole plaintiff has been transmitted to a person whose title can be disputed in the cause, no order of revivor can be made under 15 & 16 Vict. c. 86, s. 52. Accordingly, where the sole plaintiff assigned his interest in the subject-matter of the suit before decree:—Held, that such an order could not be made. *Greenhalgh* v. *Rumney*, 5 N. R. 463.

Sect. 52 of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, providing that upon a suit becoming defective by reason of transmission of interest, an order to the effect of the usual supplemental decree may be obtained, as of course upon an allegation of the transmission of interest, applies to cases where the rights of the plaintiff are affected by a settlement executed after the

institution of the suit. *Atkinson* v. *Parker*, 2 De G. M. & G. 221 : 22 L. J., Ch. 20 ; 16 Jur. 1005 ; 1 W. R. 43.

An order of revivor may be obtained on application of a plaintiff against a co-plaintiff on whom the interest of a defendant has devolved after an order on further consideration. *Battison* v. *Hobson*, 40 L. J., Ch. 378 ; 24 L. T. 57 ; 19 W. R. 402.

Where a change of interest takes place by means of probate of a will being granted to one of four executors, who did not originally prove, he may be brought before the court by a common supplemental order. *Haldane* v. *Eckford*, 14 L. T. 14 ; 14 W. R. 306, 328.

Transmission after Decree.]—A married woman, who had obtained a protection order under 20 & 21 Vict. c. 85, s. 21, on the ground of causeless desertion, was a defendant without her husband to a suit for administration of the estate of a testator who died after the desertion giving her a beneficial interest in his property, and a decree was made for accounts and inquiries. Shortly after this the protection order was discharged, on the application of the husband, on the ground that there had never been any desertion. The plaintiff thereupon obtained a supplemental order under 15 & 16 Vict. c. 86, s. 52, to bring the husband before the court :—Held, that such an order was proper. *Rudge* v. *Weedon*, 4 De G. & J. 216.

A. B., entitled to a share of the produce of a testatrix's real and personal estate, instituted a suit for its recovery, and obtained a decree. C. D. afterwards filed a bill of revivor and supplement, stating that A. B. was domiciled at Stuttgart, and that, by a decree of the court there, he had been appointed curator bonorum, and directed to get in the property for A. B.'s creditors. The bill prayed a revivor, and liberty to prosecute the original suit for payment and additional relief. A general demurrer was allowed, on the ground that the relief thus prayed could only be obtained by original bill. *Staehle* v. *Winter*, 20 Beav. 550 ; 3 W. R. 580.

Addition of Plaintiffs at Trial.]—In April, 1876, an agreement was entered into between the plaintiffs and the defendant for the purchase by them of a patent. In January, 1877, the plaintiffs brought an action to have the agreement set aside on the ground of fraud. The defendant, by his defence, denied the fraud, and by way of counter-claim claimed to have the agreement specifically performed. During the progress of the evidence it turned out that, a few days after the date of the agreement, the plaintiffs had transferred all their patent rights to a limited company. Upon the application of the plaintiffs at the trial of the action, the court allowed the pleadings to be amended, by adding the company as plaintiffs. *Ruston* v. *Tobin*, 49 L. J., Ch. 262.

Addition of Defendant at Trial.]—An order was made at the trial to add as a co-defendant a person to whom the defendant had assigned his interest pendente lite. *Kino* v. *Rudkin*, 6 Ch. D. 160 ; 38 L. T. 461.

Application at Trial held too late when Objection raised in Defence.]—An objection to part of a plaintiff's claim, on the ground that his interest in the subject-matter of the action had only accrued at a date subsequent to the transactions out of which such part of the claim arose, having been made in the defence, it was held too late at the trial to apply under r. 14 of Ord. XVI., to add an additional party as co-plaintiff in respect of the former title. *Nobel's Explosives Co.* v. *Jones*, 49 L. J., Ch. 726 ; 42 L. T. 754 ; 28 W. R. 653—C. A.

Defendant whose Interest has ceased pending Action.]—A defendant whose interest has ceased pending the suit cannot obtain payment of his costs. *Wymer* v. *Dodds*, 48 L. J., Ch. 568 ; 11 Ch. D. 436 ; 40 L. T. 420 ; 27 W. R. 675.

Order of Course.]—An order to revive under Ord. L. r. 4 (1875), is an order of course. *Roffey* v. *Miller*, 24 W. R. 109. S. P., *Jackson* v. *North Eastern Ry.*, 46 L. J., Ch. 723 ; 5 Ch. D. 844 ; 36 L. T. 779 ; 25 W. R. 518—C. A. ; and *Ashley* v. *Taylor*, 48 L. J., Ch. 406 ; 10 Ch. D. 768 ; 27 W. R. 228.

7. In Other Cases.

Striking out Plaintiff.]—A co-plaintiff may retire from a suit if he procures a sufficient person to enter into a bond to the clerk of records and writs to answer the costs of the defendant up to the time of the retirement. *Drake* v. *Symes*, 30 L. J., Ch. 358 ; 7 Jur. (N.S.) 394 ; 4 L. T. 192 ; 9 W. R. 427.

Making Co-Plaintiff a Defendant.]—One of two co-plaintiffs who had authorised the institution of a suit refused to proceed therein. The other plaintiff obtained on motion an order to amend, by making him a defendant, and to pay the costs. *Brown* v. *Sawer*, 3 Beav. 598 ; 10 L. J., Ch. 240 ; 5 Jur. 500.

Where it appeared that the association of a cestui que trust and trustee, as co-plaintiffs on the record, might materially injure the interests of the former, the court gave leave to amend the record by striking out the name of the trustee as plaintiff, and making him a defendant. *Hall* v. *Lack*, 2 Y. & Coll. C. C. 631.

The bill sought to charge trustees with mismanagement and misapplication of the trust estate. The answer insisted that one of the two co-plaintiffs had acquiesced. The court, upon motion, gave leave to amend by making such co-plaintiff a defendant on payment of costs of application, and giving security for costs already incurred. Costs of misjoinder reserved to hearing. *Bather* v. *Kearsley*, 7 Beav. 544 ; 13 L. J., Ch. 321.

Where, after a bill filed by some members of a company, on behalf of themselves and the other members, to rescind a purchase they had made, on the ground of fraud, it appeared that their title to relief might be prejudiced by the acts of two of the plaintiffs who had acted as agents for the company, some of which they contended they ought not to be bound by, they were permitted to amend the bill by striking out their names as plaintiffs, and making them defendants. *Small* v. *Attwood*, 2 Y. & J. 512.

Semble, an order to amend after the replication, by converting a plaintiff into a defendant, is consistent with the practice of the Court of Exchequer. *Attwood* v. *Small*, 6 Cl. & F. 232 ; 2 Jur. 200, 226, 246.

h. PERSONS SUING IN FORMÂ PAUPERIS.

See R. S. C., 1883, Ord. XVI. rr. 22-31.

1. In what Cases.

Criminal Matters.] — A prosecutor cannot prosecute in formâ pauperis without special cause. *Rex* v. *Clarke*, 3 Burr. 1308.

The court will not allow a party to prosecute in the K. B. in formâ pauperis on the common affidavit of poverty, but special grounds must be laid for such an application. *Rex* v. *Wilkins*, 1 D. P. C. 536.

—— **Defendant.**] — A motion to defend in formâ pauperis upon an attachment for a contempt denied. *Rex* v. *Pearson*, 2 Burr. 1039.

A defendant removing an indictment by certiorari without good cause cannot be admitted to sue in formâ pauperis. *Rex* v. *Reynolds*, 1 W. Bl. 230.

In an information under the excise laws, the court will admit a defendant to defend in formâ pauperis, on an affidavit, that he is not worth 5*l.*, over and above his wearing apparel. *Att.-Gen.* v. *Dummie*, 2 C. & M. 393; 4 Tyr. 284; 3 L. J., Ex. 86.

Costs Unpaid.]—Where a plaintiff has failed in one action and commences another for the same matter without having paid the costs of the first action, a judge properly exercises his discretion in refusing the plaintiff leave to sue in formâ pauperis. *McCabe* v. *Bank of Ireland*, 59 L. J., P. C. 18; 14 App. Cas. 413; 61 L. T. 416; 38 W. R. 257—H. L. (Ir.)

Public Right — Subscriptions.] — Upon a petition for leave to prosecute an appeal in formâ pauperis, it appeared that the petitioner sought as one of the public to establish a right of fishing in a tidal river adjoining land belonging to the defender, and that subscriptions had been collected to assist the petitioner in the litigation:—Held, that in the circumstances the application could not be granted. *Bowie* v. *Ailsa* (*Marquis*), 58 L. J., P. C. 7; 13 App. Cas. 371; 60 L. T. 162—H. L. (Sc.)

No Cause of Action.]—A party is not entitled to sue in formâ pauperis if, on his own affidavit, the court can see that he has no cause of action. *Cobbett, In re*, 3 H. & N. 155; 27 L. J., Ex. 199; 4 Jur. (N.S.) 145; 6 W. R. 282.

If it appears that the plaintiff has no meritorious cause of action, the court will discharge an order authorising him to sue in formâ pauperis. *Hawes* v. *Johnson*, 1 Y. & J. 10.

To what Proceedings Extending.]—The privilege of suing in formâ pauperis does not extend to a step collateral to the cause, such as a rule calling on his attorney to pay the costs of the day incurred through his negligence. *Bell* v. *Port of London Assurance Co.*, 1 L. M. & P. 641.

Proceedings on Crown Side.]—A party to proceedings on the crown side of the Queen's Bench division cannot be admitted to proceed as a pauper. *Mulleneisen* v. *Coulson*, 57 L. J., Q. B. 464; 21 Q. B. D. 3; 58 L. T. 562; 36 W. R. 811.

—— **Appeal from County Court.**]—Appeals from inferior courts, although under Ord. LIX. r. 4, they are to be entered in the crown paper, are not proceedings on the crown side of the Queen's Bench division within Ord. LXVIII. r. 1; and therefore the court has jurisdiction to allow appellants from such courts to appeal in formâ pauperis. *Mulleneisen* v. *Coulson* (21 Q. B. D. 3) distinguished. *Clements* v. *L. & N. W. Ry.*, [1894] 2 Q. B. 482; 9 R. 223; 42 W. R. 338; 58 J. P. 816—C. A.

Misconduct.]—A party will not be deprived of the privilege of defending himself in formâ pauperis, on account of his misconduct, semble. *Murphy* v. *Oldis*, 1 Hog. 219.

Misconduct in a former cause is no ground for refusing a party liberty to sue as a pauper in another, for the subject before in dispute. *Bowyer* v. *M'Evoy*, 1 Ball & B. 562.

Appeals.]—An appeal may be prosecuted in formâ pauperis. *Bland* v. *Lamb*, 2 Jac. & Walk. 402. See *Clarke* v. *Wyburn*, 17 L. J., Ch. 159; 12 Jur. 167.

—— **Order previously Obtained.**]—When a party has obtained the common order to sue in formâ pauperis at any stage of the suit, it will carry him through all subsequent stages; and no special order is required to enable him to appeal without payment of a deposit. *Drennan* v. *Andrew*, L. R. 1 Ch. 300; 14 L. T. 39; 14 W. R. 444.

—— **No previous Order.**] — Where a party who has not sued or defended as a pauper in the court below desires to appeal in formâ pauperis, the application for leave should be made ex parte to the Court of Appeal. The court will require the provisions of Ord. XVI. rr. 22-24, to be followed in such a case. *Goldberg, Ex parte*, 62 L. J., Q. B. 127; [1893] 1 Q. B. 417; 4 R. 232; 68 L. T. 142; 41 W. R. 210—C. A.

Where a party who has not sued or defended as a pauper in the court below applies for leave to appeal in formâ pauperis, the court will follow by analogy Ord. XVI. rr. 22, 23, and 24, and not the old practice as to such appeals. *Roberts, In re, Kiff* v. *Roberts*, 33 Ch. D. 265; 35 W. R. 176—C. A.

—— **To Privy Council.**]—*See* COLONY.

Suing in Own Right.]—Indulgence of suing in formâ pauperis extends only to persons suing in their own rights. *Paradice* v. *Sheppard*, Dick. 136.

A single creditor filed a bill in formâ pauperis, to set aside an assignment of property by an insolvent previously to his insolvency. Demurrer to the bill allowed, although the assignee in insolvency refused to take any steps to set aside the assignment. *Davis* v. *Snell*, 3 L. T. 394; 9 W. R. 209. Affirming 6 Jur. (N.S.) 1134.

Executors and Administrators.]—An executor or administrator cannot sue or defend in formâ pauperis, unless semble he is beneficially interested. *Oldfield* v. *Cobbett*, 3 Beav. 432.

An administrator having been admitted at the Rolls to sue in formâ pauperis, the order was discharged. *Paradice* v. *Sheppard*, 6 Beav. 586, n.

A., being executrix of a will, and entitled under it to an equity of redemption, filed a bill to redeem, offering to pay what, if anything, should be due on the mortgage, and praying for relief as the testator's representative:—Held, that she could not sue as a pauper. *Fowler* v. *Davies*, 16 Sim. 182; 17 L. J., Ch. 287; 12 Jur. 321.

—— **Beneficial Interest.**] — If a personal representative has also a claim himself as an

incumbrancer, that takes the case out of the rule that a personal representative cannot sue in formâ pauperis. *Anon.*, 2 Moll. 338.

A defendant who defends as executor, and is in contempt, may be admitted to defend in formâ pauperis, for the single purpose of clearing his contempt. *Oldfield* v. *Cobbett*, 1 Coll. 169; 13 L. J., Ch. 177; 8 Jur. 352.

An application by a party sued as executor for leave to defend the suit in formâ pauperis refused, though, in addition to the usual affidavit, he swore that he had been prevented, by an injunction, from receiving any assets; and semble, the result would have been the same if he had sworn that there were no assets. *Oldfield* v. *Cobbett*, 1 Ph. 613; 15 L. J., Ch. 116; 10 Jur. 2. *And see* 8 Beav. 294.

The plaintiff, the executrix, being also devisee and legatee, the court made an order that she might sue in formâ pauperis. *Flattery* v. *Anderdon*, 11 Ir. Eq. R. 586.

R., claiming in right of his wife certain property, administers to her and her sister, who claimed to be next of kin of C. deceased, whose residuary property had been handed over in another suit to other next of kin. R.'s wife and sister dying, the next of kin in possession dies, and R. sues in formâ pauperis, and gets a common order, and moves for an injunction, is dispaupered, and his motion refused. On petition for leave to sue in formâ pauperis:—Held, that the plaintiff, being entitled in jure mariti as well as representative, was able to sue in formâ pauperis. *Rogers* v. *Hooper*, 1 W. R. 474.

Husband and wife allowed to defend an administration suit in formâ pauperis where the wife was sole executrix, and separately interested in the estate. *Everson* v. *Matthew*, 3 W. R. 159.

An administratrix having a beneficial interest in the subject-matter of a suit, admitted to sue in formâ pauperis. *Parkinson* v. *Chambers*, 1 Kay & J. 72; 24 L. J., Ch. 47; 3 W. R. 34.

A party suing in a representative character may sue in formâ pauperis upon showing a beneficial interest in the subject-matter of the suit. *Martin* v. *Whitmore*, 17 W. R. 809.

But where an administratrix obtained an order for leave to appeal in formâ pauperis, upon an ex parte application supported by an affidavit which merely stated that she had a beneficial interest, without specifying how derived, such beneficial interest not appearing upon the pleadings, and the affidavit also did not aver that she had not, as such administratrix, assets wherewith to prosecute the appeal, the order was, upon subsequent application by the plaintiff, discharged, with leave for the administratrix to file a fresh affidavit. *Ib.*

Husband and Wife or Next Friend.]—Cases stated in which a feme covert suing by her next friend has been admitted to sue in formâ pauperis. Observations on *Pennington* v. *Alvin* (1 Sim. & S. 264). *Dowden* v. *Hook*, 8 Beav. 399; 14 L. J., Ch. 383; 9 Jur. 544.

Semble, a married woman may sue in formâ pauperis, but the pauper order cannot be obtained as of course. *Coulsting* v. *Coulsting*, 8 Beav. 463; 14 L. J., Ch. 385; 9 Jur. 587.

A mother of infant under seven years of age, not living apart from the father, but prevented by him from having access to the infant, was permitted, on application being made ex parte for that purpose, to present a petition under 2 & 3 Vict. c. 54, in formâ pauperis, without a next friend, and without payment of the stamp of 1*l.* required by the orders of the court. And held that, upon such an ex parte application, it was no improper suppression to forbear stating that the intended petitioner had relatives in good circumstances, it not being shown that any of them would have been willing to act as her next friend. *Hakewill, Ex parte*, 3 De G. M. & G. 116; 22 L. J., Ch. 662; 17 Jur. 334; 1 W. R. 205, 278.

R., claiming in right of his wife certain property, administers to her and her sister, who claimed to be next of kin of C. deceased, whose residuary property had been handed over in another suit to other next of kin. R.'s wife and sister dying, the next of kin in possession dies, and R. sues in formâ pauperis, and gets a common order, and moves for an injunction, is dispaupered, and his motion refused. On petition for leave to sue in formâ pauperis:—Held, that the plaintiff, being entitled in jure mariti as well as representative, was entitled to sue in formâ pauperis. *Rogers* v. *Hooper*, 1 W. R. 474.

An order obtained ex parte by a married woman for leave to file a bill and sue in formâ pauperis without a next friend:—Held, irregular, and discharged. *Page* v. *Page*, 16 Beav. 588; 17 Jur. 336; 1 W. R. 206, 262.

A married woman, living apart from her husband, allowed to sue in formâ pauperis without a next friend. Order made ex parte. *Lancaster, In re*, 2 Eq. R. 512; 18 Jur. 229; 2 W. R. 337.

On an application on behalf of a married woman for leave to file a bill in formâ pauperis, and without a next friend, she had made an affidavit that she had not 5*l.* in the world, and was unable to find anyone who would be her next friend; the bill had been settled and signed by counsel. The court held, that it ought to be informed of some of the facts on which it was proposed to file the bill; but, in order to save the parties expense, the statement that the bill had been settled and signed was taken as a positive guarantee that the bill was proper, and the order was made accordingly. *Wellesley* v. *Mornington*, 2 Eq. R. 675; 18 Jur. 552; 2 W. R. 552.

Liberty given to a married woman to file a bill without a next friend, and sue in formâ pauperis. *Forster, In re*, 18 Beav. 525. S. P., *Barnes, In re*, 31 L. J., Ch. 455; 5 L. T. 787; 10 W. R. 464.

Leave given to a married woman, who had filed a bill by her next friend in formâ pauperis, to prosecute an appeal in formâ pauperis, the next friend refusing to allow his name to be used for the purpose of the appeal, and the married woman deposing that she knew no person who would allow his name to be substituted. *Crouch* v. *Waller*, 4 De G. & J. 43; 28 L. J., Ch. 514; 5 Jur. (N.S.) 326.

The rents and profits of real estate were given by will to trustees, for the benefit of a married woman for life, with remainder to her children. Her husband obtained protection under the Insolvent Debtors Act, but was wholly unable to maintain his wife, who was in consequence in indigent circumstances. On a bill by the wife, suing in formâ pauperis and without a next friend, against the trustees, the assignees, and the husband:—Held, that she was entitled to a settlement. *Barnes* v. *Robinson*, 1 N. R. 257; 32 L. J., Ch. 143; 9 Jur. (N.S.) 245; 7 L. T. 617; 11 W. R. 276.

A married woman suing without a next friend, her husband not being a party, applied for leave to appeal in formâ pauperis:—Held, that her husband as well as herself must make the affidavit required by Ord. XVI. r. 22. *Roberts, In re, Kiff* v. *Roberts*, 33 Ch. D. 265; 35 W. R. 176—C. A.

Infant.]—An infant may sue in formâ pauperis by his next friend. *Bryant* v. *Wagner*, 3 Jur. 460.

An order for an infant to sue in formâ pauperis by his next friend was obtained ex parte, on an affidavit by the infant, in the common form, as to his own property:—Held, that such an affidavit was clearly insufficient, and that the order had rightly been discharged, with costs. *Lindsay* v. *Tyrrell*, 2 De G. & J. 7; 5 W. R. 617. Affirming 24 Beav. 124; 3 Jur. (N.S.) 1014; 5 W. R. 482. *And see* 6 W. R. 143.

Trustee Relief Act.]—A claimant allowed to proceed in formâ pauperis for payment of money out of court paid in under the Trustee Relief Act, 1847. *Money, In re*, 13 Beav. 109; 20 L. J., Ch. 274; 15 Jur. 51.

Winding-up.]—Order ex parte for a person carrying in a claim under a winding-up to sue in formâ pauperis. *Fry, Ex parte*, 1 Dr. & Sm. 318; 3 L. T. 462; 9 W. R. 51.

Peeress.] — A peeress allowed to sue as a pauper. *Wellesley* v. *Wellesley*, 16 Sim. 1.

Examination pro interesse suo.]—A person having been examined pro interesse suo, was permitted to prosecute, and make out her right in formâ pauperis. *James* v. *Dore*, Dick. 788.

2. Practice.

Motion on Summons.]—Leave to present a petition in formâ pauperis will be granted on motion; but such leave may also be obtained by summons in chambers. *Lewin, In re*, 33 W. R. 128.

Jurisdiction of County Court.]—A judge of a county court has power to allow parties to sue in formâ pauperis. *Chinn* v. *Bullen*, 8 C. B. 447; 7 D. & L. 297; 19 L. J., C. P. 42; 14 Jur. 201.

Amount of Property.]—An application to sue in formâ pauperis in this court must be made on an affidavit that the plaintiff is not worth 5*l.* (now 25*l.*) except the matter in question in this suit. *O'Donnell* v. *M'Mahon*, 9 Ir. Eq. R. 471.

The meaning of the common affidavit required on application for leave to sue or defend in formâ pauperis is, that the party has not 5*l.* in the world besides, &c., available for the prosecution or defence of the suit; and if he can make the affidavit with truth in that sense, the omission to set forth the details of his means, and the circumstances which render them unavailable, is not such an omission of material facts as will induce the court on that ground alone to discharge the order. *Dresser* v. *Morton*, 2 Ph. 286; 1 Coop. C. C. 376.

It appearing on affidavit that a pauper defendant was entitled to property exceeding 20*l.* in value, the court, on motion, ordered him to be dispaupered. *Goldsmith* v. *Goldsmith*, 5 Hare, 125; 15 L. J., Ch. 264; 10 Jur. 561.

The affidavit as to property filed in support of an application to be allowed to sue in formâ pauperis, ought to except nothing but the wearing apparel, and the matters in question in the cause. *Perry* v. *Walker*, 1 Coll. 229; 13 L. J., Ch. 75; 8 Jur. 680.

An officer having half-pay amounting to 150*l.* a year (which is not alienable) will not be allowed to proceed in formâ pauperis, and that notwithstanding he has taken the benefit of the Insolvent Act. *Boddington* v. *Woodley*, 5 Beav. 555; 12 L. J., Ch. 15; 6 Jur. 960.

A suit was instituted against several defendants, all of whom having died, a bill of revivor and supplement was filed against the administrator of the last surviving defendant, and he obtained the common order to sue in formâ pauperis. This defendant was tenant at will of a cottage, worth 10*l.* per annum, was also in receipt of an annuity of 20*l.* per annum, and claimed to be entitled to further property, but which he alleged was not available for paying the costs of his suit:—Held, that the common order to sue in formâ pauperis must be discharged. *Burry Port Co.* v. *Bowser*, 26 L. J., Ch. 319; 5 W. R. 325.

Plaintiff was confessedly entitled, under a codicil, to the interest of 800*l.* consols. He claimed by the suit, and in opposition to that codicil, a greater interest in the testator's estate. A motion to dispauper him was refused. *Allen* v. *M'Pherson*, 5 Beav. 485.

—— **Possession or Receipt of Property in Question.**]—A farming tenant who has valuable crops on his farm, but no other property, will not be admitted to defend in formâ pauperis, although he has in the suit been restrained from selling or removing the crops. *Ridgway* v. *Edwards*, L. R. 9 Ch. 143; 29 L. T. 906; 22 W. R. 288.

Affidavit that defendant is not worth more than 5*l.* except in matters in question, of which he had possession, will not entitle him to defend in formâ pauperis. *Spencer* v. *Bryant*, 11 Ves. 49; 8 R. R. 85.

A party being in possession and enjoyment of the property in question, which was worth 140*l.*, and 10*l.* a year, dispaupered. *Taprell* v. *Taylor*, 9 Beav. 493.

Pauper order discharged, the party being in receipt of an annuity, though it was the subject of the suit. *Butler* v. *Gardiner*, 12 Beav. 525; 19 L. J., Ch. 473.

The court refused to dispauper a plaintiff, although in the possession of property, and in the exercise of a business; the possession of the property being wrongful, the wrongful possession acquiesced in by the adverse party, and the business being necessary to the maintenance of himself and family. *Perry* v. *Walker*, 1 Y. & C. C. C. 676; 6 Jur. 846.

—— **After Payment of Debts.**]—A plaintiff suing in formâ pauperis, carrying on a considerable business, and having the possession of property greater in amount than 5*l.*, though not after payment of his just debts, dispaupered. *Perry* v. *Walker*, 1 Coll. 229; 13 L. J., Ch. 75; 8 Jur. 680.

A pauper plaintiff was shown to be in possession of 50*l.* a year; but he swore that he was not worth 5*l.* after his just debts were paid. The court thereupon ordered him to specify the debts, which specification being unsatisfactory

he was dispaupered. *Raxworthy* v. *Raxworthy*, 7 L. J., Ch. 136.

Affidavit by Whom made.]—The affidavit to ground an order to be admitted to sue in formâ pauperis must be made by the party, not by a third person. *Wilkinson* v. *Belsher*, 2 Bro. C. C. 272.

Affidavit of a party convicted of perjury admissible to enable him to sue as a pauper. *Bowyer* v. *M'Evoy*, 1 Ball & B. 56.

Denial of Allegations.] — Pauper order discharged, the particular circumstances tending to show that the plaintiff was not a pauper, not being specifically denied. *Mather* v. *Shelmerdine*, 7 Beav. 267.

An order by which the defendant was admitted to defend in formâ pauperis, was, under the circumstances of the case, discharged, notwithstanding the affidavit of the defendant that his property did not amount to 5*l.*, and his denial of the allegations by which the plaintiff endeavoured to prove the contrary. *Romilly* v. *Grint*, 2 Beav. 186 ; 9 L. J., Ch. 109.

At what Stage.]—A plaintiff may be admitted to sue in formâ pauperis after the commencement of the action. *Brunt* v. *Wardell*, 3 Man. & G. 534 ; 4 Scott (N.R.) 188 ; 1 D. (N.S.) 229 ; 11 L. J., C. P. 17. S. P., *Pitcher* v. *Roberts*, 2 D. (N.S.) 394 ; 12 L. J., Q. B. 178 ; 7 Jur. 466 : *Doe* d. *Ellis* v. *Owens*, 9 M. & W. 455 ; 1 D. (N.S.) 404 ; 10 M. & W. 514 ; 2 D. (N.S.) 426 ; 12 L. J., Ex. 53 ; 7 Jur. 91 : *Holmes* v. *Penney*, 9 Ex. 584 ; 2 C. L. R. 1004 ; 23 L. J., Ex. 132 ; 2 W. R. 256.

No Retrospective Operation.]—A pauper may obtain the order at any time during the progress of the suit ; but it has no retrospective operation. *Doe* d. *Ellis* v. *Owen*, supra.

Pauper leaving England.]—A pauper plaintiff who will be absent from England for eighteen months will be ordered to give security for costs, or the proceedings will be stayed until his return. *Foss* v. *Wagner*, 2 D. P. C. 499.

Effect of Order on Solicitor.]—A claimant in a chancery suit in March, 1851, retained an attorney, to conduct it upon the ordinary terms. In July an order was obtained from the Master of the Rolls, by which the claimant was made a pauper. In December an order was obtained from the Master of the Rolls, by which the claimant was dispaupered from the 31st of October preceding :—Held, that the order of December operated between the parties only of the chancery suit, and not as between attorney and client, and therefore that the attorney was not entitled to charge for services rendered by him whilst the first order was in force, viz. between July and December. *Holmes* v. *Penney*, 9 Ex. 584 ; 2 C. L. R. 1004 ; 23 L. J., Ex. 132 ; 2 W. R. 256.

Held, also, that the attorney was entitled to recover for payments made to the law stationer for parchment and paper, but not for copying. *Ib.*

Held, also, that he could not recover for counsel's fees which had not been paid. *Ib.*

Order operates from Service.]—An order for suing in formâ pauperis takes effect only from the time when it is served on the defendant or otherwise brought to his knowledge, and therefore a defendant who succeeds is entitled to his costs incurred before that time. *Fray* v. *Voules*, 9 B. & S. 60 ; L. R. 3 Q. B. 214 ; 16 W. R. 399.

An order to sue in formâ pauperis is ineffectual until served ; and the party obtaining it was held, on that ground, liable to pay divers costs. *Ballard* v. *Catling*, 2 Keen, 606 ; 7 L. J., Ch. 186. S. P., *Smith* v. *Pawson*, 2 De G. & Sm. 490 ; 17 L. J., Ch. 454 ; 12 Jur. 819.

An order for leave to sue in formâ pauperis is not inoperative, although it is not served, where there is no mala fides in withholding it, and no step has been taken in the cause inconsistent with the order. Semble, the same rule applies to orders of court generally. *Church* v. *Marsh*, 2 Hare, 652 ; 13 L. J., Ch. 12 ; 8 Jur. 54.

Suppression of Facts.]—A plaintiff claiming partly under the heirs of a French subject, and through an instrument of doubtful construction, obtained an order of course at the rolls to sue in formâ pauperis, upon the simple allegation of his poverty :—Held, that the order was irregular, on the ground of the suppression of the facts, which ought to have been presented for the consideration of the court upon the application. *St. Victor* v. *Dereveux*, 6 Beav. 584 ; 13 L. J., Ch. 102 ; 8 Jur. 26.

Irregularity.]—Where a plaintiff had obtained an order to sue in formâ pauperis, and the defendant had answered, and replication had been filed :—Held, that the defendants could not, three years afterwards, have the order to sue in formâ pauperis discharged for irregularity. *Parkinson* v. *Hanbury*, 4 De G. M. & G. 508 ; 1 Eq. R. 368 ; 22 L. J., Ch. 979 ; 1 W. R. 400, 509.

An order to allow a plaintiff to sue in formâ pauperis had been obtained on an affidavit, which was defective for the want of an addition of his profession or occupation :—Held, that the effect was a mere irregularity, and that after several months had elapsed, in which the defendant might have examined the affidavit, and in which various steps had been taken in the cause, it was too late for the defendant to move to set aside the order for the defect, and dispauper the plaintiff, although it was sworn that the defendant had only acquired knowledge of the defect three days before the motion. *Seymour* v. *Maddox*, 19 L. J., Q. B. 525.

Certificate required.]—On an application for leave to sue in formâ pauperis, a certificate of counsel must be produced that the petitioner has a good cause of action. *Atkinson, In re*, 23 L. R., Ir. 509.

In pauper suits it is the duty of counsel to satisfy himself, by an inspection of the accounts, that it is a case in which a decree for an account should be granted. *Iles* v. *Flower*, 6 L. T. 843.

The hand of counsel to the petition of a pauper, certifying that he has good cause of action, is for the information of the court ; and it is not necessary that a rule, admitting the plaintiff to sue in formâ pauperis, be drawn up on reading such certificate. *Bryant* v. *Wagner*, 7 D. P. C. 676 ; 3 Jur. 893.

Inspection of Case and Opinion.]—The defendant in an action where the plaintiff is suing as a pauper is not entitled to inspection of the case laid before counsel and his opinion thereon upon

which the permission to sue as a pauper was obtained. *Sloane* v. *British Steamship Co.*, 66 L. J., Q. B. 72; [1897] 1 Q. B. 185; 75 L. T. 542; 45 W. R. 203—C. A.

Motion — What Matters included in.]—A plaintiff may, on one motion, apply to be admitted to sue in formâ pauperis, and by prochein amy. *Bryant* v. *Wagner*, 7 D. P. C. 676; 3 Jur. 893.

Staying Proceedings until Payment of Costs.]—The Court of Exchequer stayed the proceedings in a pauper suit until the costs of a former suit in chancery were paid. *Calvert* v. *Rooth*, 4 Y. & Coll. 514.

Proceedings stayed until part of costs of former suit by same party suing in formâ pauperis in cases only of great vexation. *Wild* v. *Hobson*, 2 Ves. & B. 112.

When a pauper makes default in proceeding to trial, in pursuance of notice, and is resident without the jurisdiction of the court, on an application for the costs of the day, for not proceeding to trial, the defendant is entitled to make the payment of the costs a condition precedent of further proceedings. *Cross* v. *Port of London Assurance Co.*, 18 L. J., Q. B. 72; 13 Jur. 125.

Notice of Motion—Signature.]—Ord. XVI. r. 29, which provides that no notice of motion shall be served on behalf of a pauper unless it is signed by a solicitor, does not apply to a pauper who elects to sue in person, and to whom, therefore, no solicitor has been assigned. *Jacobs* v. *Crusha*, 63 L. J., Q. B. 526; [1894] 2 Q. B. 37; 9 R. 392; 70 L. T. 524; 42 W. R. 387—C. A.

Assigning Counsel and Solicitor.]—In pauper suits the court will not compel a solicitor to act for the pauper; but the course is to assign to him counsel and a six clerk, and it is the duty of the six clerk to appoint one of the sixty clerks of his office to act on the part of the pauper. *Lewis* v. *Kennett*, 3 Russ. 466.

Where the master has reported that a defendant was unable, by reason of poverty, to employ a solicitor to put in his answer, the court, by one order, directed counsel and a solicitor to be assigned to the defendant, for the purpose of putting in his answer, and that a habeas corpus should issue against him, and that the plaintiff's clerk in court should attend with the record on the return of the writ, in order that the bill might be taken pro confesso against the defendant, unless he should, in the meantime, put in his answer. *Welford* v. *Daniel*, 9 Sim. 652; 3 Jur. 650.

The plaintiff sued in formâ pauperis, and had had counsel and a six clerk assigned to him. He had also, before and at the time of the decree, and since, in the registrar's and master's offices, employed a solicitor, who did not appear to have been changed by him, or discharged by the court:—Held, that he could not present a petition, not having the sanction of such solicitor, or some other officer of the court. *Perry* v. *Walker*, 2 Y. & Coll. C. C. 655; 13 L. J., Ch. 75; 8 Jur. 53.

A person suing in formâ pauperis must obtain the six clerk's certificate of the propriety of an appeal from a decision of the court below, before he can be heard. *Emperingham* v. *Short*, 11 L. J., Ch. 36; 5 Jur. 1076.

Appearance in Person.]—A pauper plaintiff, to whom counsel and solicitor had been assigned, gave notice of motion, and appeared in person in support of it:—Held, that a pauper plaintiff so circumstanced could not appear in person. *Parkinson* v. *Hanbury*, 4 De G. M. & G. 508; 1 Eq. R. 368; 22 L. J., Ch. 979; 1 W. R. 400, 509.

A person who has been admitted to sue as a pauper, but to whom no counsel has been assigned, is entitled to be heard in person. *Tucker* v. *Collinson* or *Cotterell*, 55 L. J., Q. B. 224; 16 Q. B. D. 562; 54 L. T. 263; 34 W. R. 354—C. A.

Appearance by Counsel.]—On the trial of an action brought in formâ pauperis, a king's counsel or a serjeant may appear for the plaintiff alone without a junior. *James* v. *Harris*, 7 Car. & P. 257.

Compromise.]—As a general rule, the court will not uphold any agreement of compromise between a plaintiff suing in formâ pauperis and the defendant, having for its object the deprival of the plaintiff's attorney of his costs; and, therefore, a plea of release puis darrein continuance was set aside by the court. *Wright* v. *Burroughs*, 3 C. B. 344; 15 L. J., C. P. 277; 10 Jur. 860.

Changing Solicitor.]—A plaintiff suing in formâ pauperis, having obtained a final decree, entered a rule to change her solicitor. Upon a motion by the solicitor that the rule should be rescinded, and the carriage of the decree restored to him, or that the plaintiff should pay to him the costs incurred, the court refused the application, without prejudice to any lien he might have on the fund. *M'Ghee* v. *Mahon*, Fl. & K. 93.

Account.]—Where a plaintiff suing in formâ pauperis establishes title to an account from the defendant, it is no objection to his obtaining a decree for an account that the defendant has produced evidence, uncontradicted by the plaintiff, to show that the balance of the account will be against the plaintiff. *Smith* v. *Taggart*, 1 L. J. (o.s.) Ch. 90.

Trespass—Injunction.]—A pauper defendant had committed various acts of trespass against the plaintiffs, which it was sought to restrain by injunction:—Held, on demurrer, that the power of recovering damages at law against a pauper did not constitute an adequate remedy; and that a bill for an injunction would consequently lie. *Hodgson* v. *Duce*, 4 W. R. 576.

From what Payments Exempted.]—A party admitted to sue in formâ pauperis is exempt from the payment of interlocutory as well as final costs, except in cases for not proceeding to trial pursuant to notice. *Pratt* v. *Delarue*, 2 D. (N.S.) 322; 10 M. & W. 509; 12 L. J., Ex. 25; 7 Jur. 91.

—— **Amendment.**]—The court will not allow as a matter of right, that a plaintiff, who sues in formâ pauperis, shall amend the declaration, after demurrer thereto, without payment of costs. *Fowler* v. *Bank of England*, 6 Q. B. 878; 2 D. & L. 790; 14 L. J., Q. B. 178; 9 Jur. 107.

Plaintiff suing in formâ pauperis shall not amend by leaving out defendants, without paying their costs. *Wilkinson* v. *Belsher*, 2 Bro. C. C. 272.

—— **Not proceeding to Trial.**]—Where a pauper in an action against magistrates of the northern division of the county of Lancaster, for a cause of action arising there, laid the venue in the southern division, and at the assizes withdrew the record:—Held, that he ought to pay the costs of the day, although not dispaupered. *Thompson* v. *Hornby*, 9 Q. B. 978; 16 L. J., Q. B. 152; 11 Jur. 169.

A plaintiff sued in formâ pauperis does not render himself liable to costs by countermanding notice of trial. *Doe* d. *Pugh* v. *Price*, 2 B. C. Rep. 311; 11 Jur. 170.

If a pauper withdraws his record because he is not prepared with a certain necessary document at the assizes, the court will compel him to pay the costs of the day. *Doe* d. *Lindsey* v. *Edwards*, 2 D. P. C. 471. S. P., *Gore* v. *Morphew*, 8 D. P. C. 137; 1 W. W. & H. 331.

If a person suing in formâ pauperis neglects to proceed to trial pursuant to notice, the defendant is entitled to the costs of the day, but not to dispauper him. *Waller* v. *Joy*, 16 M. & W. 60; 4 D. & L. 338; 16 L. J., Ex. 17. S. P., *Pratt* v. *Delarue*, supra.

Although the omission occurred through the negligence of the attorney's clerk. *Hodges* v. *Toplis*, 3 D. & L. 786; 2 C. B. 921; 15 L. J., C. P. 195; 10 Jur. 438.

—— **Non-appearance at Trial.**]—A plaintiff, suing in formâ pauperis, who applies for the restoration to the list of an action which has been dismissed owing to his absence through illness, may be required to pay the costs thrown away as a condition of his application being granted. *Jacobs* v. *Crusha*, 63 L. J., Q. B. 526; [1894] 2 Q. B. 37; 9 R. 392; 70 L. T. 524; 42 W. R. 387—C. A.

Dismissing Bill.]—Plaintiff obtained an order to sue in formâ pauperis, and filed two bills of complaint. Plaintiff afterwards obtained an order ex parte dismissing her own bill without costs:—Held, that the plaintiff being a pauper, cannot dismiss her own bill ex parte without costs. *Parkinson* v. *Hanbury*, 4 De G. M. & G. 508; 1 Eq. R. 368; 22 L. J., Ch. 979; 1 W. R. 400, 509.

A pauper plaintiff having moved to dismiss the bill as against two defendants, the court ordered it to be on payment of costs. *Pearson* v. *Belsher*, 3 Bro. C. C. 87. See also *Corbett* v. *Corbett*, 16 Ves. 407.

Payment of Costs out of Fund.]—Relief granted to plaintiff suing in formâ pauperis in a cause occasioned by their own default, on the terms that as the recovery afforded the means of payment, they should pay dives costs out of the fruit of the decree. *M'Donough* v. *O'Flaherty*, Beat. 54.

After a plea of payment of money into court the plaintiff obtained an order to sue in formâ pauperis. A judge, therefore, made an order that the money should remain in court, to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendant having obtained the verdict, the court ordered that the money should be paid out to him in satisfaction of his costs antecedent to the order to sue in formâ pauperis. *Casey* v. *Tomlin*, 7 M. & W. 189; 8 D. P. C. 892; 10 L. J., Ex. 87.

Court Fees.]—A plaintiff suing in formâ pauperis, who has obtained a verdict, is entitled to have judgment signed without payment of fees, though the amount of the verdict is more than 5*l*. *Hoare* v. *Coupland*, 1 L. M. & P. 57; 19 L. J., Q. B. 150; 14 Jur. 247.

A person suing in formâ pauperis is entitled to the chief clerk's certificate without paying the court fees, even though the order enabling him to sue has been made after the certificate was ready. *Thomas* v. *Ellis*, 8 Ch. D. 518; 26 W. R. 839—C. A. *See* Ord. XVI. r. 25.

Liability of Solicitor to pay Costs.]—A pauper's solicitor will be ordered to pay the costs of any irregular proceeding. *Brown* v. *Dawson*, 2 Hog. 76.

Taxation of Plaintiff's Costs—Costs out of Pocket.]—Under the Rules of the Supreme Court, 1883. Ord. XVI. rr. 24, 25, 26, 27, 31, a successful plaintiff in an action in formâ pauperis tried before a judge and jury is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. *Carson* v. *Pickersgill*, 54 L. J., Q. B. 484; 14 Q. B. D. 859; 52 L. T. 950; 33 W. R. 589; 49 J. P. 612—C. A.

A plaintiff suing in formâ pauperis, who recovers a verdict above 5*l*. and obtains a certificate for his costs, is only entitled to recover from the defendant such costs as he has paid and is liable to pay; and therefore on taxation, fees to his counsel and attorney, which are not payable by him, are not to be allowed. *Dooley* v. *G. N. Ry.*, 4 El. & Bl. 341; 3 C. L. R. 110; 24 L. J., Q. B. 25; 1 Jur. (N.S.) 28; 3 W. R. 76.

If one is admitted to defend a suit in chancery in formâ pauperis, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit. *Philipe* v. *Baker*, 1 Car. & P. 533.

Where the plaintiff, a pauper, had a decree for the duty and costs, and the master taxed full costs, yet, on motion, the court ordered plaintiff and his solicitor to make oath before a master of what they had paid, or were to pay, and that to be allowed, but no further. *Angell* v. *Smith*, Pre. Ch. 219.

Defendant to a bill by a pauper plaintiff put in a plea and demurrer, which were both overruled; and it was insisted that he should have no costs, being at none; but Lord Somers ordered him his costs like other suitors, for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant, but to the pauper. *Scatchmer* v. *Foulkard*, 1 Eq. Abr. 125.

The general rule is, that a party who sues or defends in formâ pauperis shall have only such costs as he has paid or become liable to pay; but the court has a discretion in each case. An heir-at-law defending in formâ pauperis, in a suit to establish a will, was held under the circumstances to be entitled only to pauper costs. *Stafford* v. *Higginbotham*, 2 Keen, 147; 6 L. J., Ch. 314.

Party suing in formâ pauperis and proving successful, declared entitled to ordinary costs. *Roberts* v. *Lloyd*, 2 Beav. 376.

Plaintiff a pauper; costs of impertinence expunged from the answer ordered to be taxed as dives costs to be paid into court. *Rattray* v. *George*, 16 Ves. 232.

Where costs are awarded to a party suing or defending in formâ pauperis, they ought in general to be dives and not pauper costs. But the existing practice of the taxing-masters, whose costs are awarded simpliciter to a party suing or defending in formâ pauperis, is to tax them as pauper costs only; and therefore, where it is intended that the party should have dives costs, the decree or order ought to contain a special direction to that effect. *Rubery* v. *Morris*, 1 Macn. & G. 413; 1 H. & Tw. 400; 16 Sim. 481; 18 L. J., Ch. 444; 12 Jur. 689.

The plaintiff had obtained an order to dismiss his bill as against a pauper defendant:—Held, that the defendant was entitled to dives costs. *S. C.*, 16 Sim. 433.

A pauper asking for costs of an abandoned motion is entitled to dives costs. *Mornington (Lady)* v. *Keane*, 24 L. J., Ch. 400; 3 Eq. R. 578; 3 W. R. 429.

When a pauper plaintiff obtains a decree for payment of money, it is to be drawn up on stamps as in a dives suit. *Hansard* v. *Kemeys*, 1 Jac. & Walk. 189.

A married woman filed a bill suing in formâ pauperis, under an order of the court, without a next friend, and obtained a decree. On an unsuccessful appeal, the appellant was ordered to pay to the plaintiff herself dives costs. *Wellesley* v. *Wellesley*, 1 De G. M. & G. 501; 21 L. J., Ch. 738.

One of the defendants was admitted to sue in formâ pauperis. The decree ordered generally that the costs of all parties should be taxed and paid out of the estate; the costs of the pauper defendant shall be taxed as dives costs. *Wallop* v. *Warburton*, 2 Cox, 409; 2 R. R. 89.

If a trustee defendant is in the situation of being sued in formâ pauperis, but is clearly entitled to his costs out of the estate, his costs will be ordered to be taxed as dives costs. *Ib.*, 411.

—— **Appeal—Irregularity.**]—Where a respondent suing in formâ pauperis has not appeared to an appeal until it is appointed for hearing, he may still, by leave of the house of lords, lodge his printed cases, and, at the same time, be heard at the bar in support of the decree, but although he has a clear case on the merits, and the appeal is dismissed, he will not be allowed his costs. *Gordon* v. *Clyne*, 6 Cl. & F. 539.

—— **Costs of Witnesses.**]—A pauper opposed a will which was pronounced against on the grounds of incapacity and undue influence:—Held, that the pauper was entitled to the costs incurred in producing his witnesses. *Powell* v. *Scantlebury*, 1 Jur. (N.S.) 95.

The rule requiring that the costs of witnesses be actually paid before the allowance of them, on taxation, applies to a plaintiff suing in formâ pauperis. *Freeman* v. *Rasher*, 6 D. & L. 517; 18 L. J., Q. B. 105; 13 Jur. 427.

Liability for Costs incurred before Order.]—A pauper is liable to costs, precedent to his admission to sue as such. *Anon.*, Mos. 66.

A party admitted to sue in formâ pauperis after the commencement of a suit, may be attached for nonpayment of costs, which have been previously ordered to be paid in that suit, without being first dispaupered. *Davenport* v. *Davenport*, 1 Ph. 124; 11 L. J., Ch. 325; 6 Jur. 633.

A plaintiff obtained an order to sue in formâ pauperis, but before it was served the defendant gave a notice to dismiss the bill for want of prosecution. The plaintiff then served the defendant with his order to sue in formâ pauperis, and filed a replication. The defendant having brought on the motion for the purpose of getting the costs of it:—Held, that he was entitled to such costs, as the order to sue in formâ pauperis only took effect from the time of service. *Smith* v. *Pawson*, 2 De G. & Sm. 490; 17 L. J., Ch. 454; 12 Jur. 819.

Where a defendant does not at the first, but does at the latter, stage of the suit defend in formâ pauperis, the court, should the merits so require, will direct him to pay the costs up to the time when he became a pauper. *Prince Albert* v. *Strange*, 13 Jur. 507.

A plaintiff, who had obtained an order to sue in formâ pauperis:—Held, to be liable to pay dives costs, he not having served the order on the defendant. *Ballard* v. *Catling*, 2 Keen, 606; 7 L. J., Ch. 186.

Where the order for leave to sue in formâ pauperis has not been served, and is not rendered inoperative by any subsequent step in the cause, it is in the discretion of the court, either to give costs to the pauper, or to order him to pay them, as the case may be. *Church* v. *Marsh*, 2 Hare, 654; 13 L. J., Ch. 12; 8 Jur. 54.

Payment of Money to Pauper for Costs.]—In *Hinckley* v. *Appleby* (cited 2 Cox, 409), defendant was ordered to pay a pauper plaintiff 50*l.*, on account of her property without prejudice, and plaintiff, afterwards obtaining a decree, was allowed her costs, which were taxed as dives costs in the usual manner. And in *Jones* v. *Coxeter* (2 Atk. 399), it being suggested that plaintiff would not be able, on account of her poverty, to carry on the cause, unless defendant were directed to pay something to her in the meantime, Lord Hardwicke ordered the costs, decreed to be paid to plaintiff, to be taxed, and paid to her by defendant, to enable her to go on with the cause. See also *Dickenson* v. *Mavie*, Dick. 582; *Tillotson* v. *Hargreaves*, 4 Madd. 172.

Where a pauper claimed as heir-at-law against a will and deed which were disputed, and the bill had been retained, with liberty to bring an action, the tenants were ordered to pay plaintiff 150*l.*, to enable him to go to trial. *Perishal* v. *Squire*, Dick. 31; Beam. Costs 379, inserted from the Register Book, from which it appears that this indulgence was extended also to one of the defendants.

Solicitor's Lien.]—When a pauper obtains a decree for debt and costs, his solicitor has a lien on the sum recovered for dives costs, though the fund is deficient for payment of the plaintiff's demand. *Quin* v. *Boukin*, 2 Hog. 240.

Committal.]—A pauper is liable to be committed for filing an improper bill. *Pearson* v. *Belchier*, 4 Ves. 630.

A pauper in contempt, is like any other suitor in contempt, and cannot be discharged unless he pays dives costs. *Murphy* v. *Oldis*, 2 Moll. 475.

This court, either by virtue of its general jurisdiction, or under statute 11 Geo. 4 & 1 Will. 4, c. 36, r. 17, has power to discharge a pauper

defendant out of custody without compelling him to pay costs incurred previously to the order to defend in formâ pauperis. *Bennett* v. *Chudleigh*, 2 Y. & Coll. C. C. 164 ; 7 Jur. 166.

A motion to discharge pauper defendants, under 23 & 24 Vict. c. 149, the plaintiffs appeared and consented to an order, but applied for costs to be paid out of the Suitors' Fund. The court refused the application. *Ward* v. *Woodcock*, 5 L. T. 816—L. C.

On motion on behalf of a pauper in contempt, that he may be discharged from custody, the court has no authority, under the Courts of Justice (Salaries and Funds) Act, 1869, 32 & 33 Vict. c. 91, to order the costs of the plaintiff, upon his own application, to be provided for by the Treasury. *Hall* v. *Hall*, 40 L. J., Ch. 236 ; L. R. 11 Eq. 290 ; 23 L. T. 837 ; 19 W. R. 467.

3. Dispaupering.

Order must be entered.]—An order, allowing a plaintiff to sue in formâ pauperis, must be made a rule of court before the court will entertain a motion to discharge it. *Hawes* v. *Johnson*, 1 Y. & J. 10.

On what Grounds.]—If a plaintiff has been guilty of repeated defaults in not proceeding to trial, he may be dispaupered, and ordered to pay the costs of the day by the same rule. *Bedwell* v. *Coulstring*, 1 B. C. Rep. 97 ; 3 D. & L. 767.

Where a pauper gave notice of trial, and, on the second day of the assizes, withdrew his record, on the ground of its requiring amendment, the court dispaupered him. *Faur* or *Facer* v. *French*, 5 D. P. C. 554 ; W. W. & D. 195.

A plaintiff in ejectment suing in formâ pauperis will be dispaupered in case of vexatious delay. *Doe* d. *Leppingwell* v. *Trussell*, 6 East, 505 ; 2 Smith, 676 ; 8 R. R. 518.

Pauper plaintiffs who had been guilty of vexatious conduct in the suit, ordered to be dispaupered. *Wagner* v. *Mears*, 3 Sim. 127.

Improper and vexatious conduct in a former suit, or a subscription, though liable to be impeached as maintenance, no ground for dispaupering. *Corbett* v. *Corbett*, 16 Ves. 407.

Circumstances under which a plaintiff, appearing to be conducting his suit in a vexatious manner, will be dispaupered. *Daintree* v. *Haynes*, 12 Jur. 594.

Semble, that a pauper plaintiff or defendant may be dispaupered for vexatious conduct in the suit. *Perry* v. *Walker*, 1 Coll. 229 ; 8 Jur. 680.

A libellous handbill published by the bankrupt against the assignees and the solicitor to the commission, is not a sufficient ground for discharging an order which allowed the bankrupt to petition in formâ pauperis. *Morland, Ex parte*, 3 Deac. & C. 248.

When arbitration is proposed in a pauper cause, if the pauper refuses, he will be dispaupered. *Supple* v. ——, 2 Moll. 345.

A party admitted to sue in formâ pauperis being executor and residuary legatee, ordered, upon becoming insolvent, to be dispaupered on the ground of his then suing only in his representative capacity. *Oldfield* v. *Cobbett*, 2 Beav. 444 ; 10 L. J., Ch. 232 ; 5 Jur. 115.

A surgeon was admitted a pauper, and swore that he had no patients or income. The court refused to dispauper him on the allegation of the adverse party, that he was capable of earning an income. *Spratt* v. *Spratt*, 5 W. R. 323.

Where it appeared, from the affidavits in answer to an application to dispauper the defendant, that many facts were not denied, and that he had improperly obtained the order, or was putting on a fraudulent appearance of credit, the court discharged the order with costs. *Romilly* v. *Grint*, 2 Beav. 186 ; 9 L. J., Ch. 109.

An order dispaupering the plaintiff, obtained on affidavit of service on his solicitor at his office, discharged, but without costs, on the ground of a misnomer of the solicitor in the notice of motion. *Moody* v. *Hebberd*, 17 L. J., Ch. 24 ; 11 Jur. 941.

i. Third Parties.

Intervention by.]—A stranger to an action injuriously affected through any judgment suffered by default may intervene in one of two ways. He may either obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made ; and he may thereupon, in the defendant's name, apply to have the judgment set aside on terms. Or he may take out a summons in his own name at chambers, to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty to defend the action on terms. Per cur. *Jacques* v. *Harrison*, 53 L. J., Q. B. 137 ; 12 Q. B. D. 165 ; 50 L. T. 246 ; 32 W. R. 471—C. A.

Notice claiming Contribution or Indemnity.]—*See* post, col. 229.

j. Persons having Conduct of Proceedings.

General Rule.]—The general rule that where two actions have been commenced for the administration of the same estate, the conduct of the proceedings will be given to the plaintiff in the first action, although the decree in the second has been obtained first, applies to actions commenced in the palatine court of Lancaster, as well as to those commenced in the High Court of Justice. *Swire, In re, Mellor* v. *Swire*, 21 Ch. D. 647 ; 46 L. T. 437 ; 30 W. R. 525.

—— **Application of—Special Circumstances.**]—In considering whether the rule ought to be applied, the court will have regard to the special circumstances, and will take into account the amount of the interest of the plaintiff in the first action, and his object in bringing his action. The fact of a plaintiff, being a stranger to the family, who had bought up the reversionary interests of some of the residuary legatees, held not a sufficient reason for not giving him the conduct of the proceedings, although his purchase of some of the shares was disputed on the ground of inadequacy of consideration and undue influence. *Ib.*

Where three actions had been commenced for the administration of the same estate, the court (notwithstanding the general rule that the plaintiff in the first action is entitled to the conduct of the proceedings), ordered the three actions to be consolidated, and gave the conduct of the future proceeding in the consolidated causes to the plaintiff in the second action, on the ground that the parties thereto were the persons chiefly interested, by whom the costs would have to be borne, and, consequently, to

whose advantage it would be to keep down the expenses. *Prime's Estate, In re*, 48 L. T. 208.

A judgment creditor of the defendant brought an action in the court of the county palatine of Lancaster, to obtain a declaration that he had a charge upon certain lands of the defendant, comprised in a certain deed of settlement, and to carry into effect the trusts of the settlement. He obtained judgment for a declaration on his charge, and for administration, inquiries and a receiver. Afterwards one of the beneficiaries under the settlement brought an action in the high court to carry into effect the trusts of the settlement, and charging the trustees with a breach of trust. Judgment was obtained, and inquiries directed, including one as to the breach of trust:—Held, that the plaintiff in the palatine action was not a stranger to the action in the high court, and was entitled to the conduct of that action; and he undertaking to add the inquiry as to the breach of trust to the inquiry in the palatine action, the court stayed all proceedings in the action in the high court. *Townsend* v. *Townsend*, 23 Ch. D. 100; 48 L. T. 694; 31 W. R. 735.

A creditor of a partnership firm brought an administration action against the executor of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the executor, and obtained judgment:—Held, on an application by the plaintiff in the first action for the conduct of the proceedings in the second action, that a joint creditor of a firm could not maintain a simple action for the administration of the estate of a deceased partner, and therefore that the first action was not properly constituted. The application of the plaintiff was consequently refused. *McRae, In re, Forster* v. *Davis*, 53 L. J., Ch. 1132; 25 Ch. D. 16; 49 L. T. 544; 32 W. R. 304.

In a question as to the carriage of a decree for a sale in two suits, where the solicitor in the first had taken an assignment of a charge, prior to the plaintiffs, and it was in that cause reported at 1,800*l.*, but in the second cause at 900*l.* (which was explained by a difference in the accounts decreed):—Held, that the solicitor in the first cause having, by the assignment, an interest different from the plaintiffs, the carriage of the decree should be given to the plaintiffs in the second suit. *Keons* v. *Magawly*, 7 Ir. Eq. R. 603.

Conduct of suit given, on motion, to one of two co-plaintiffs, the other not appearing to have any interest. *Rowlinson* v. *Hallifax*, 2 Sim. & S. 27.

Decree in one Suit obtained.]—Two suits were instituted to administer the same estate. The plaintiff in the first suit was not a party to the second. A decree having been obtained in the second suit, the proceedings in the first suit were stayed. The conduct of the cause was given to the plaintiff in the first suit. *Belcher* v. *Belcher*, 6 N. R. 314; 13 W. R. 913.

Two suits for the administration of the same will were instituted on behalf of an infant; the bill in the second suit being filed after a decree had been made in the first suit, but before it had been drawn up. All the parties to the first suit were represented by the same solicitor, and the next friend was that solicitor's clerk:—Held, in the absence of evidence against the character or conduct of the next friend, that there was no ground for disturbing the decree. *Lloyd* v. *Davies*, 3 N. R. 700; 10 L. T. 182.

Two suits were instituted in consecutive months on behalf of the same infant plaintiffs for the administration of the same estate: a decree was obtained by consent in the later suit, and an order subsequently made staying proceedings in the earlier suit: the solicitors for the plaintiffs in the later suit were the London agents of the solicitors of the defendant in both suits:—Held, that the later suit ought not to have been instituted, and the conduct of the later suit was given to the next friend who had instituted the earlier suit. *Frost* v. *Ward*, 3 N. R. 348; 9 L. T. 668; 12 W. R. 285—L.JJ.

Co-plaintiffs disagreeing.]—When one of two co-plaintiffs refuses to concur in the appointment of a solicitor, there being no solicitor on the record, the proper course is for the remaining plaintiff to apply in chambers for the sole conduct of the cause on a summons taken out in person against the refusing plaintiff only; and a motion to strike out the name of the refusing party as plaintiff, and make him a defendant, will be refused. *Butlin* v. *Arnold*, 1 Hem. & M. 715; 3 N. R. 687; 10 L. T. 95; 12 W. R. 571.

Transfer to other Party.]—The master has jurisdiction, under the 147th General Order, to transfer the carriage of a decree from a plaintiff, who, through want of interest, is unwilling to proceed. *Biddulph* v. *Fitzgerald*, Sau. & Sc. 434.

Plaintiff's solicitor neglecting to proceed under the decree, will be ordered in default to lodge the decree and order of reference with his six clerk, and then party applying to be at liberty to proceed instead of plaintiff. *Charitable Bequests Commissioners* v. *Walsh*, 2 Moll. 382.

Where the plaintiff omitted to prosecute an order upon a claim:—Held, that the court might give a defendant leave to sue out writs of summons to bring before the master the parties required by the terms of the order. *Turnbull* v. *Warne*, 2 De G. M. & G. 281.

Costs of Inquiries.]—Where a party, who eventually proved not to be entitled to property, the subject of the suit, claimed to be entitled, and was entrusted by the court with the conduct of inquiries in respect thereof:—Held, on the principle of the 23 & 24 Vict. c. 127, s. 28, that he ought to be paid his costs of the inquiries out of the estate. *Best* v. *Stonehewer*, 1 W. R. 419.

Duty to protect Interests.]—When one of several cestuis que trustent institutes a suit for relief in respect of a breach of trust, he is bound, in the conduct of the suit, to take care of the interests of the others as well as of his own. *Williams* v. *Powell*, 2 Ph. 329.

Matter of Discretion.]—An order giving a party the conduct of proceedings is a matter entirely within the discretion of the judge. *Dowbiggin* v. *Trotter*, 20 W. R. 1024.

k. Other Points.

Disagreement of Co-plaintiffs.]—Where one of two co-plaintiffs refuses to concur in the appointment of a solicitor, there being no solicitor on the record, the proper course is for the remaining plaintiff to apply for the sole conduct of the cause on a summons taken out in person against the refusing plaintiff only. *Butlin* v. *Arnold*, 1

Hem. & M. 715; 3 N. R. 687; 10 L. T. 95; 12 W. R. 571.

Co-plaintiffs must act together, and cannot take inconsistent proceedings. One of several co-plaintiffs moved for liberty to take a state of facts into the master's office, and proceed thereon apart from the rest. The motion was refused with costs. *Wedderburn* v. *Wedderburn*, 17 Beav. 158.

Nominal Plaintiff.]—A party carrying on a suit in the name of another, under a power of attorney, is bound by the acts of the nominal plaintiff, so far as not to be able to have them set aside by petition in the suit; but he must file a supplemental bill; and that, though the defendant knew at the time that the plaintiff was but nominally so. *Pentland* v. *Quarrington*, 3 Myl. & C. 249.

Proceeding against some Defendants only.]—The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each:—Held, irregular. *Pepper* v. *Whalley*, 1 Bing. (N.C.) 71; 2 D. P. C. 821.

Upon a writ against several, the plaintiff may declare against one only; but if he declares against any other afterwards, he will be irregular. *Caldwell* v. *Blake*, 2 C. M. & R. 249; 3 D. P. C. 656; 1 Gale, 157; 4 L. J., Ex. 200. S. P., *Carson* v. *Dowding*, 4 D. P. C. 297; 1 H. & W. 507.

Nominal Defendant — Indemnity against Costs.]—Where the defendant in an action had agreed, in consideration of an indemnity against costs, to allow a third party to defend the action in his name, and had in pursuance of that agreement given to such third party's solicitor a retainer to act in the defence of the "action and any appeals therefrom":—Held, that the indemnity appearing to be undoubtedly sufficient, the nominal defendant had no right to withdraw the retainer so as to prevent, or otherwise to interfere with, an appeal in his name to the house of lords. Injunction granted to restrain him from so doing. Whether, if the sufficiency of the indemnity had been doubtful, the result would have been the same, quære. *Montforts* v. *Marsden*, 64 L. J., Ch. 52; [1895] 1 Ch. 11; 12 R. 193; 71 L. T. 620—C. A.

Amendment—Change of Character.] — The court being asked to convert an action against the lords of the admiralty for an injunction in respect of alleged trespass into a maintainable action, by giving the plaintiffs leave to amend the writ by suing the lords individually and adding as parties the servants of the admiralty who were the trespassers, refused such leave and dismissed the action, but without prejudice to any action maintainable by the plaintiffs. *Raleigh* v. *Goschen*, 67 L. J., Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90.

III. JOINDER OF CAUSES OF ACTION.

a. In ordinary Cases, 121.
b. In Actions for Recovery of Land, 123.
c. In Actions against Executors, &c., 125.

a. IN ORDINARY CASES.

See R. S. C., Ord. XVIII.

Same Plaintiffs—Slander—Same Defendants.]—The plaintiffs, a mother and daughter, brought an action for slander against the defendants, a husband and wife. The statement of claim alleged several distinct slanders, some of one plaintiff, some of the other:—Held, that these were two separate actions, that the plaintiffs were improperly joined, that they must elect which plaintiff would proceed, and that so much of the statement of claim as related to the other plaintiff must be struck out. *Sandes* v. *Wildsmith*, 62 L. J., Q. B. 404; [1893] 1 Q. B. 771; 67 L. T. 387.

One by Plaintiff alone—Other by Plaintiff and others.]—In an action two causes of action were joined, the one by K. alone, and the other by K. as a shareholder in a company, with certain other persons being "all the other shareholders" against the same defendant:—Held, that such causes of action were wrongly joined. *Kelso* v. *Goldsmid*, 53 J. P. 200.

Unconnected Claims against several Defendants.]—To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (except as far as it is historically connected with it as one matter in the transaction) is not contemplated by Ord. XVIII. r. 1, which authorises the joinder not of several actions against distinct persons, but of several causes of action. *Burstall* v. *Beyfus*, 53 L. J., Ch. 565; 26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418—C. A.

Inconsistent or Embarrassing Claims.]—A plaintiff alleged in his statement of claim that he had been induced by the misrepresentations of the defendant to enter into an agreement for partnership with him. He also alleged that he, the plaintiff, had carried out the agreement on his part, but that the defendant refused to continue to carry it out on his. He then claimed that the agreement might be declared void, or, in the alternative, that the partnership might be dissolved, and the accounts taken and the assets realised. The defendant moved for an order confining the plaintiff's action to one or other of the causes of action in respect of which he sought relief:—Held that the motion must be refused, as there was nothing inconsistent either in the relief claimed or in the allegations in the statement. *Bagot* v. *Easton*, 47 L. J., Ch. 225; 7 Ch. D. 1; 37 L. T. 369; 26 W. R. 66—C. A.

A claim in which the vendor of goods and the indorsees of a bill given by the purchaser to the vendor for the price jointly sue the purchaser to recover the price, and also upon the dishonoured bill, is embarrassing, and may therefore be struck out. *Smith* v. *Richardson*, 48 L. J., C. P. 140; 4 C. P. D. 112; 40 L. T. 256; 27 W. R. 230.

Where two distinct trust funds have been so mixed together by the trustees of them that neither fund can be dealt with separately, a bill is not multifarious which relates to both funds, but prays relief only in respect of one of them. *Margetts* v. *Perks*, 10 L. T. 85; 12 W. R. 517.

Antagonistic Cases.] — Semble, antagonistic cases cannot be combined by co-plaintiffs in an action, as, for example, where the claim of one plaintiff is founded upon a case which can only succeed if the case of the other co-plaintiff fails. *Att.-Gen.* v. *Durham (Earl)*, 46 L. T. 16.

b. In Actions for Recovery of Land.

Application for Leave to Join.]—An application for leave to join another action with an action for the recovery of land must be made before the writ is issued. *Pilcher, In re, Pilcher* v. *Hinds*, 48 L. J., Ch. 587; 11 Ch. D. 905; 40 L. T. 832; 27 W. R. 789—C. A.

Where another action had been joined with an action for the recovery of land without leave, the court refused to grant leave to continue the action in that form although the defendants had appeared. *Ib.*

Issue joined—Action set down—Counter-claim for Recovery of Land.]—In an action for specific performance of an agreement to grant a lease and build a house, issue had been joined, the pleadings shewed no real dispute between the parties, and the action had been set down for trial. The plaintiff had taken possession under the agreement:—Held, that leave ought not to be given to the defendant to amend his counter-claim by adding thereto a claim for recovery of the land agreed to be let. *Clark* v. *Wray*, 55 L. J., Ch. 119; 31 Ch. D. 68; 53 L. T. 485; 34 W. R. 69.

What are Actions for Recovery of Land.]—An action to establish title to land is an action for the recovery of land so as to require the leave of the court for its joinder with another cause of action. *Whetstone* v. *Dewis*, 45 L. J., Ch. 49; 1 Ch. D. 99; 33 L. T. 501; 24 W. R. 93.

An action "to establish title to land," not claiming possession, is not an action "for the recovery of land," so as to require the leave of the court, under Rules of the Supreme Court, r. 2 of Ord. XVII., for its joinder with another cause of action. *Whetstone* v. *Dewis* (1 Ch. D. 99) not followed. *Gledhill* v. *Hunter*, 49 L. J., Ch. 333; 14 Ch. D. 492; 42 L. T. 392; 28 W. R. 530.

Where the writ was indorsed for declaration of title, declaration that a lease was granted under a mistake, recovery of rents and profits, and a receiver, and the statement of claim asked also for possession:—Held, that this was an action for recovery of land and nothing else, and that there was no joinder of any cause of action which required the leave of the court. *Ib.* Cp. *Norwich Corporation* v. *Brown*, 48 L. T. 898.

A foreclosure action is not an action for the recovery of land within the meaning of the Rules of Court, 1875, Ord. XVII. r. 2. *Tawell* v. *Slate Co.*, 3 Ch. D. 629.

A claim for a declaration that a mortgage is invalid, and for possession on that footing, may be joined with an alternative claim to redeem the mortgage if valid, without any leave under Ord. XVIII. r. 2. *Hunt* v. *Worsfold*, 65 L. J., Ch. 548; [1896] 2 Ch. 224; 74 L. T. 456; 44 W. R. 461.

Applies to Counter-claim.]—The provision of r. 2 of Ord. XVII., that no cause of action, except those specified in that rule, shall, unless by leave of the court, be joined with an action for the recovery of land, applies to a counter-claim as well as to an original action. *Compton* or *Comton* v. *Preston*, 51 L. J., Ch. 680; 21 Ch. D. 138; 47 L. T. 122; 30 W. R. 563.

Injunction not a Separate Cause of Action.]—A purchaser of real property brought an action claiming quiet possession of the property purchased, and an injunction to restrain the defendant from interfering with such possession:—Held, that the claim for an injunction was not a separate cause of action, and could be joined with that for possession without the leave of the court. *Kendrick* v. *Roberts*, 46 L. T. 59; 30 W. R. 365.

A writ was issued claiming recovery of possession of premises; and also an injunction to restrain nuisance contrary to the provisions of the lease, and damages. Leave of the court had not been obtained for the joinder of the causes of action:—Held, that the writ was good in form, for though a perpetual injunction might be relief inconsistent with the terms of Ord. XVIII. r. 2, yet an interlocutory injunction was within the terms of the rule, being a substitute for damages which might be assessed for the continuing breach between the issue of the writ and the trial. *Read* v. *Wotton*, 62 L. J., Ch. 481; [1893] 2 Ch. 171; 3 R. 374; 68 L. T. 209; 41 W. R. 556.

What Claims will be allowed to be Joined.]—An action for the administration of personal estate may be joined with an action to establish title to real estate where the plaintiff claims both estates under a common gift in the same will. *Whetstone* v. *Dewis*, 45 L. J., Ch. 49; 1 Ch. D. 99; 33 L. T. 501; 24 W. R. 93.

Leave will be given to join with an action for the recovery of land an action for the recovery or delivery up of a deed relating to the land; also for the recovery of personal estate comprised in the same instrument. *Cook* v. *Enchmarch*, 45 L. J., Ch. 504; 2 Ch. D. 111; 24 W. R. 293.

In an action by the heir-at-law, who was also one of the next of kin of an intestate, against the administratrix, who was in possession of the intestate's real estate, leave was given to join a claim for the recovery of the land, and a claim for the administration of the estate. *Kitching* v. *Kitching*, 24 W. R. 901.

Leave was given to join, with an action for the recovery of land, a claim for a receiver. *Allen* v. *Kennet*, 24 W. R. 845.

Where an agreement for a tenancy had failed and the plaintiff brought an action for recovery of the land, and the defendant, who had entered into possession of the land, set up the agreement as a defence; on summons brought by the plaintiff for leave to amend the indorsement on the writ by claiming a valuation which he alleged that the defendant had agreed to pay on entering into possession of the land, but had not paid:—Held, that the plaintiff had a right to claim the valuation under the agreement as an alternative, in case he failed in recovering the land, and that the amendment should be allowed. *Rushbrooke* v. *Farley*, 54 L. J., Ch. 1079; 52 L. T. 572; 33 W. R. 557. See also *Clark* v. *Wray*, supra.

A mortgage was created of certain land by A., who subsequently went into liquidation. The trustee in the liquidation sold the equity of redemption to B. An action was brought by the mortgagee against B. for foreclosure. The security was insufficient, and it was necessary to obtain possession as soon as possible. On demanding possession, however, the mortgagee found that A. was in possession and refused to go out. The mortgagee asked for leave to amend the writ in the action by adding the name of A.

as a defendant, and by including, as part of the relief sought, a claim for recovery of possession of the mortgaged property:—Held, that the leave could not be granted. *Sutcliffe* v. *Wood*, 53 L. J., Ch. 970; 50 L. T. 705.

A declaration contained counts for double rent, and for use and occupation. The court refused a rule to strike out one of the two counts. *Thornton* v. *Whitehead*, 1 M. & W. 14; 4 D. P. C. 747; 1 Gale, 359; 1 Tyr. & G. 313; 5 L. J., Ex. 113.

Irregularity—Appearance—"Fresh Step" in the Proceedings.]—Ord. LXX. r. 2, does not prevent a defendant who has appeared to a writ ex facie irregular under Ord. XVIII. r. 2, from applying to stay proceedings. *Mulckern* v. *Doerks* (53 L. J., Q. B. 526) not followed. *Hunt* v. *Worsfold*, 65 L. J., Ch. 548; [1896] 2 Ch. 224; 74 L. T. 456; 44 W. R. 461.

—— **Objection by Defence.**]—The plaintiff, without obtaining leave of the court, joined a claim for recovery of land with other claims. By his statement of claim he altered his claim for relief by omitting the claim for recovery of land. The defendant by his defence raised the objection that the writ of summons was issued without leave of the court:—Held, that the defence ought not to be struck out as embarrassing. *Wilmott* v. *Freehold House Property Co.*, 51 L. T. 552—C. A.

Semble, that such an objection is properly pleaded in the defence, that the plaintiff cannot cure the irregularity in his writ by omitting his claim for recovery of land from his statement of claim, that to cure the irregularity the writ of summons must be amended, and that such amendment cannot be made without the consent of the defendant. *Ib.*

c. IN ACTIONS AGAINST EXECUTORS, &C.

In what Cases.]—Semble, that Ord. XVIII. r. 5, refers to a case where the plaintiff's personal claim is in respect of the assets of the testator as such. *Johnson* v. *Burges*, 47 L. J., Ch. 552.

Where a plaintiff sues in her own right, a defendant will not be allowed to set up, by way of counter-claim, a claim against the plaintiff as executrix. *Macdonald* v. *Carington*, 48 L. J., C. P. 179; 4 C. P. D. 28; 39 L. T. 426; 27 W. R. 153.

In an action against executors a cause of action in respect of a tort committed by them in the lifetime of the testator cannot be joined with a claim on a contract made with the testator. *Whitworth* v. *Darbishire*, 5 R. 198; 68 L. T. 216; 41 W. R. 317.

Time for taking Objection.]—An action was commenced against a trustee and the executors of his deceased co-trustee for the administration of the estate of a testatrix. The plaintiffs subsequently amended their statement of claim without the leave of the court, and asked that one of the executors of the deceased trustee might be ordered to give up possession of a certain inn belonging to the trust estate. It was pleaded by the defence and urged at the trial that this pleading was irregular, as joining two causes of action without leave:—Held, that the defendant should have applied at once to have the pleadings set right, and the objection was now untenable. *Derbon, In re*, *Derbon* v. *Collis*, 58 L. T. 519; 36 W. R. 667.

IV. WRIT OF SUMMONS.

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a. FORM AND CONTENTS OF, &C.

1. Teste, Date and Title.

See R. S. C., 1883, Ord. II. s. 8.

Teste.]—A writ of summons was issued complying in all respects with the requisites prescribed by the General Orders of the High Court, with the exception of an inaccuracy in the teste, the omission being the name of the Lord Chancellor: the words "witnessed Lord High Chancellor" were attached, but not the name "Hardinge Stanley, Baron Halsbury":—Held, that the writ so issued was good. *McNay* v. *Alt*, 66 L. T. 832.

A writ will not be set aside because the christian name of the chief justice is misstated therein. *Folkard* v. *Fitzstubbs*, 1 F. & F. 376.

A copy tested on a Sunday, and service thereof (the writ being correctly tested), are merely irregular and waived by laches. *Corrall* v. *Foulkes*, 5 D. & L. 590; 2 B. C. Rep. 262.

—— **Amendment of.**]—*See* post, col. 141.

Date.]—If a defective writ is resealed, it ought to be dated of the day of resealing. *Knight* v. *Warren*, 7 D. P. C. 663.

A writ dated on a Sunday is a nullity, and the objection is not waived by lapse of time. *Hanson* v. *Shackelton*, 4 D. P. C. 48; 1 H. & W. 342.

A mistake in the year in the teste, of the copy of a writ, the writ itself being right, is a mere irregularity, which is waived if the defendant does not come to the court before the time for entering an appearance has elapsed. *Edwards* v. *Collins*, 5 D. P. C. 227; 2 H. & W. 299.

The court has no power to alter the date of a writ of summons. *Clark* v. *Smith*, 2 H. & N. 753; 27 L. J., Ex. 155.

Where such an alteration is made by a judge, in order to prevent the operation of the Statute of Limitations, the defendant does not waive the objection by appearing to the writ after notice. *Ib.*

—— **Amendment of.**]—*See* post, col. 142.

Title.]—The writ of summons in an action for administration ought to be intitled in the matter of the estate. *Eyre* v. *Cox*, 24 W. R. 317.

2. Names and Description of Parties.

Names of Plaintiffs.]—If a name on the face of the writ is naught or uncertain, the writ is bad. *Walker* v. *Parkins*, 2 D. & L. 982; 14 L. J., Q. B. 214; 9 Jur. 665.

A variation in the spelling of a plaintiff's name in a single letter between the writ and the subsequent proceedings is immaterial. *Leatherbarrow* v. *Ward*, 5 Jur. 388.

The plaintiffs sued by the name of "The National Bank of St. Charles"; the name given by the charter of the King of Spain was "The Bank of St. Charles":—Held, no variance, the bank being in fact a national one. *Bank of St. Charles* v. *De Bernales*, 1 Car. & P. 569; R. & M. 190. S. P., *Alivon* v. *Furnival*, 1 C. M. & R. 277, 296; 4 Tyr. 751; 3 L. J., Ex. 241.

Plaintiff's Address.]—The provisions of Ord. IV. r. 1, of the Rules of the Supreme Court, 1883, that the address of the plaintiff shall be indorsed upon the writ of summons, require that the address of the plaintiff's residence shall appear upon the writ, and are not satisfied by an indorsement of the address of his place of business. *Stoy* v. *Rees*, 59 L. J., Q. B. 310; 24 Q. B. D. 748; 63 L. T. 49; 38 W. R. 683—C. A.

In a writ of summons it is necessary to state truly the residence of the plaintiff; the business address of the plaintiff not being enough. *Karpeles* v. *Friedlander*, 53 J. P. 264.

Names of Defendants.]—Every writ must have the full title of the action, including the names of all the defendants, but need only be directed to the particular defendant or defendants intended to be served therewith. *Traill* v. *Porter*, 1 L. R., Ir. 60.

A writ described a defendant as "The Right Honorable Baron Suffield," his true description being "The Right Honorable Edward Vernon Harbord, Baron Suffield." The court refused to set aside the writ on that ground. *Wells* v. *Suffield (Lord)*, 5 D. & L. 177; 4 C. B. 750.

The describing in the writ and declaration a party to the suit by the initials only of his christian name must be treated as a misnomer. *Rust* v. *Kennedy*, 4 M. & W. 586; 7 D. P. C. 199; 8 L. J., Ex. 85; 3 Jur. 198.

A writ was set aside where the defendant's christian name was omitted and an initial only was given. *Murphy* v. *Cheevers*, 15 W. R. 1061.

Where a party has been sued by a wrong name, the title of the cause cannot be changed until an appearance has been entered by him stating his true one. *Borthwick* v. *Ravenscroft*, 5 M. & W. 31; 7 D. P. C. 393; 8 L. J., Ex. 160; 3 Jur. 703.

A variance in the name of a defendant in a writ, where it is idem sonans with the real name is not material. *Webb* v. *Lawrence*, 2 D. P. C. 81; 1 C. & M. 806; 3 Tyr. 906.

Addition of Defendants.]—No addition having been given to the defendant, either in the recital of the writ or in the subsequent part of the declaration, the defendant pleaded the Statute of Additions (1 Hen. 5) in abatement, and prayed judgment of the declaration:—The court held the plea a nullity, and gave leave to the plaintiff to sign judgment. *Gray* v. *Sidneff*, 3 Bos. & P. 395.

The addition of a defendant need not be inserted. It is sufficient to state his residence. *Morris* v. *Smith*, 2 C. M. & R. 120; 3 D. P. C. 698; 5 Tyr. 523; 1 Gale, 103; 4 L. J., Ex. 184.

Address of Defendant.]—A writ in Form 1, App. A, Part 1, to the Rules of 1883, with the exception that no address was inserted as that of the defendants, was issued against a foreign company having no place of business in this country, and was served at Dover on one of the managing directors of the company, who was temporarily there on business connected with the company:—Held, that the writ must be set aside. *The W. A. Scholten*, 57 L. J., P. 4; 13 P. D. 8; 58 L. T. 91; 36 W. R. 559; 6 Asp. M. C. 244.

A writ issued against a foreign company having no office within the United Kingdom must be in the Form No. 5 or No. 6 of Part 1 of the Appendix to the Rules of 1883. A writ in Form No. 2 issued against a foreign company having no offices in the United Kingdom will be set aside. *Sedgwick* v. *Yedras Mining Co.*, 35 W. R. 780.

—— **Sufficiency of.**]—A writ of summons is not invalidated by the fact that the defendant is described in it as of a place in England, which he periodically visits in the course of his business, although his sole residence and place of business are out of the jurisdiction. *Smith* v. *Hammond*, 65 L. J., Q. B. 477; [1896] 1 Q. B. 571; 74 L. T. 590; 44 W. R. 478.

Description of Defendant's Residence.]—Newcastle-upon-Tyne, in the county of Northumberland, is a sufficient description of a defendant's residence in a writ since 2 & 3 Will. 4, c. 64, by schedule O 26 of which Newcastle-upon-Tyne is made to comprise certain townships that are not within the town and county of the town. *Rippon* v. *Dawson*, 5 Bing. (N.C.) 206; 7 Scott, 145; 7 D. P. C. 247; 1 Arn. 470; 8 L. J., C. P. 102.

It is sufficient if a defendant is described as of his last supposed residence. *Norman* v. *Winter*, 7 Scott, 251; 5 Bing. (N.C.) 279; 7 D. P. C. 304; 1 Arn. 511; 8 L. J., C. P. 179; 3 Jur. 147.

"Yorkshire" is a good description of a defendant's residence, although he resides at the town of Kingston-upon-Hull, if he may be supposed to be resident in the former county. *Jelks* v. *Fry*, 3 D. P. C. 37.

If a writ is directed to A. B., of S. in the county of Kent, "but to be heard of at Peele's Coffee-house in the city of London," service of a copy in London is bad, and will be set aside, though the latter part of the description is correct. *Simpson* v. *Ramsay*, D. & M. 396; 5 Q. B. 371; 13 L. J., Q. B. 91; 8 Jur. 288.

The copy of a writ served on a defendant, described him as "J. S., late of B., in the county of York, but now in the castle in the city of York":—Held, insufficient, it not being shewn that there was not a place called "the castle" within the city of York, though it was sworn that York Castle is in the county of York. *Balman* v. *Sharp*, 16 M. & W. 93; 16 L. J., Ex. 39.

So, where a writ described a defendant as "Edmund Garbett, of Wellington, in the county of Salop, but now of Middlesex." *Downes* v.

Garbett, 2 D. & L. 945; 14 L. J., Q. B. 216; 9 Jur. 690.

A defendant's place of residence described as of "Clapham, in the county of Surrey," is sufficient. *Toulmin* v. *Bowditch*, 2 B. C. Rep. 89; 11 Jur. 455.

The description of the residence of a defendant in a writ is immaterial. *Windham* v. *Fenwick*, 11 M. & W. 102; 2 D. (N.S.) 783; 12 L. J., Ex. 183: 7 Jur. 401.

Where a defendant was described as "R. S., of the city of London":—Held, that the description was insufficient, although it was stated in the affidavits that some time before the issuing of the writ he had abandoned his house, and had no regular place of abode. *Cotton* v. *Sawyer*, 10 M. & W. 328; 2 D. (N.S.) 310; 11 L. J., Ex. 397.

The 2 Will. 4, c. 39, s. 1, required the actual or supposed residence of a defendant to be stated in every writ of summons; but, in either case, the place must be correctly described. *King* v. *Hopkins*, 2 D. & L. 637; 13 M. & W. 685; 14 L. J., Ex. 106; 9 Jur. 286.

The omission of the name of the county in the description in the writ of the defendant's residence was merely an irregularity which was waived, if not made the subject of an application within a reasonable time. *Ross* v. *Gandell*, 6 D. & L. 698; 7 C. B. 766; 18 L. J., C. P. 224; 13 Jur. 941.

In a writ against a company completely registered under 7 & 8 Vict. c. 110, it is irregular to describe their supposed address as "now or late carrying on business in King William-street, in the city of London." *Pilbrow* v. *Pilbrow*, 4 Railw. Cas. 683; 3 C. B. 730; 4 D. & L. 450; 16 L. J., C. P. 11.

3. Duration of Writ.

By Rules of Supreme Court, 1883, Ord. VIII. r. 1, *no original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply for leave to renew the writ.*

A defendant who has been served with a writ after it has expired should apply to set aside the writ, and not treat it as a nullity. *Hamp* v. *Warren*, 3 D. & L. 758; 10 M. & W. 103; 12 L. J., Ex. 215; 7 Jur. 156.

4. Indorsements.

Claim against Separate Estate of Married Woman—Husband sued as Trustee of Separate Estate.]—Where a plaintiff seeks to enforce a claim against the separate estate of a married woman, the writ should be indorsed with a claim for that relief. Where the husband is sued as trustee of separate estate of his wife vested in him, as well as in his personal capacity, the claim against him as such trustee should be made expressly in the indorsement. *Dixon* v. *Dougan*, 8 L. R., Ir. 211.

Claim for Injunction.]—A plaintiff should indorse his writ with a claim for an injunction or for a receiver when the obtaining of either is a substantial object of his action. *Colebourne* v. *Colchourne*, 45 L. J., Ch. 749; 1 Ch. D. 690; 24 W. R. 235.

Claim for Interest—Demand in Writing.]—A claim for interest made in a writ for the first time is not such a demand in writing of interest as is required by s. 28 of 3 & 4 Will. 4, c. 42. *Rhymney Ry.* v. *Rhymney Iron Co.*, 59 L. J., Q. B. 414; 25 Q. B. D. 146; 63 L. T. 407; 38 W. R. 764—C. A.

Amount of Debt and Costs.]—Reg. Gen. of H. T. 2 Will. 4, r. 11, which required the indorsement, upon process for payment of a debt, of the amount of debt and costs, did not apply to actions qui tam for penalties. *Hobbs* v. *Young*, 2 D. & L. 474; 14 L. J., Q. B. 4; 8 Jur. 1029.

In an action to recover penalties for bribery under the Municipal Corporations Act, it was not necessary to indorse the amount of debt and costs upon the writ. *Daives* v. *Lloyd*, 3 M. & W. 69; 6 D. P. C. 173; 7 L. J., Ex. 38; 1 Jur. 897.

A stack of hay was sold by the defendant to the plaintiff, with liberty to keep it on the defendant's premises for a certain time; the hay was seized as a distress before the expiration of that time:—Held, that it was not necessary to indorse on the writ sued out for the above cause of action the amount of debt and costs. *Perry* v. *Patchett*, 1 C. M. & R. 87; 2 D. P. C. 667; 4 Tyr. 925; 3 L. J., Ex. 353.

An indorsement, that "the plaintiff claims 50*l.* for debt, and — *l.* for costs," is irregular. *Trusloce* v. *Whitechurch*, 1 Scott (N.R.) 415; 1 Man. & G. 426; 8 D. P. C. 837; 4 Jur. 722.

An indorsement claiming a sum for principal and interest should either state the amount of the interest or the date from which it is to be calculated. *Bardell* v. *Miller*, 6 C. B. 733; 6 D. & L. 721; 18 L. J., C. P. 249. *Fitzgerald* v. *Ecans* or *Curtis*, 6 Scott (N.R.) 55; 5 Man. & G. 207; 2 D. (N.S.) 916; 12 L. J., C. P. 138. *Chapman* v. *Becke*, 3 D. & L. 350; 15 L. J., Q. B. 5; 9 Jur. 1012.

The following indorsement is insufficient:—"The plaintiff claims 102*l.* 5*s.*, and interest thereon, at 5 per cent. per annum, from the 31st of March (not saying what March) till payment, for debt, and 2*l.* 2*s.* for costs." *Ib.*

But it is not necessary to state the rate of interest demanded; it will be intended to be 5*l.* per cent. *Allen* v. *Bussey*, 4 D. & L. 430.

A writ indorsed in this form, "The plaintiff claims 50*l.* for debt, with interest from the 25th of May last, and 2*l.* for costs," is regular. *Sealey* v. *Hearne*, 3 D. P. C. 196.

The objection is waived by omitting to apply to set aside the writ in time. *Fryer* v. *Smith*, 1 D. & L. 75; 6 Scott (N.R.) 658; 12 L. J., C. P. 223; 7 Jur. 973.

The form of indorsement prescribed by the Summary Procedure on the Bills of Exchange Act (18 & 19 Vict. c. 67) may be altered by inserting a claim for costs, and the blank before "days" may be filled up with "four." *Robinson* v. *Cotterell*, 11 Ex. 476; 25 L. J., Ex. 3; 1 Jur. (N.S.) 1113; 4 W. R. 127.

Indorsement of Costs.]—It is irregular to indorse a writ of summons with an excessive amount for costs, and such a writ will be set aside. *Jacobs* v. *Monck*, 12 L. R., Ir. 373.

5. Special Indorsement.

Equivalent to a Pleading.]—A writ specially indorsed in lieu of a statement of claim is

equivalent to an ordinary pleading. *Robertson* v. *Howard*, 47 L. J., C. P. 480; 3 C. P. D. 280; 38 L. T. 715; 26 W. R. 683.

Sufficiency of.]—A writ is specially indorsed within the meaning of Ord. III. r. 6 and Ord. XIV. if the indorsement gives sufficiently specific particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is. *Bickers* v. *Speight*, infra.

—— **Common Law Procedure Act, 1852, s. 25.**] — Per Bramwell, L.J.: — Any special indorsement that would have been sufficient under the Common Law Procedure Act, 1852, s. 25, is sufficient under r. 6 of Ord. III. and Ord. XIV. *Aston* v. *Hurwitz*, 41 L. T. 521—C. A.

Any indorsement which would have been a sufficient special indorsement within the meaning of s. 25 of the Common Law Procedure Act, 1852, to entitle the plaintiff to judgment, under s. 27, in default of appearance, is a special indorsement within the meaning of Ord. III. r. 6 and Ord. XIV. *Bickers* v. *Speight*, 58 L. J., Q. B. 42; 22 Q. B. D. 7; 37 W. R. 139.

Claim for Injunction and Money received.]—The plaintiff, a barrister, issued his writ on the 30th August, 1879, indorsed for an injunction and other relief, and for payment of a sum of 1,000*l.* alleged to have been received by the defendant as his solicitor. On the 12th December, 1879, the plaintiff was ordered to deliver a statement of claim on or before the 12th January. On the 10th January he delivered a statement of claim in person; on the 12th his solicitor, who had been that day served with a summons to set aside the statement of claim for irregularity, delivered a notice that his claim appeared by the indorsement on the writ in the form prescribed by Ord. XXI. r. 4:—Held, that the writ was not specially indorsed within the meaning of Ord. III. r. 6, and the statement of claim delivered by the solicitor must be set aside. *Yeatman* v. *Snow*, 42 L. T. 502; 28 W. R. 574.

Part Liquidated — Part Unliquidated.] — A writ cannot be specially indorsed for a demand partly liquidated and partly unliquidated. *Rogers* v. *Hunt*, 10 Ex. 474; 3 C. L. R. 174; 24 L. J., Ex. 23; 18 Jur. 1084; 3 W. R. 72.

A writ which claims payment of a sum which is in dispute, besides payment of a liquidated demand, is not specially indorsed so as to entitle the plaintiff to judgment under Ord. XIV. for the liquidated demand. *Clarke* v. *Berger*, 36 W. R. 809.

Condition Precedent—No Averment of Performance.] — The defendant agreed to pay 210*l.* to the plaintiff if he would deliver to the defendant's husband certain bills of exchange. In an action to recover the 210*l.*:—Held, that, although the writ did not aver performance of the condition precedent, it was a good special indorsement. *Bradley* v. *Chamberlyn*, [1893] 1 Q. B. 439; 5 R. 185; 68 L. T. 413; 41 W. R. 300.

Assignment of Debt.]—A writ of summons was indorsed with a claim for a sum of money due from the defendant to the plaintiff under an assignment; this assignment, the terms of which were set out, was a request to the defendant to pay to the plaintiff a sum due from the defendant to the assignor under an I.O.U. of a certain date, signed by the defendant. The indorsement did not give any particulars of the circumstances under which the I.O.U. was originally given:—Held, that the indorsement was a sufficient special indorsement under Ord. III. r. 6. *Bickers* v. *Speight*, 58 L. J., Q. B. 42; 22 Q. B. D. 7; 37 W. R. 139.

The indorsement upon a writ of summons stated that the plaintiff's claim was for a certain sum for principal and interest due to him as the assignee of a mortgage debt due from the defendant, but did not state that express notice in writing of the assignment was given to the defendant:—Held, that the writ was specially indorsed within Ord. III. r. 6, and that, therefore, leave could be given to enter final judgment under Ord. XIV. r. 1. *Satchwell* v. *Clarke*, 66 L. T. 641—C. A.

Bills of Exchange—Expenses of Noting.]—In an action on a bill of exchange the writ was specially indorsed with a claim for the amount of the bill, and also 2*s.* 9*d.* "bank charges":—Held, that by the expression "bank charges" expenses of noting were referred to, and that as expenses of noting are made liquidated damages by s. 57 of the Bills of Exchange Act, 1882, this was a good special indorsement. *Dando* v. *Boden*, 62 L. J., Q. B. 339; [1893] 1 Q. B. 318; 5 R. 183; 68 L. T. 90; 41 W. R. 285. S. P., *Lawrence* v. *Willcocks*, 61 L. J., Q. B. 519; [1892] 1 Q. B. 696; 66 L. T. 511; 40 W. R. 419—C. A.

Where the special indorsement on a writ of summons included an item for the expenses of noting a dishonoured promissory note, the court refused to give the plaintiff liberty to sign final judgment under Ord. XIII. r. 1. *Skelly* v. *McKenna*, 6 L. R., Ir. 24.

A plaintiff cannot sign final judgment for want of appearing to a writ specially indorsed, claiming the expense of noting and commission on a bill of exchange, the same being unliquidated damages. *Rogers* v. *Hunt*, 10 Ex. 474; 3 C. L. R. 174; 24 L. J., Ex. 23; 18 Jur. 1084; 3 W. R. 72.

The particulars in the indorsement of a writ for the balance claimed to be due on an account stated included a sum of 2*s.* 6*d.* for noting a dishonoured bill of exchange. On a motion to mark final judgment under Ord. XIII. r. 1, it appeared that the defendant had made an arrangement in bankruptcy for a composition, payable by instalments and secured by his promissory notes, and that the amount ascertained as due to the plaintiffs in the arrangement matter included the charge for noting mentioned in the indorsement on the writ; the composition payable to them being calculated accordingly, and composition notes passed to them for it, and the notes not being paid, the plaintiffs now sued for their original debt:—Held, that the plaintiffs' claim was for a liquidated demand, and that they were entitled to mark judgment. *Northern Bank* v. *Chapman*, 6 L. R., Ir. 25.

A special indorsement on a writ of summons claimed 49*l.*, and stated the particulars with dates and amounts to be "to goods"; it also contained an item for "bank draft returned," which was entered both on the debit and credit side of the particulars, and it further contained a sum for "notary charges on same":—Held, a sufficient indorsement under r. 6 of Ord. III. to entitle the plaintiff to sign judgment under r. 1 of Ord. XIV. *Smith* v. *Wilson*, 49 L. J.,

C. P. 96; 5 C. P. D. 25; 41 L. T. 433; 28 W. R. 57—C. A.

Cheque—Notice of Dishonour.]—To maintain an application for final judgment under Ord. XIV. r. 1, upon a writ indorsed with a claim for the amount of a dishonoured cheque, the indorsement must contain an allegation that the drawer of the cheque has received notice of dishonour. *Frühauf* v. *Grosvenor*, 61 L. J., Q. B. 717; 67 L. T. 350.

—— **Copy set out without more.**] —In an action by the indorsee for value of a cheque against drawer and indorser, the mere setting out of a copy of the cheque without more does not constitute a special indorsement of the writ under Ord. XIV. r. 1. *Northern Bank* v. *Bailey*, [1894] 2 Ir. R. 18.

Promissory Note — Default in Payment of Instalments.]—A writ indorsed with the date, the amount, and the making of a joint and several promissory note, with a statement that it was "payable by certain instalments in respect whereof default has been made," and particulars merely showing the balance still due, is not a specially indorsed writ within Ord. III. r. 6. *Manchester Advance and Discount Co.* v. *Walton*, 62 L. J., Q. B. 158; 5 R. 147; 68 L. T. 167.

Bond—Penalty.]—The indorsement on a writ claimed 500*l.* as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 26*l.* during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid:—Held, that the plaintiff was not entitled to proceed under Ord. XIV. r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Will. 3, c. 11, s. 8, and Ord. XIII. r. 14. *Tuther* v. *Caralampi*, 21 Q. B. D. 414; 59 L. T. 141; 37 W. R. 94; 52 J. P. 616.

Contribution—Bills of Exchange.]—A writ in an action was indorsed as follows: "The plaintiff's claim is 399*l.* 9*s.* 7*d.*, the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiff were jointly liable, and which bills and notes have been taken up by the plaintiff":—Held, that this indorsement did not constitute a good "special indorsement" under Ord. III. r. 6, and therefore the judgment which had been signed under Ord. XIV. r. 1, must be set aside. *Walker* v. *Hicks*, 47 L. J., Q. B. 27; 3 Q. B. D. 8; 37 L. T. 529; 26 W. R. 113.

Covenant in Mortgage Deed.]—In an action for principal and interest due under a covenant in a mortgage deed, the mere fact that a receiver has been appointed by and in the interests of the plaintiff does not prevent the writ from being specially indorsed under Ord. III. r. 6. But if there is a doubt as to the amount which has come into the hands of the receiver, the case is not one in which summary judgment ought to be given under Ord. XIV. *Poulett* v. *Hill* ([1893] 1 Ch. 277) considered. *Lynde* v. *Waitham*, 64 L. J., Q. B. 762; [1895] 2 Q. B. 180; 14 R. 489; 72 L. T. 857—C. A.

Where a receiver has been appointed in a foreclosure action to receive the rents and profits of the property mortgaged, a writ cannot be specially indorsed with a liquidated sum under Ord. III. r. 6, to recover any mortgage interest unpaid. *Poulett* v. *Hill*, 62 L. J., Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503—C. A.

A writ which claims foreclosure or sale and a receiver, besides payment of the debt and interest, is not specially indorsed so as to entitle the plaintiff to summary judgment on the claim for debt and interest. *Imbert-Terry* v. *Carver*, 56 L. J., Ch. 716; 34 Ch. D. 506; 56 L. T. 91; 35 W. R. 328.

Debt or Liquidated Demand.] — A writ indorsed to recover money paid by the plaintiff as the defendant's surety for his use and at his request, is specially indorsed, being a liquidated demand. *Borland* v. *Curry*, 4 L. R., Ir. 273—C. A.

A writ indorsed for a balance due on a building contract and a sum for extra work is specially indorsed. *Meade* v. *Mouillott*, 4 L. R., Ir. 207.

A claim for work and labour upon a quantum meruit is a debt or liquidated demand in money within Ord. III. *Stephenson* v. *Weir*, 4 L. R., Ir. 369.

—— **Arrears of Alimony pendente lite.**]—A claim for arrears of alimony pendente lite is not a claim for a "debt or liquidated demand in money" within the meaning of Ord. III. r. 6 so as to entitle the plaintiff to apply for judgment under Ord. XIV. r. 1. *Bailey* v. *Bailey*, 13 Q. B. D. 855—C. A. Affirming 53 L. J., Q. B. 583; 50 L. T. 722; 32 W. R. 856.

Goods sold.]—To obtain leave to sign final judgment under Ord. XIV., the writ must be specially indorsed with the particulars of the plaintiff's claim; and where the action is for the price of goods sold, the dates and amounts of the consignments or supplies should be given. *Parpaite Frères* v. *Dickinson*, 38 L. T. 178; 26 W. R. 479.

A writ was indorsed, "The plaintiff's claim is 2,323*l.* 4*s.* 7*d.*, being 75 per cent. of the invoice price of goods supplied by the plaintiffs to the defendant under an agreement entered into between the plaintiffs and the defendant, in or about March, 1877, whereby the plaintiffs agreed to consign the goods to the defendant for further consignment by the defendant to Australia, the 75 per cent. to be paid by the defendant in cash on receipt of the goods":—Held, that this was insufficient to enable the plaintiffs to sign final judgment under Ord. XIV. *Ib.*

A claim for a named sum as the balance due for the price of goods sold with particulars as to dates and the goods sold is a special indorsement. *McCawley* v. *Campbell*, 4 L. R., Ir. 410—C. A.

Shares sold.]—A writ was indorsed with a claim for a certain sum, being balance due for money paid for purchase of shares between certain dates, "an account of which has been rendered":—Held, a sufficient special indorsement under r. 6 of Ord. III. to empower the court to allow judgment to be signed, or give leave to defend under Ord. XIV. *Aston* v. *Hurwitz*, 41 L. T. 521—C. A.

"Liquidated Demand in Money with Interest arising on a Trust."]—The plaintiffs, by their

writ, claimed to have a legacy of 2,750*l.*, bequeathed by the will of John Brogden, "which has remained unpaid by reason of a breach of trust on the part of the defendants, and which is now due from them upon a trust," paid by the defendants, with interest thereon at 4 per cent. per annum, from the 12th of April, 1885. John Brogden, by his will, directed that interest at the rate of 4 per cent. per annum should be paid on this legacy from the death of his wife; she died on the 12th of April, 1885. On an application by the plaintiffs for leave to enter final judgment against the defendants for the amount of principal and interest due in respect of the legacy:—Held, that the writ claimed the interest payable under the will, and did not claim interest by way of damages arising out of a breach of trust; and, therefore, that the writ was specially indorsed within the meaning of Ord. III. r. 6. *Hamilton* v. *Brogden*, 60 L. J., Ch. 88.

Interest—Contract express or implied.]—Ord. XIV. applies only when the defendant has appeared to a writ specially indorsed under Ord. III. r. 6, which applies only to cases in which the demand which the plaintiff seeks to recover, whether or not it be made up in part of interest, is a liquidated demand—in other words, to cases in which the interest is payable under a contract, and not by way of unliquidated damages. A claim for interest cannot be made on a specially indorsed writ, if it is not due by contract, or if a definite sum is not claimed in respect thereof. A statement of claim which demands interest but shews no liability to pay it is, upon general principles, defective, as it is important that a man who is to be proceeded against summarily for judgment should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risks of calculation. A claim for interest from the date of the writ till payment or judgment is an essential part of the indorsement of the writ, although it comes after the signature of the plaintiff's solicitors, at the foot of the plaintiff's particulars; and such a claim for interest, to be capable of being made on a specially indorsed writ, must comply with the requirements of a special indorsement—namely, first, it must shew that the interest is claimed as being due by contract; secondly, a definite sum is claimed. *Sheba Gold Mining Co.* v. *Trubshawe*, 61 L. J., Q. B. 219; [1892] 1 Q. B. 674; 66 L. T. 228; 40 W. R. 381.

A specially indorsed writ, in which interest is claimed on the sum sought to be recovered, is bad unless the indorsement itself shews on the face of it that such interest is payable either by statute or under any contract between the parties. *Gold Ores Reduction Co.* v. *Parr*, 61 L. J., Q. B. 522; [1892] 2 Q. B. 14; 66 L. T. 687; 40 W. R. 526.

A writ of summons in which an unspecified sum for interest up to the date of payment or of signing judgment is claimed is not a specially indorsed writ within the meaning of Ord. III. r. 6, so as to make the provisions of Ord. XIV. r. 1 applicable. *Wilks* v. *Wood*, 61 L. J., Q. B. 516; [1892] 1 Q. B. 684; 66 L. T. 520; 40 W. R. 418—C. A.

The indorsees of promissory notes, which had not been met, issued a writ indorsed with the sum due and interest up to date; and added the following claim: "The plaintiff also claims interest at the rate of 5 per cent. per annum till payment or judgment":—Held, that under s. 57 of the Bills of Exchange Act, 1882, interest down to judgment was properly claimed as liquidated damages; that the writ was, therefore, specially indorsed within Ord. III. r. 6, and the plaintiff was entitled to sign final judgment upon it under Ord. XIV. r. 1. *London and Universal Bank* v. *Clancarty*, 61 L. J., Q. B. 225; [1892] 1 Q. B. 689; 66 L. T. 798; 40 W. R. 411.

The holders of a bill of exchange which had been dishonoured issued a writ against the acceptor, indorsed with the sum due, and claiming the expenses of noting and interest thereon to date, and also interest on the principal sum at 5 per cent. from the date of the writ until payment:—Held, that under s. 57 of the Bills of Exchange Act, 1882, these sums respectively were properly claimed as liquidated damages; that the writ was, therefore, specially indorsed within the meaning of Ord. III. r. 6, and the plaintiff was entitled to sign final judgment upon it under Ord. XIV. r. 1. *Lawrence* v. *Willcocks*, 61 L. J., Q. B. 519; [1892] 1 Q. B. 696; 66 L. T. 511: 40 W. R. 419—C. A.

The interest which the 15 & 16 Vict. c. 76, s. 25, allows to be specially indorsed on a writ of summons is interest due on a contract, express or implied, and not interest which a jury may award as unliquidated damages, either at common law or under 3 & 4 Will. 4, c. 42, s. 28. *Rodway* v. *Lucas*, 10 Ex. 667; 3 C. L. R. 615; 24 L. J., Ex. 155; 1 Jur. (N.S.) 311; 3 W. R. 212.

Judgment, Action on.]—When an action is brought on a judgment, the particulars of the claim may be indorsed on the writ, for it is a debt or a claim in the nature of a debt. *Hodsoll* v. *Baxter*, El. Bl. & El. 884; 28 L. J., Q. B. 61; 4 Jur. (N.S.) 556; 6 W. R. 686—Ex. Ch.

Rent—Sufficiency of Particulars.]—Where a plaintiff by his writ claimed rent in a personal action against several defendants, and gave particulars as to the lands, the gale-days, and amounts due, but omitted to state how the defendants' alleged liability arose:—Held, that the writ was not specially indorsed pursuant to Ord. III. r. 6, of the Rules of 1891. *Seaton* v. *Clarke*, 28 L. R., Ir. 514.

In a special indorsement of a writ under Ord. III. r. 6, it is essential that the dates at which the items mentioned in the particulars became payable should be set out. *Beaufort* v. *Ledwith*, [1894] 2 Ir. R. 16.

Action for Recovery of Land—Landlord and Tenant.]—In an action for the recovery of land by a landlord against a tenant, the writ of summons can be specially indorsed under Ord. III. r. 6 (F.), only when the plaintiff was party to the lease or agreement under which the hereditaments have been held, or when the defendant has paid rent to the plaintiff, thereby acknowledging his title, or when the defendant is otherwise estopped from denying the plaintiff's title. *Casey* v. *Hellyer*, 55 L. J., Q. B. 207; 17 Q. B. D. 97; 54 L. T. 103; 34 W. R. 337—C. A.

The relationship of landlord and tenant may be created by a mortgage-deed, and therefore, in an action for recovery of land by mortgagees from a mortgagor in possession under a mortgage deed creating a tenancy between them, the writ may be specially indorsed under Ord. III. r. 6,

(F.), so that Ord. XIV. will apply, and final judgment may be ordered. *Daubuz* v. *Lavington*, 53 L. J., Q. B. 283; 13 Q. B. D. 347; 51 L. T. 206; 32 W. R. 772.

A mortgage-deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default having been made, the mortgagee commenced an action for the recovery of the premises, and applied for judgment under Ord. XIV.:—Held, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Ord. III. r. 6 (F.), and the plaintiff was entitled to judgment. *Daubuz* v. *Lavington* (13 Q. B. D. 347) approved and followed. *Hall* v. *Comfort*, 56 L. J., Q. B. 185; 18 Q. B. D. 11; 55 L. T. 550; 35 W. R. 48

—— **Mortgagor and Mortgagee—Attornment Clause—Tenancy at Will.**]—Where a mortgagor is in possession of premises under a mortgage-deed containing a clause under which he attorns tenant from year to year to the mortgagees, but also containing a provision entitling the mortgagees at any time without previous notice to determine the tenancy which had been created, such tenancy is a tenancy at will which may be determined at any time without previous notice, and the mortgagees are entitled, in an action to recover the premises, to specially indorse the writ under Ord. III. r. 6 (F.), and apply for judgment under Ord. XIV., inasmuch as the claim to possession is not based on a forfeiture. *Arden* v. *Boyce* (63 L. J., Q. B. 338; [1894] 1 Q. B. 796) distinguished. *Kemp* v. *Lester*, 65 L. J., Q. B. 532; [1896] 2 Q. B. 162; 74 L. T. 268; 44 W. R. 453—C. A.

—— **Forfeiture Clause.**]—A writ of summons cannot be specially indorsed under Ord. III. r. 6 (F.), in an action by a landlord against a tenant to enforce a forfeiture clause in a lease, notwithstanding that the form of such clause is that, upon the breach occurring, the lessor may forthwith determine the term by notice to quit, and that the notice to quit has been given in accordance with the terms of the clause. *Arden* v. *Boyce*, 63 L. J., Q. B. 338; [1894] 1 Q. B. 796; 9 R. 372; 70 L. T. 480; 42 W. R. 354—C. A.

—— **Lease expired — Service of Defective Copy.**]—In an action by a lessor for the recovery of premises from lessees whose term had expired, the writ stated the date of making, length of term of the lease, and devolution to the defendant. The copy served upon the defendant, however, omitted to state the length of the term:—Held, that the writ was specially indorsed within Ord. III. r. 6. *Hammer* v. *Clifton*, [1894] 1 Q. B. 238; 10 R. 55; 42 W. R. 287.

—— **Mesne Profits—Indorsement explained by Affidavit.**]—Where a special indorsement of a writ is good in itself, it is not invalidated by a statement in the affidavit filed in support of an application for final judgment under Ord. XIV. *Southport Tramways Co.* v. *Gandy*, 66 L. J., Q. B. 532; [1897] 2 Q. B. 66; 76 L. T. 815; 45 W. R. 684—C. A.

Inasmuch as under s. 214 of the Common Law Procedure Act, 1852, the court has power in an ejectment action to give to the landlord mesne profits down to the time of the verdict, and the landlord's right to bring an action for mesne profits from the time of the verdict down to the day of delivery of possession is expressly reserved, there is jurisdiction on a writ specially indorsed with a claim for recovery of land and mesne profits to make an order giving the landlord possession of the land and mesne profits to be calculated up to the date of his obtaining possession. *Ib.*

Amendment of Indorsement.] — A material omission in a specially indorsed writ may be supplied by amendment without leave under Ord. XXVIII. r. 2, notwithstanding that a summons for judgment under Ord. XIV. is pending at the time; and if the indorsement on the writ is thereby rendered sufficient at the time of adjudication, an order may be made upon that summons. *Roberts* v. *Plant*, 64 L. J., Q. B. 347; [1895] 1 Q. B. 597; 14 R. 222; 72 L. T. 181; 43 W. R. 308—C. A.

The defendant appeared to a writ indorsed with a claim for a liquidated amount, and also with a claim for use and occupation of premises. The plaintiff applied by summons for final judgment under Ord. XIV. r. 1. At the hearing of the summons the defendant objected that the writ was not specially indorsed within Ord. III. r. 6, and the master adjourned it, giving the plaintiff leave to amend the indorsement by striking out the claim for use and occupation. A copy of the writ so amended was served, and upon the adjourned summons (there being no affidavit of merits) the master made an order for final judgment for the liquidated amount:—Held, that the defendant had not appeared to a writ specially indorsed under Ord. III. r. 6; the application for final judgment was improper; the amendment nunc pro tunc was improper; and the order for judgment was made without jurisdiction. *Gurney* v. *Small*, 60 L. J., Q. B. 774; [1891] 2 Q. B. 584; 65 L. T. 754. See *Paxton* v. *Baird*, 62 L. J., Q. B. 176; [1893] 1 Q. B. 139; 5 R. 129; 67 L. T. 623; 41 W. R. 88.

Where a writ of summons was indorsed with admittedly liquidated demands, and also with a small sum which the defendant alleged was in the nature of an unliquidated claim:—Held, that the court had power to amend the writ by striking out the amount of the alleged unliquidated demand, and to give final judgment under Ord. XIII. r. 1, for the balance. *Robinson* v. *Ralston*, 8 L. R., Ir. 26—C. A.

Form of Indorsement.] — A writ specially indorsed with a statement of claim need not have the word "delivered" nor the date of delivery at the end of such statement of claim. *Veale* v. *Automatic Boiler Feeder Co.*, 56 L. J., Q. B. 307; 18 Q. B. D. 631; 35 W. R. 454.

In order to enable the plaintiff to obtain final judgment, as on a specially indorsed writ, the indorsement of the plaintiff's claim on the writ must be headed with the words "Statement of Claim," and must be signed at the foot. *Cassidy* v. *M'Aloon*, 32 L. R., Ir. 368—C. A.

Defence, Time for Delivery of.]—The service of a writ specially indorsed under Ord. III. r. 6, is delivery of a statement of claim to the defendant within the meaning of Ord. XXI. r. 6, so that the defendant has ten days from the time limited for appearance within which to deliver

his defence. *Anlaby* v. *Prætorius*, 57 L. J., Q. B. 287; 20 Q. B. D. 764; 58 L. T. 671; 36 W. R. 487—C. A. *See* further, infra, PLEADING.

6. Disclosure by Solicitor and Plaintiffs.

R. S. C., 1883, Ord. VII. r. 1.

An order by a judge "that the plaintiff's attorney do forthwith declare in writing to the defendant's attorney or agent the profession, occupation or quality, and place of abode of the plaintiff, and that after five days all further proceedings be stayed until such delivery," is not a good order within s. 7 of 15 & 16 Vict. c. 76. *Malpas* v. *Mudd*, 3 H. & N. 246; 27 L. J., Ex. 367.

The order not being complied with, the court refused to attach the attorney for contempt, such order not being good under the statute, and if made under the common law jurisdiction of the courts it required to be made a rule of court. *Ib.*

In an action for penalties, where a description and address of the plaintiff had been given, in pretended compliance with a judge's order staying proceedings until the address and occupation were furnished, which, after verdict, was discovered to be false, and to have been given fraudulently, the court refused to stay or set aside the proceedings, there being no real prejudice to the defendant; but held, that the parties who were guilty of the fraud had committed a contempt of court, and might be punished for the offence. *Smith* v. *Bond*, 11 M. & W. 326; 1 D. & L. 287; 12 L. J., Ex. 343.

Semble, that a plaintiff who wilfully caused his attorney to deliver a false address, the attorney having been required by a judge's order under 2 Will. 4, c. 39, s. 17, to declare the place of the plaintiff's abode, was guilty of a contempt of court, and liable to be punished by attachment. *Smith* v. *Bond*, 13 M. & W. 594; 2 D. & L. 460; 14 L. J., Ex. 114; 9 Jur. 20.

After plea pleaded, the court refused to order particulars of the residence of the plaintiff to be furnished by her attorney where it appeared that the object of the application was to arrest her on a criminal charge. *Harris* v. *Holler*, 7 D. & L. 319; 19 L. J., Q. B. 62.

But it is no answer to an application for the address of the plaintiff that the defendant makes it for the purpose of enabling him to enforce against the plaintiff an attachment out of the Court of Chancery for non-payment of costs in a suit there. *Cox* v. *Bockett*, 18 C. B. (N.S.) 239; 34 L. J., C. P. 125; 11 Jur. (N.S.) 88; 11 L. T. 629.

In a joint action for a libel by three, the defendant may call on the attorney of one of them for an account of the residence or occupation of the others. *Worton* v. *Smith*, 6 Moore, 110.

So, in trespass for an assault, the court compelled the plaintiff to disclose his proper addition and place of residence to the defendants, his identity being material to their defence at the trial. *Johnson* v. *Birley*, 5 B. & Ald. 540; 1 D. & R. 174.

A plaintiff being called upon for his place of residence, gave "Peele's Coffee-house, Fleet-street":—Held, not sufficient, and proceedings were stayed till he gave a better place of residence. *Hodson* v. *Gamble*, 3 D. P. C. 174.

An attorney who gives a false residence of his client, without using proper means to ascertain whether it is correct or not, subjects himself to the costs which may be occasioned by moving for an attachment against him; but he is not liable to pay the costs of the action if he is bonâ fide unable, after proper inquiry, to give his client's residence. *Neale* v. *Holden*, 3 D. P. C. 493.

Where an infant sues by guardian, her attorney is bound, on motion, to give notice of the guardian's place of abode. *Tomlin* v. *Brookes*, 1 Wils. 246.

Where a defendant pleaded in abatement, that others were jointly liable with himself, and the plaintiff applied to the defendant's attorney to give the places of abode and additions of those persons, which he refused to do unless the action was discontinued:—Held, that if the defendant refused to deliver such particulars, the plea might be set aside. *Taylor* v. *Harris*, 4 B. & Ald. 93.

The court will not, after verdict, compel an attorney to discover his client's place of abode. *Hooper* v. *Harcourt*, 1 H. Bl. 534.

Communication when privileged.]—*See* EVIDENCE.

7. Solicitor's Name and Address.

What sufficient.]—A writ was indorsed, "This writ was issued by T. W. G., of Hereford, whose address for service is T. W. G., care of T. W. & Son, 11, Bedford-row, W. C.":—Held, a sufficient indorsement under Ord. IV. r. 3 a. *Smith* v. *Dobbin*, 47 L. J., Ex. 65; 3 Ex. D. 338; 37 L. T. 777—C. A.

Before 15 & 16 Vict. c. 76, s. 6, a writ was indorsed, "This writ was issued by A. and B., of, &c., agents for J. T., of the city of Exeter, of the county of Devon, the plaintiff within named." The court set aside the copy and the service for irregularity, as it did not appear to be issued either by the plaintiff in person or by an attorney for him. *Toby* v. *Hancock*, 4 D. & L. 385; 1 B. C. Rep. 207; 16 L. J., Q. B. 33.

An attorney suing in person may indorse the writ thus:—"This writ was issued in person by the within-named A. B., who resides at," &c., naming his place of business, though it is not the place where he sleeps. *Ablett* v. *Basham*, 5 El. & Bl. 1019; 25 L. J., Q. B. 239; 2 Jur. (N.S.) 285.

A writ indorsed with the name of the firm of the attorney used in carrying on the business is sufficient, though only one of them is alive and an attorney. *Hartley* v. *Rodenhurst*, 4 D. P. C. 748.

The county in which the attorney by whom the process is issued resides need not be stated in the indorsement, nor is it necessary that the indorsement should be dated. *Borler* or *Border* v. *Levi*, 1 Scott, 270; 3 D. P. C. 150; 1 Bing. (N.C.) 363; 4 L. J., C. P. 29. S. P., *Voulton* v. *Hall*, 4 M. & W. 583; 7 D. P. C. 175; 8 L. J., Ex. 147.

"No. 2, Clifford's Inn-passage, Fleet-street, in the city of London," without mentioning the parish, is a sufficient indorsement of the attorney's residence. *Arden* v. *Garry* or *Jones*, 2 Scott, 186; 4 D. P. C. 120; 1 Hodges, 197.

But "Southampton-buildings" is an insufficient description. *Rust* v. *Chine*, 3 D. P. C. 565.

Where the indorsement was, "This writ was issued by, &c., attorney for the said plaintiffs," instead of "attorney for the said A. B.":—Held, good. *Hennah* v. *Wyman*, 2 C., M. & R. 239; 3 D. P. C. 673; 1 Gale, 105; 5 Tyr. 792; 4 L. J., Ex. 200.

A writ indorsed "M. & Co., agents for S.," without specifying the christian names, is sufficient. *Pickman* v. *Collis*, 3 D. P. C. 429.

The residence of an attorney is sufficiently described by "Gray's Inn, London." *Engleheart* v. *Eyre*, 2 D. P. C. 145. S. P., *Jelks* v. *Fry*, 3 D. P. C. 37. *King* v. *Monkhouse*, 2 D. P. C. 221; 2 C. & M. 314; 4 Tyr. 234; 3 L. J., Ex. 35.

And the name of the attorney suing it out is sufficiently stated by indorsing the name of the firm to which he belongs. *Ib.*

An attorney suing out process in a cause in which he is plaintiff need not indorse thereon his name and place of abode. *Hamilton* v. *Jones*, 4 M. & P. 523; 8 L. J. (o.s.) C. P. 279.

8. Amendment of Writ.

Date of Teste.]—The plaintiffs in an action for goods supplied issued a specially indorsed writ against the defendant. The goods were supplied during and after the month of July, 1882. The copy of the writ served on the defendant was accurate in all respects except that in the teste the year was thus given: "one thousand eight hundred and eighty," instead of "eighty-two." In default of appearance the plaintiffs signed final judgment:—Held, that the mistake in the teste of the writ was a mere imperfection, and not a fatal error prejudicing the defendant, who therefore was not entitled to have the judgment against him set aside. *Wesson* v. *Stalker*, 47 L. T. 444.

Error in Teste.]—A writ of summons issued in an action corresponded in all respects with the form prescribed by the Judicature Act and General Orders, except that, although issued in 1882, it purported to be tested by the "Right Honourable Hugh M'Calmont, Earl Cairns, Lord High Chancellor of Great Britain":—Held, on motion to dismiss the action, that the inaccuracy must be considered as a clerical error which the judge had power under Ord. XXVII. r. 11, to set right by giving leave to amend. *Pleasants* v. *East Dereham Local Board*, 47 L. T. 439.

The teste of a writ, if irregular in naming a late chief baron, instead of an existing chief baron, might be amended, even after a rule to set it aside upon that ground. *Wakeling* v. *Watson*, 1 C. & J. 467; 1 Tyr. 377.

Jurisdiction—Ord. XIV.—Striking out Unliquidated Demand.]—*See* post, col. 216.

To introduce New Cause of Action.]—In amending a statement of claim without leave, under Ord. XXVI. r. 1, a plaintiff is not justified in adding a new and distinct cause of action uncovered by the indorsement of the writ of summons; and such an amendment is liable to be set aside. Where it becomes necessary to make an amendment of this nature, the plaintiff should first obtain leave (on notice to the defendant) to amend the writ of summons. *Large* v. *Large* (W. N. 1877, 198) and *Johnson* v. *Palmer* (4 C. P. D. 258) observed on. *Moore* v. *Alwill*, 8 L. R., Ir. 245.

Writ for Service out of Jurisdiction.]—Under Ord. XXVIII. the indorsement of a writ may be amended although the writ is for service out of the jurisdiction and has been so served, if the action will still be one in which leave to serve the writ out of the jurisdiction might be given. *Holland* v. *Leslie*, 63 L. J., Q. B. 679; [1894] 2 Q. B. 450; 9 R. 743; 71 L. T. 33; 42 W. R. 577—C. A.

Plaintiff's Name.]—Where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a corporate body, the court allowed the writ of summons, declaration, and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff, it appearing that by the law of the country the bank was entitled to sue in his name. *Banca Nazionale Sede di Torino* v. *Hamburger*, 2 H. & C. 330; 8 L. T. 548; 11 W. R. 1074.

When an action has been brought in the name of a person who was dead at the time the writ issued, the court has no power to amend the writ by substituting the name of his legal representative. *Clay* v. *Oxford*, 4 H. & C. 690; 36 L. J., Ex. 15; L. R. 2 Ex. 54; 12 Jur. (N.S.) 994; 15 L. T. 286; 15 W. R. 109.

Returnable on dies non.]—A writ returnable on a dies non was void, and could not be amended. *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

After Judgment.]—After judgment in a salvage action the court allowed an amendment of the indorsement on the writ by increasing the amount claimed therein. *The Dictator*, 61 L. J., P. 72; [1892] P. 64; 66 L. T. 863; 7 Asp. M. C. 175.

Where judgment in a foreclosure action has been pronounced, but has not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under Rules of Supreme Court, 1883, Ord. XVI. r. 11, to amend the writ and statement of claim by making the puisne mortgagees defendants. *Keith* v. *Butcher*, 53 L. J., Ch. 640; 25 Ch. D. 750; 50 L. T. 203; 32 W. R. 378.

Statute of Limitations.]—The plaintiff, suing as assignee of a debt, issued a writ for money lent without having given notice of the assignment to the defendant; and he afterwards applied to amend his writ by adding the assignor as a party to entitle him to sue. Between the date of the issue of the writ and the application to amend, the Statute of Limitations had barred the remedy, and a judge at chambers had given the plaintiff unconditional leave to amend the writ as of the date of its issue:—Held, that the plaintiff ought not to be allowed to make such amendment, as it would take away from the defendant a defence which had already accrued to him by virtue of the statute, and would change the substantial rights of the parties. *Hudson* v. *Fernyhough*, 61 L. T. 722.

Leave refused to amend the claim by increasing the amount in an action which had been dormant for some years, during which time the defendant had died, and the Statute of Limitations had run. *Pearce* v. *Preston*, 11 W. R. 35.

The court will not make an alteration in the date of the teste of a writ of summons which will have the effect of depriving the defendant of his defence under the Statute of Limitations. *Campbell* v. *Smart*, 5 C. B. 196; 17 L. J., C. P. 63; 11 Jur. 1018.

Nor alter the date of a writ of summons after it has been once issued, so as to save the Statute of Limitations, even in the case of a mistake. *Clark* v. *Smith*, 2 H. & N. 753; 27 L. J., Ex. 155; 6 W. R. 260.

The indorsement on a pluries writ, one of a set issued to prevent a claim being barred by the Statute of Limitations, and on a copy of it served, erroneously represented the date of the issue of the first writ. Afterwards the 15 & 16 Vict. c. 76 passed. The court, after the Statute of Limitations had run, amended the indorsement on the writ by virtue of 15 & 16 Vict. c. 76, s. 222, but declined to amend the indorsement on the copy served. *Cornish* v. *Hoekin*, 1 El. & Bl. 602; 22 L. J., Q. B. 142; 17 Jur. 1049; 1 W. R. 164.

Affidavit in Support—Cross-examination.]—A plaintiff had taken out a summons before the chief clerk for leave to amend his writ and statement of claim so as to introduce matters which had arisen subsequently to the issue of the writ:—Held, that no affidavit was necessary, and cross-examination by the defendant on such an affidavit was irregular. *Conybeare* v. *Lewis*, 44 L. T. 242; 29 W. R. 391.

Service of Amended Writ.]—An amended writ may be delivered to a defendant who has made default in appearance by filing it at the Central Office, personal service being unnecessary. *Hartley, In re, Nuttall* v. *Whittaker*, [1891] 2 Ch. 121; 64 L. T. 786; 39 W. R. 604.

A writ of summons amended under an order of court made in presence of both parties, the order being silent as to service, must be re-served on defendant, and a judgment marked without such re-service, and without any previous intimation to defendant of plaintiff's intention to amend, or to abstain from amending, under the order, was set aside. *Bryans* v. *Hughes*, 14 L. R., Ir. 62. See *The Cassiopeia*, 48 L. J., P. 39; 4 P. D. 188; 40 L. T. 869; 27 W. R. 703—C. A.

Before 15 & 16 Vict. c. 76.]—Since 3 & 4 Will. 4, c. 42, s. 11, a plaintiff who sues out a writ against a person by a wrong christian name is himself at liberty to correct the misnomer, and is not bound to enter the appearance and declare against the defendant by the name in which he originally sued him in the writ. *Hobson* v. *Wadsworth*, 8 D. P. C. 601; 4 Jur. 745.

Semble, that the 11th and 12th sections of the 3 & 4 Will. 4, c. 42, apply only to the case of a misnomer of a defendant. *Lindsey* v. *Wells*, 4 Scott, 471; 3 Bing. (N.C.) 77; 3 Hodges, 97; 5 D. P. C. 618; 6 L. J., C. P. 237.

The court would not permit a writ of summons to be amended unless it appeared that the plaintiff's remedy would otherwise be entirely lost. *Partridge* v. *Wallbank*, 5 D. P. C. 93; 1 M. & W. 316; 5 L. J., Ex. 167. S. P., *Eccles* v. *Cole*, 8 M. & W. 537; 1 D. (N.S.) 34; 10 L. J., Ex. 475.

A copy of a writ could not be amended after service, as the courts had no power over the copy. *Byfield* v. *Street*, 10 Bing. 227; 3 M. & Sc. 407; 2 L. J., C. P. 171.

A plaintiff could not alter his writ after service; and a notice not to appear to the copy of the writ first served did not cure the defect. *Glenns* v. *Wilks*, 4 D. P. C. 322.

There were only two cases in which a writ of summons was allowed to be amended: one where the Statute of Limitations would otherwise have operated as a bar; the other where there had been a clerical error in the writ. *Green* v. *Kettleby*, 8 D. P. C. 783; 6 M. & W. 731; 9 L. J., Ex. 228; 4 Jur. 725.

A writ of summons might be amended so as to render it conformable to the præcipe on which it was founded. *Kirk* v. *Dolby*, 8 D. P. C. 766; 6 M. & W. 636; 4 Jur. 610; 9 L. J., Ex. 223.

A writ and other proceedings against the inhabitants of the "hundred of S." were amended by inserting "borough of S." instead where the time for commencing a fresh action against them for felonious injury to property by rioters under 7 & 8 Geo. 4, c. 3, had expired. *Horton* v. *Stamford*, 2 D. P. C. 96; 1 C. & M. 773; 3 Tyr. 869; 2 L. J., Ex. 274.

Action on Bill of Exchange.]—A writ issued under the Bills of Exchange Act, 18 & 19 Vict. c. 67, in a case which was not within the act—the bill or note having become due and payable more than six months before—may, by virtue of s. 222 of the Common Law Procedure Act of 1852, be amended by turning it into a writ under the latter act. *Leigh* v. *Baker*, 2 C. B. (N.S.) 367; 26 L. J., C. P. 220; 3 Jur. (N.S.) 668; 5 W. R. 877.

A writ issued under the Bills of Exchange Act of 1855, by indorsee against maker of a note, omitted the maker's name in the copy of the note indorsed upon it. Upon motion by the defendant to set aside the copy of the writ and the service and all subsequent proceedings for this omission, the court ordered the writ and copy to be amended, and the service to stand good, the plaintiff undertaking to pay the costs of the application. *Knight* v. *Pocock*, 17 C. B. 177; 25 L. J., C. P. 31; 1 Jur. (N.S.) 1022; 4 W. R. 10.

9. Irregularity.

Time for Application to set aside.]—Where there appears to have been a delay of more than eight days before moving to set aside proceedings for irregularity, the defendant must clearly explain the delay, otherwise the presumption will be against him. *Herbert* v. *Darley*, 4 D. P. C. 726.

Where on the eighth day after the service of a copy of a writ, such eighth day being before the first day of term, an application was made in court to set aside the service, on the ground of irregularity:—Held, that the motion was regular, and that the defendant was not bound to have gone into chambers in the intervening period. *Day* v. *Holly*, 2 D. (N.S.) 974; 12 L. J., Q. B. 295; 7 Jur. 534.

An application to set aside a writ issued under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), for irregularity, is not too late if made within the time limited for obtaining an order to appear. *Robinson* v. *Cotterell*, 11 Ex. 476; 25 L. J., Ex. 3.

A writ was served, on the 17th of September, upon a British subject residing out of the jurisdiction of the court. On the 27th of October the plaintiff obtained an order for leave to proceed, and filed a declaration on the 28th charging the defendant with a breach of promise of marriage; but the affidavit upon which the order was obtained was not so framed as to bring the case within the statute:—Held, that, in order to take advantage of the irregularity, it was incumbent on the defendant to apply within a reasonable time, and that the irregularity was waived by taking the declaration out of the office. *Bayne* v. *Slack*, 3 C. B. (N.S.) 363; 27 L. J., C. P. 14; 4 Jur. (N.S.) 192; 6 W. R. 171.

A defendant seeking to set aside the service of a writ for irregularity, must apply within the time limited for appearance. *Child* v. *Marsh*,

3 M. & W. 433 ; 6 D. P. C. 576 ; 7 L. J., Ex. 197. S. P., *Crow* v. *Field*, 8 D. P. C. 231 ; *Patterson* v. *Busby*, 7 D. P. C. 868 ; 5 M. & W. 521 ; 9 L. J., Ex. 16.

A lapse of six days is not too great to preclude a motion for setting aside the copy of a writ for irregularity. *Smith* v. *Pennell*, 2 D. P. C. 654.

If, a plaintiff having served an irregular process, the defendant gives him notice of the irregularity, and that, if he proceeds thereon, the defendant will move to set aside the proceedings ; that is an exception to the ordinary rule, that the party applying to set aside irregular proceedings must do so before the other party has taken any further step in the cause. *Topping* v. *Fuge*, 5 Taunt. 330 ; 1 Marsh. 341.

It is an irregularity merely if a plaintiff proceeds to judgment and execution without any service of the writ ; and, therefore, an application to set aside the proceedings must be made within a reasonable time after the defendant has notice of them. *Holmes* v. *Russell*, 9 D. P. C. 487.

A writ was served on the 25th October. An application on the 3rd November, to set aside the service for irregularity (the 2nd being a Sunday), is out of time ; it should have been made on the 1st. *Tyler* v. *Green*, 3 D. P. C. 439.

A defendant irregularly served with process early in the vacation cannot wait until the ensuing term, but is bound to apply in the vacation to a judge, if he wishes to take advantage of the irregular service. *Cox* v. *Tulloch*, 1 C. & M. 531 ; 3 Tyr. 578 ; 2 D. P. C. 47 ; 2 L. J., Ex. 233.

Whether an application, made before a judge at chambers, to set aside process for irregularity is made early enough is a question for his discretion, and the court will not review his decision. *Tadman* v. *Wood*, 4 A. & E. 1011.

When Proceedings set aside.]—Where there is an objection in point of form, which applies as well to the writ as to the copy, the defendant cannot move to set aside the service of the writ only, but he must move to set aside both writ and copy. *Anon*, 1 D. P. C. 654.

There must be some irregularity in the service to warrant a motion to set aside the service only. *Ib.*

Where a writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity, the court discharged the rule. *Hesker* v. *Jarmaine*, 1 C. & M. 401 ; 3 Tyr. 381 ; 2 L. J., Ex. 166.

The fact that a person holds himself out on a card, published by himself, as carrying on business at 38, Watling Street, is primâ facie evidence that he is resident there, and the operation of s. 2 of 15 & 16 Vict. c. 76, is to give jurisdiction to the courts at Westminster to issue a writ of summons against him. *Naef* v. *Mutter*, 12 C. B. (N.S.) 816 ; 31 L. J., C. P. 357 ; 9 Jur. (N.S.) 384 ; 10 W. R. 758.

If such a writ has issued, and an order to proceed without personal service has been made, the defendant cannot set it aside, on the ground of his being resident out of the jurisdiction, without an affidavit, shewing definitively where he was residing when the writ was issued. *Ib.*

An affidavit in support of a motion to set aside service of an irregular writ, need not shew that the defendant has not been served with any regular process. *Patterson* v. *Busby*, 7 D. P. C. 868 ; 5 M. & W. 521 ; 9 L. J., Ex. 16. S. P., *Wintle* v. *Hogg*, 7 D. P. C. 623.

Where the copy served on the defendant is irregular, the application should be to set aside the service, or the copy and service ; an application to set aside the copy served is nugatory. *Hall* v. *Redington*, 5 M. & W. 605 ; 9 L. J., Ex. 100. S. P., *Crow* v. *Field*, 8 D. P. C. 231. *Geyde* v. *Bishop*, 2 Scott (N.R.) 203 ; 9 D. P. C. 57. *Truslove* v. *Whitechurch*, 1 Scott (N.R.) 415 ; 1 Man. & G. 426 ; 8 D. P. C. 837 ; 4 Jur. 722.

When the copy of a writ was indorsed "This writ was issued by A. B., of, &c., attorney for the said ——," without mentioning whom, the court set aside the copy and service for irregularity. *Ward* v. *Lloyd*, 9 D. P. C. 213.

The court refused to set aside the copy of a writ because the word "plaintiff" was used in the indorsement on the back of the writ, instead of his name. *Hannah* v. *Wyman*, 3 D. P. C. 673 ; 2 C. M. & R. 239 ; 1 Gale, 105 ; 4 L. J., Ex. 200.

When in the copy of the writ served on the defendant the letter "s" was omitted in the word "she":—Held, to be immaterial, as it could not mislead. *Sutton* v. *Burgess*, 1 C. M. & R. 770 ; 3 D. P. C. 489 ; 5 Tyr. 320 ; 1 Gale, 17 ; 4 L. J., Ex. 109.

A copy of a writ served upon a defendant, and not having the indorsement of the memorandum of the time of service, is irregular. *Day* v. *Holly*, 2 D. (N.S.) 974 ; 12 L. J., Q. B. 295 ; 7 Jur. 534. S. P., *Patterson* v. *Busby*, 5 M. & W. 521 ; 7 D. P. C. 868 ; 9 L. J., Ex. 16.

The court will not quash a writ on the ground of irregularity in its service. *Watson* v. *Stedman*, 1 Marsh. 9.

Where a party applied to a judge to set aside the copy of a writ for irregularity, who refused to interfere, a subsequent application to the court made more than eight days from the service, was held too late, the affidavit on which it was made not disclosing the fact of the previous application to the judge. *Goren* v. *Tute*, 7 M. & W. 142 ; 8 D. P. C. 868 ; 10 L. J., Ex. 61.

When there is an irregularity in the service of a writ, the defendant may apply for a rule in the alternative to set aside either the writ or the service. *Wills* v. *Dawson*, 2 D. (N.S.) 465 ; 12 L. J., Ex. 24 ; 6 Jur. 1068.

Where an incorrect copy of a writ was served, as if tested on a Sunday, but the writ itself was regular :— Held, that the defendant was not bound to treat the proceeding as a mere nullity, although the plaintiff had taken no subsequent steps, but might set aside the copy and service. *Corrall* v. *Foulkes*, 5 D. & L. 590; 2 B. C. Rep. 262.

It is not necessary that a party who has been served with a writ should state in his affidavit, to ground an application to set it aside, that he is the defendant in the cause. *Stevenson* v. *Thorne*, 13 M. & W. 149 ; 2 D. & L. 230 ; 13 L. J., Ex. 303 ; 8 Jur. 518.

A writ was issued in the form for a defendant resident, or supposed to reside, within the jurisdiction of the court, and an order was obtained enabling the plaintiff to proceed as if personal service had been effected. On an application to set aside the order, upon an affidavit that the defendant was residing out of the jurisdiction at the time the writ issued, and down to the time of swearing the affidavit :—Held, that the application was rightly made to set aside the order, and not the writ itself ; and, as the fact was that the defend nt was not within the jurisdiction, the proceedings subsequently to the writ must be set aside. *Hesketh* v. *Fleming*, 24 L. J., Q. B. 255 ; 1 Jur. (N.S.) 475 ; 3 W. R. 448.

See also cases post, col. 193.

Waiver of Defect.]—An appearance cures irregularity in process. *Anon.*, 1 Chit. 129 (*a*).

Appearance to a writ is a "fresh step" taken within the meaning of Ord. LXX. r. 2, and a writ which is irregular to the knowledge of the defendant cannot be set aside on his application after appearance. *Mulekern* v. *Doerks*, 53 L. J., Q. B. 526; 51 L. T. 429. But see *Willmott* v. *Freehold House Property Co.*, 51 L. T. 552—C. A.

The writ in an action action described the defendant as "J. L. Young, carrying on business as the Edison Mineograph Co. at 60 Ludgate-hill." The defendant, who was not in fact carrying on the business, entered an appearance as "J. L. Young, sued as J. L. Young, carrying on business as the Edison Mineograph Co. at 60, Ludgate-hill, but who denies that he is carrying on business as the Edison Mineograph Co. at 60, Ludgate-hill, or elsewhere":—Held, on motion by the defendant to set aside the writ and subsequent proceedings on the ground of irregularity, that there was no irregularity in the writ, and that the mistake had been set right by the form in which an appearance had been entered by the defendant. The motion was accordingly refused. *Zuccato* v. *Young*, 38 W. R. 474.

Where a wrong name of a defendant is inserted in the process, it is cured by his attorney's undertaking to appear. *Lowes* v. *Clarke*, 2 Chit. 240.

A defendant waives an objection of misnomer by taking out a judge's order, wherein he uses the name by which he was arrested. *Nathan* v. *Cohen*, 3 D. P. C. 370. See *Bayne* v. *Slack*, 3 C. B. (N.S.) 363; 27 L. J., C. P. 14; 4 Jur. (N.S.) 192; 6 W. R. 171.

If a plaintiff sues a defendant by a wrong christian name, and the defendant appears by his right name, the plaintiff may declare against him by such right name. *Doo* v. *Butcher*, 3 Term Rep. 611.

A defendant not being a British subject, and residing out of the jurisdiction, was served abroad with a writ giving him fourteen days for appearance, and also with a notice of the writ. The memorandum on the notice stated that if the debt and costs were paid in seven days from the service, further proceedings would be stayed. The defendant had by letter admitted the debt and service, but as the notice did not give the defendant the fourteen days limited for his appearance in which to pay the debt and costs, the court refused to give the plaintiff leave to proceed. *Galli* v. *Mongruel*, 13 L. T. 330; 14 W. R. 106.

Where a party held to bail obtains time to put in bail to the action, he cannot afterwards object to the writ for irregularity. *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 124.

b. Time from which Writ takes Effect.

Issuing is not Judicial Act—No relation back to earliest Period of Day.]—To issue a writ of summons is not a judicial act, and the court may inquire at what period of the day it was issued. It appeared from the statement of claim that the writ of summons in the action was issued on the 2nd of July, and that the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must therefore be presumed to have taken place at the earliest moment of the day, before the cause of action accrued:—Held, that the court could inquire whether or not the writ was in fact issued after the cause of action accrued. *Clarke* v. *Bradlaugh*, 51 L. J., Q. B. 1; 8 Q. B. D. 63; 46 L. T. 49; 30 W. R. 53; 46 J. P. 278—C. A.

Title to Sue acquired subsequently.]—When there has been no title to sue at the time of filing an original bill or information, a decree cannot be founded upon a right of suit subsequently acquired and brought forward by a supplemental bill, or by way of amendment, the rule applying not only in cases where the title to sue in respect of the whole matter of the suit is acquired subsequently to filling the original bill, but also in cases where the title to sue in respect of the whole matter of the suit is so acquired; the principle being that there must be a right of suit when the suit is commenced; and a supplemental bill is not the commencement, but the continuance of the suit. *Att.-Gen.* v. *Aron* (otherwise *Aberaron*) *Corporation*, 3 De G. J. & S. 637; 33 L. J., Ch. 172.

A plaintiff must establish, at the hearing, that he had a title to relief at the time of filing his bill, or if he relies on matter subsequent he must file a supplemental bill. *Barfield* v. *Kelly*, 4 Russ. 355.

c. Service of Writ.

1. In General.

Personal Service—What Sufficient.]—When a defendant was followed upstairs by a party who was endeavouring to serve him, and having run into a room and closed the door after him, the copy of the writ was put into the room through a crevice in the wall, and he was told what it was:—Held, that the service was not sufficient. *Christmas* v. *Eicke*, 2 B. C. Rep. 292; 6 D. & L. 156.

When a party seeking to serve a writ was standing in the defendant's yard, close to the street-door of his house, and saw him at a window within the dwelling-house, and informed him in a loud voice that he had a writ against him, and held the copy out and threw it on the ground in his presence, and left it there:—Held, that this did not amount to a personal service of the writ. *Heath* v. *White*, 2 D. & L. 46; 13 L. J., Q. B. 218; 8 Jur. 575. S. P., *Goggs* v. *Huntingtower* (*Lord*), 12 M. & W. 503; 1 D. & L. 599; 13 L. J., Ex. 352; 8 Jur. 66.

It is no ground for setting aside the service of a writ that it was served on the defendant whilst attending in a nisi prius court, in obedience to a subpœna to give evidence in a cause in which he was the plaintiff. *Poole* v. *Gould*, 1 H. & N. 99; 25 L. J., Ex. 250.

Under particular circumstances, one man may be justified in laying hands upon another, for the purpose of serving him with process. *Harrison* v. *Hodgson*, 5 M. & Ry. 392; 10 B. & C. 445; 8 L. J. (O.S.) K. B. 223.

If a person who has corresponded on the subject of the action, and to whom process is sent inclosed in a letter by the post, wilfully refuses to receive the letter, it will be deemed good service on him though he never read it. *Aldred* v. *Hicks*, 5 Taunt. 186; 1 Marsh. 8.

Sending process by the post in a letter which the defendant refuses to receive is not good service, although the refusal may have been wilful, and accompanied with a long avoidance of service. *Redpath* v. *Williams*, 3 Bing. 443; 11 Moore, 333.

Delivery of process, sealed up in a letter, in the absence of the person to whom it is addressed, is no service but from the time when the letter is opened. *Arrowsmith* v. *Ingle*, 3 Taunt. 234.

The court will dispense with strict personal service, where it appears that the process has come to the possession of the defendant. *Williams* v. *Piggott*, 5 D. P. C. 320; 1 M. & W. 574; 2 Gale, 115; 5 L. J., Ex. 245.

On Defendant's Solicitor.]—Service of a writ on the attorney of a defendant who was prosecuting a cross action cannot be made good service, although he may be keeping out of the way to avoid being served. *Parmenter* v. *Reed*, 7 D. P. C. 545.

Where an action is brought against a writer to the signet, resident in Edinburgh, as administrator, the court will not allow service of the writ on the person resident in London, who has acted as agent in obtaining the defendant's letters of administration, to be good service. *Kerr* v. *Miller*, 8 D. P. C. 322.

On Clerk.]—When a copy of a writ was delivered to the clerk of the defendant, with orders to deliver it to his master, which he promised to do, and the defendant afterwards called on the plaintiff's attorney with the writ in his hand, and wrote a letter, stating that he had received it on such a day:—Held, a sufficient personal service. *Aston* v. *Greathead*, 2 D. (N.S.) 547; 6 Jur. 1000.

On Relations.]—The court will not allow service of a writ at the house of a defendant's uncle to be good service, though it cannot be discovered where the defendant resides, and though answers have been returned to the letters left for him at his uncle's. *Sainsbury* v. *Thorpe*, 9 D. P. C. 182.

A copy of a writ enclosed in a letter was left with the defendant's son, at the defendant's residence; the son was desired to give the letter to his father, which he promised to do:—Held, equivalent to personal service. *Rhodes* v. *Innes*, 1 D. P. C. 215; 5 M. & P. 153; 7 Bing. 329; 9 L. J. (O.S.) C. P. 116.

On Lunatics.]—Where a lunatic, confined in an asylum, cannot be served, leave will not be granted to proceed without personal service under s. 17 of the Common Law Procedure Act, 1852. *Williamson* v. *Maggs*, 28 L. J., Ex. 5; 7 W. R. 50. S. P., *Holmes* v. *Service*, 15 C. B. 293; 24 L. J., C. P. 24; 1 Jur. (N.S.) 258; 3 C. L. R. 234.

An action may proceed against a lunatic on the writ of summons coming to his knowledge. *Kimberley* v. *Alleyne*, 2 H. & C. 223; 9 Jur. (N.S.) 650; 8 L. T. 398; 11 W. R. 757.

The defendant, who carried on business in the name of a firm apparently consisting of more than one person, was sued in her firm name; the writ was served at her place of business upon the manager, according to Ord. IX. r. 6a; and judgment signed in default of appearance. At the time of the service of the writ she was of unsound mind and confined in an asylum, but this was unknown to the plaintiff:—Held, that the judgment must be set aside, as the writ ought to have and had not been served under Ord. XIII. r. 1. *Fore-street Warehouse Co.* v. *Durrant*, 52 L. J., Q. B. 287; 10 Q. B. D. 471; 48 L. T. 531; 31 W. R. 765.

—— **Substituted Service.**]—Where the medical officer of an asylum refused to allow service of a bill in equity on a lunatic who was not so found by inquisition, the court allowed substituted service on the medical officer. *Raine* v. *Wilson*, 43 L. J., Ch. 469; L. R. 16 Eq. 576; 29 L. T. 51. S. P., *Morgan* v. *Jones*, 4 W. R. 381.

In an action for specific performance of contract, where one of the parties to the contract had become a lunatic so found by inquisition, but no committee had been appointed of her person or estate, the court directed service of the writ upon the keeper of the asylum at which she was residing, or upon the persons with whom she was residing. *Than* v. *Smith*, 27 W. R. 617.

Colonial Government.]—A colonial government is not a corporation, and cannot be effectually served with a writ of summons. *Sloman* v. *New Zealand Government*, 46 L. J., C. P. 185; 1 C. P. D. 563; 35 L. T. 454; 25 W. R. 86—C. A.

On One Commissioner whether Service on All.]—A writ was sued out against commissioners in their collective name, but it was served only on one of them:—Held, that such a service was not irregular, the commissioners not being a corporation. *Williams* v. *Admiralty Commissioners*, 11 C. B. 420; 2 L. M. & P. 456; 20 L. J., C. P. 245; 16 Jur. 42.

Production of Original.]—When a person serving a writ of summons does not, when requested, produce the original, the proceedings taken under the writ are void, and not merely irregular. *Hawthorn* v. *Harris*, 23 W. R. 214.

—— **Service of Copy.**]—If a process-server meets a party on horseback, to whom he shows the original subpœna and tells his business, and offers a copy and it is refused, he may leave the copy on the spot and the party is well served. *Fry* v. *Crosbie*, 1 Hog, 289.

Demand to see Original.]—If a defendant, at the time he is served with a copy of a non-bailable writ, demands to see the original, which is refused, the service is irregular and will be set aside with costs. *Thomas* v. *Pearce*, 4 D. & R. 317; 2 B. & C. 761; 2 L. J. (O.S.) K. B. 153; 26 R. R. 543. S. P., *Petit* v. *Ambrose*, 6 M. & S. 274.

Where a defendant was served with a copy of a capias, and a quarter of an hour afterwards demanded to see the original, which was refused by the officer, the court set aside the service and subsequent proceedings. *Westley* v. *Jones*, 5 Moore, 162.

Where a person serving a writ did not, though requested so to do, show the original writ to the defendant, and the plaintiff signed judgment thereon:—Held, that all the proceedings taken under the writ should be set aside, whether such proceedings were to be considered as irregular or absolutely void. *Phillipson* v. *Emanuel*, 56 L. T. 858.

Of Amended Writ.]—An amended writ must be served in the same way as if it had been an original writ. After the writ in an action in rem in the Admiralty Division against a ship had been filed and served on the ship, the ship was sold in an action brought by another party, and the proceeds of the sale brought into court. The writ was then amended, and filed in the

Admiralty Registry, but was not formally served on the registrar, nor was it indorsed with the date of service under Ord. IX. r. 13. The defendants did not appear:—Held, that the service of the amended writ was not sufficient, and the plaintiff was not entitled to obtain judgment by default. *The Cassiopeia*, 48 L. J., P. 39; 4 P. D. 188; 40 L. T. 869; 37 W. R. 703—C. A. See *Hartley, In re*, and *Bryans* v. *Hughes*, ante, col. 143.

Setting Aside for Irregularity.]—It is not sufficient ground for setting aside proceedings that the service of the writ was not made directly and personally upon the defendant, and especially after a positive affidavit of personal service on the plaintiff's part; the defendant must go on further to show that neither the writ nor the copy came to his knowledge or possession. *Phillips* v. *Ensell*, 2 D. P. C. 684; 4 Tyr. 814; 1 C. M. & R. 374; 3 L. J., Ex. 338.

The court will not set aside proceedings on the ground that the defendant has not been personally served with process, unless it is distinctly shewn that it has not come to his knowledge. *Emerson* v. *Brown*, 8 Scott (N.R.) 219; 7 Man. & G. 476.

If a defendant seeks to set aside proceedings on the ground of not having been served with process, it must appear by his affidavit that he is the defendant in the cause. *Johnson* v. *Smallwood*, 2 D. P. C. 588.

There being cases in which the commissioners for executing the office of Lord High Admiral may, by virtue of 1 & 2 Geo. 4, c. 93, s. 9, be sued in their collective name, the court will not, to set aside a writ or service, inquire into the fact whether the action is one in which they may be so sued or not. *Williams* v. *Admiralty Commissioners*, 2 L. M. & P. 456; 11 C. B. 420; 20 L. J., C. P. 245; 16 Jur. 42.

Compare cases ante, cols. 145, 146.

Service on Wrong Person—Amendment or Discharge.]—If a copy of a writ of summons is served on a person by a wrong name, he is not bound to apply to set it aside. *Hinton* v. *Stevens*, 1 H. & W. 621.

Where a writ of summons issued against Thomas Gray, and was served on William Gray, the court refused to set aside the proceedings. *Griffin* v. *Gray*, 5 D. P. C. 331; 2 Gale, 201.

Where a writ has been served on the wrong person, and service is possible on the right person, leave will not be given under Ord. LXX. r. 1, to amend the irregularity, but the faulty service will be discharged with costs upon the application of the person intended to be served. *Nelson* v. *Pastorino*, 49 L. T. 564.

Waiver of Objection to Service.]—An application made by the defendants for security for costs constitutes a waiver of any objection as to service. *Lhoneux* v. *Hong Kong and Shanghai Banking Corporation*, 55 L. J., Ch. 758; 33 Ch. D. 446; 54 L. T. 863; 34 W. R. 753.

A writ of summons was issued out of the Court of Common Pleas at Lancaster, which is a superior court, for a cause of action cognisable by that court, but which arose beyond its jurisdiction. The service was upon the defendant's attorney beyond the jurisdiction; and he gave an undertaking to appear and did appear for the defendant:—Held, that the irregularity in the service was cured by the appearance. *Oulton* v. *Radcliffe*, 43 L. J., C. P. 87; L. R. 9 C. P. 189; 30 L. T. 22; 22 W. R. 372.

Obstructing or Preventing Service.]—A governor of a prison, in compliance with an order of the visiting justices, refused to allow the process of the court to be served upon a prisoner undergoing a criminal sentence. The court granted a rule nisi for an attachment against the governor, on the condition that the rule was not to be served or acted upon, unless he persisted in refusing to allow service. *Danson* v. *Le Capilain*, 7 Ex. 667; 21 L. J., Ex. 219.

So when a keeper of an asylum refused to allow service of a writ on a lunatic under his charge, or to bring it to his notice, the court granted a rule nisi for an attachment against him for obstructing its proceedings. *Denison* v. *Harding*, 15 W. R. 346.

Time for Service.]—A specially indorsed writ is not a pleading within the meaning of Ord. LXIV. r. 11, and service thereof may therefore be effected at any hour of the day. *Murray* v. *Stephenson*, 56 L. J., Q. B. 647; 19 Q. B. D. 60; 56 L. T. 720; 35 W. R. 666.

It is no objection to the service of a writ that it was not made until after the expiration of four months from the date, provided the defendant agrees to accept it as good service. *Coates v. Sandy*, 2 Scott (N.R.) 535; 9 D. P. C. 381.

A writ of summons may be served on a party in a court of justice, and while a trial is going on. *Poole* v. *Gould*, 1 H. & N. 99; 25 L. J., Ex. 250.

2. On Firms and Persons trading in other than their own Names.

Foreigner residing Abroad.]—Ord. XLVIIIA. r. 11, providing that persons carrying on business within the jurisdiction in a name or style other than their own name may be sued in such name or style as if it were a firm name, does not apply to a foreigner resident out of the jurisdiction. *De Bernales* v. "*New York Herald*," 62 L. J., Q. B. 385; [1893] 2 Q. B., 97, n.; 5 R. 339; 68 L. T. 658; 41 W. R. 481. Affirmed, 5 R. 343, n. —C. A.

Service on Manager within Jurisdiction.]—A foreigner resident abroad, who carries on business within the jurisdiction in a name or style other than his own name cannot be sued here under Ord. XLVIIIA. r. 11, and consequently a writ against him cannot be served on his manager within the jurisdiction under r. 8. *Russell* v. *Cambefort* (23 Q. B. D. 526) approved. *St. Gobain* v. *Hoyermann's Agency*, 62 L. J., Q. B. 485; [1893] 2 Q. B. 96; 4 R. 441; 69 L. T. 329; 41 W. R. 563—C. A.

Ord. IX. r. 6 does not apply to a foreign partnership firm, the members of which are foreign subjects domiciled and resident out of the jurisdiction; service of a writ of summons on the manager at the principal place, within the jurisdiction, of the business of such firm, set aside accordingly. *O'Neil* v. *Clason* (46 L. J., Q. B. 191) overruled. *Russell* v. *Cambefort*, 58 L. J., Q. B. 498; 23 Q. B. D. 526; 61 L. T. 751; 37 W. R. 701—C. A.

To enable service of a writ of summons to be made under Ord. IX. r. 6a, upon a defendant's manager, it is not necessary that the defendant himself should be within the jurisdiction. It is enough if he, carrying on business in the name of a firm, has a place of business within the jurisdiction, under the control or management of

some person. *O'Neil* v. *Clason*, 46 L. J., Q. B. 191.

A foreign corporation owning a line of steamers running between Tilbury and Ostend had their place of business in Belgium. In this country the business of the line was transacted by B., M. & Co., at Dominion House, 110, Fenchurch Street. Upon the door of these offices B., M. & Co. were described as general agents, while the name of the foreign corporation appeared below. The offices were taken by B., M. & Co. in their own name, and the rent was paid by them. B., M. & Co. received a commission on freights and a fixed annual allowance as remuneration for transacting the business of the line. Upon business cards and forms issued by B., M. & Co. in connection with the line were the words "Apply at the Company's Offices, Dominion House, 110, Fenchurch Street," and a similar notice appeared in advertisements inserted in the daily papers. In their affidavit B., M. & Co. swore that they were merely agents for the defendant corporation. In an action in personam against the foreign corporation to recover damages for a collision, the writ was served upon the manager of B., M. & Co. The service of the writ was set aside on the ground that the person upon whom it was effected was not the servant of the defendant corporation, but of their agents. *The Princess Clementine*, 66 L. J., P. 23; [1897] P. 18; 75 L. T. 695; 8 Asp. M. C. 222.

London Agency.]—In an action against a foreign bank, service of the writ of summons on the head manager of the London "Agency" of the bank—the agency being ostensibly and in fact a bank with the usual offices, manager, and staff of clerks:—Held, to be good service on the defendants. *Lhoneux* v. *Hong Kong and Shanghai Banking Corporation*, 55 L. J., Ch. 758; 33 Ch. D. 446; 54 L. T. 863; 34 W. R. 753.

A foreign corporation, with the majority of its shareholders resident in England, had a London agency carried on in the agent's own office, but carried on no principal or material part of its business in this country:—Held, not liable to be sued in an English court under Ord. IX. r. 8, and service of a writ of summons on the agent in London was accordingly set aside. *Badcock* v. *Cumberland Gap Park Co.*, 62 L. J., Ch. 247; [1893] 1 Ch. 362; 3 R. 188; 68 L. T. 155; 41 W. R. 204.

"Carrying on Business within the Jurisdiction."]—Where partners of a foreign firm personally select goods in this country, which are then purchased by a merchant here in his own name and shipped to the firm, this does not constitute "a carrying on business within the jurisdiction" so as to render the firm liable to be sued here in the firm name under Ord. XLVIIIA. r. 1. *Singleton* v. *Roberts*, 10 R. 223; 70 L. T. 687.

For the purposes of the issuing under Ord. XLVIII. r. 1, of a writ in the firm name against a firm carrying on business within the jurisdiction, it is immaterial whether the firm is an English or a foreign firm. *Worcester City Banking Co.* v. *Firbank*, 63 L. J., Q. B. 542; [1894] 1 Q. B. 784; 9 R. 367; 70 L. T. 443; 42 W. R. 402—C. A.

—— **Partner domiciled in Scotland.**]—A partner domiciled in Scotland, who carries on business within the jurisdiction in a name or style other than his own, cannot, under Ord. XLVIIIA. r. 11, be sued here in respect of the partnership by service of the writ upon the manager of his business within the jurisdiction. *McIver* v. *Burns*, 64 L. J., Ch. 681; [1895] 2 Ch. 630; 12 R. 467; 73 L. T. 39; 44 W. R. 40—C. A.

Ord. XLVIIIA. rr. 1 and 3, do not apply to a firm carrying on business in partnership in Glasgow, the members of which are domiciled and resident in Scotland, and having no place of business within the jurisdiction; nor do the rules affect the principle laid down in *Russell* v. *Cambefort* (23 Q. B. D. 526). *Grant* v. *Anderson*, 61 L. J., Q. B. 107; [1892] 1 Q. B. 108; 66 L. T. 79—C. A.

The firm of A. & Co., woollen manufacturers, consisted of two partners, who carried on their manufactory in Glasgow and resided there. MacC. rented an office in London, consisting of two rooms in Milk Street Buildings, Cheapside, and acted as agent for A. & Co. for the receipt of orders and instructions from London customers, which he transmitted to Glasgow for approval, and was paid a commission on business done. One room was used by MacC. as an office, and the other was used by him for storing samples of the firm's goods. The name of A. & Co. appeared in large letters outside MacC.'s office and at the doorway, but on the doorway MacC.'s name was written below the firm's name in smaller letters. Upon A. & Co.'s letter paper, in the same space allotted for their Glasgow address, the words "London Warehouse, 2, Milk Street Buildings," also appeared:—Held, that MacC.'s office was not a place within the jurisdiction of the business of the partnership of A. & Co.; that MacC. was not a person having control of the partnership business; and that service of a writ of summons issued against A. & Co. at the suit of G., upon MacC., was not a good service:—Held, also, that the firm did not carry on business within the jurisdiction, and that the writ of summons having been improperly issued must be set aside. *Ib.*

A company having its registered office in Scotland, but also carrying on its business within the jurisdiction of the High Court, cannot be served with a writ of summons within the jurisdiction. *Watkins* v. *Scottish Imperial Insurance Co.*, 58 L. J., Q. B. 495; 23 Q. B. D. 285; 60 L. T. 639; 37 W. R. 670.

A company had their registered office in Scotland, but carried on branch works in England. The writ in the action had been served on the manager of the branch works, and a copy had also been sent by post to the registered office:—Held, that the service was bad and must be set aside. *Wood* v. *Anderston Foundry Co.*, 36 W. R. 918.

Foreign Corporation—Branch Office in England.]—Ord. IX. r. 8, of the Rules of Court, 1883, applies to a foreign corporation established by foreign law, provided it really carries on business and has a residence in this country. *Newby* v. *Von Oppen* (L. R. 7 Q. B. 293), approved. *Haggin* v. *Comptoir d'Escompte*, 58 L. J., Q. B. 508; 23 Q. B. D. 519; 61 L. T. 748; 37 W. R. 703—C. A.

A foreign corporation, carrying on business in England, although not incorporated according to English law, may be sued in an English court, in respect of a cause of action which arose within the jurisdiction. Service of a writ of summons on the head officer of an English branch of a foreign corporation carrying on business in England is good service, and it is not necessary to serve the process on the officer at the head office abroad.

Newby v. *Von Oppen*, 41 L. J., Q. B. 148 ; L. R. 7 Q. B. 293 ; 26 L. T. 164 ; 20 W. R. 383.

Dissolution of Firm.]—Where a firm has been dissolved to the knowledge of the plaintiff, an outgoing partner cannot be proceeded against under Ord. XLVIIIA. r. 8, unless he has been personally served with the writ in the action. *Wigram* v. *Cox*, 63 L. J., Q. B. 751 ; [1894] 1 Q. B. 792 ; 70 L. T. 656.

Where a partnership between a foreigner residing abroad and a British subject has, before the commencement of an action against the partnership, been dissolved without the knowledge of the plaintiff, and the business has been carried on in England under the style of the firm by the foreigner alone, service of the writ on the partnership can be effected under Ord. IX. r. 6, and Ord. XVI. r. 14, by service at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the management of the business. *Pollexfen* v. *Sibson* (16 Q. B. D. 792), discussed and followed. [*Shepherd* v. *Hirsch*, 59 L. J., Ch. 819 ; 45 Ch. D. 231 ; 63 L. T. 335 ; 38 W. R. 745.

Member of Foreign Firm temporarily within Jurisdiction.]—The defendants, who were a foreign partnership carrying on business out of the jurisdiction, were sued in the name of their firm. One member of the firm happening to be within the jurisdiction was served with the writ, which was the ordinary eight-day writ :—Held, that such service was good under Ord. IX. r. 6, which provides that, where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there. *Pollexfen* v. *Sibson*, 55 L. J., Q. B. 294 ; 16 Q. B. D. 792 ; 54 L. T. 297 ; 34 W. R. 534.

A writ in Form 1, Appendix A, Part 1 to the Rules of 1883, with the exception that no address was inserted as that of the defendants, was issued against a foreign company having no place of business in this country, and was served at Dover on one of the managing directors of the company who was temporarily there on business connected with the company :—Held, that the writ must be set aside. *The W. A. Scholten*, 57 L. J., P. 4 ; 13 P. D. 8 ; 58 L. T. 91 ; 36 W. R. 559 ; 6 Asp. M. C. 244.

Ord. IX. r. 6, does not apply to a foreign partnership, not carrying on business in England, the members of which are resident and domiciled abroad. The service, therefore, of a writ issued against such a partnership in the firm name upon one of the partners temporarily in England, "as a partner," is not good service against the firm under Ord. IX. r. 6. In suing a foreign partnership not carrying on business in England, the members of which are resident and domiciled abroad, the proper course is to insert in the writ the names of the partners whom it is desired to sue, and such writ, so framed, may be served on any of the partners found within the jurisdiction; or it may be served out of the jurisdiction under Ord. XI., in cases where that order is applicable. *Western National Bank* v. *Perez*, 60 L. J., Q. B. 272 ; [1891] 1 Q. B. 304 ; 64 L. T. 543 ; 39 W. R. 245—C. A.

A writ of summons under the Rules of the Supreme Court, 1883, issued against a foreign partnership in the name of the firm is irregular, and the writ and service thereof upon a member of the partnership within the jurisdiction will be set aside upon an application for that purpose made by the partner served before appearance. *Heinemann* v. *Hale*, 60 L. J., Q. B. 650 ; [1891] 2 Q. B. 83 ; 64 L. T. 548 ; 39 W. R. 485—C. A.

Amendment of Writ—Fresh Cause of Action.]—The plaintiffs, an English firm, entered into contracts in India with G. & Co., an Indian firm, for the manufacture of indigo. O. & Co. were the English correspondents of G. & Co., and there were some partners common to both firms, and some of the partners of each firm were resident in India. G. & Co. consigned indigo to O. & Co., and the plaintiffs brought an action against the firm of O. & Co. claiming the indigo, to which all the members of O. & Co. both in England and India appeared. The plaintiffs then obtained an order ex parte to amend their writ by adding G. & Co. as defendants, and making consequential alterations in the writ, and also obtained leave to serve the amended writ on the defendants out of the jurisdiction. In making the amendments the plaintiffs made the firm of G. & Co. defendants, and added a claim in respect of fresh causes of action arising out of breaches of contract by G. & Co. in India, which were not included in the original writ. The members of the firm of G. & Co. appeared to the amended writ, and moved to discharge the order to amend as irregular :—Held, that the original writ was wrongly issued against the firm of O. & Co., some of the partners being out of the jurisdiction, and that the order to amend it was also bad. The court accordingly set aside the amended writ, and gave liberty to the plaintiffs to amend the original writ by substituting for the name of the firm of O. & Co. the names of the individual members of that firm and of the firm of G. & Co., who were in this country, and by adding a claim in respect of breaches of the contracts; the members of the two firms who were out of the jurisdiction being at liberty to set aside their appearances, without prejudice to any application by the plaintiffs to add such members as parties, and to serve them with the amended writ. *Western National Bank* v. *Perez* ([1891] 1 Q. B. 304) followed. *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31 ; 64 L. T. 846 ; 39 W. R. 646—C. A.

Firm carrying on Business in England—One Partner domiciled Abroad—Service on Partner resident within Jurisdiction.]—Two persons, subjects of a foreign state, carried on business as co-partners in England. One of them resided in England, the other resided and was domiciled abroad. A writ having been issued against them in the name of their firm, the partner resident in England was served with such writ under Ord. IX. r. 6, and appeared. There being no defence to the action, judgment was entered against the firm under Ord. XIV. :—Held, that the service on the partner was a good service on the firm, and that judgment was rightly entered against the firm. *Lysaght* v. *Clark*, [1891] 1 Q. B. 552 ; 64 L. T. 776.

Service of Writ on Firm—Subsequent Service on Partner—Judgment—Appearance by Partner—Judgment against Firm set aside.]—The writ or summons in an action against a firm was duly

served upon the firm, and five days afterwards was served upon an alleged partner. Judgment by default was signed against the firm; subsequently to the signing of the judgment, but within eight days from the service of the writ upon him, an appearance was entered by the partner:—Held, that the partner was entitled to have the judgment against the firm set aside. *Alden* v. *Beckley*, 60 L. J., Q. B. 87; 25 Q. B. D. 543; 63 L. T. 282; 39 W. R. 8.

Foreign Defendant—Appointment of Agent in London to Accept Service.]—A contract for delivery and acceptance of certain quantities of copper, between a company whose registered office was in the United Kingdom, and a company incorporated under decrees and articles of association according to the law of France, with their principal office in Paris and having no place of business in the United Kingdom, contained a clause that the same should be construed according to English law, and that a firm of metal brokers in London should be agents for the French company, "on whom any writ or other legal process arising out of the contract might be served." Subsequently the French company was declared to be in judicial liquidation under the direction and supervision of the Tribunal of Commerce of the Seine:—Held, that service of a writ in an action by the English company upon a member of the firm named in the contract was a good service, although not a service within the Rules of the Supreme Court. Further, that, upon authority, the judicial liquidation in France did not revoke the contract. *Tharsis Sulphur and Copper Co.* v. *Société des Métaux*, 58 L. J., Q. B. 435; 60 L. T. 924; 38 W. R. 78.

No Place of Business in England.]—Ord. IX. r. 6, does not apply to foreign partnerships not subject to English law, though sued in respect of a cause of action within Ord. XI. r. 1. *Dobson* v. *Festi*, 60 L. J., Q. B. 481; [1891] 2 Q. B. 92; 64 L. T. 551; 39 W. R. 481—C. A.

The defendants, a firm which consisted entirely of foreigners domiciled and resident abroad, and had no property, place of business, or manager in England, were sued in their firm name in respect of a breach of contract committed within the jurisdiction. Leave was obtained to issue a writ for service out of the jurisdiction, and notice of the writ was given in accordance with the provisions of Ord. IX. r. 6, to one partner abroad. No appearance was entered for the defendants:—Held, that there was no jurisdiction to enter judgment for the plaintiffs in default of appearance. *Russell* v. *Cambefort* (23 Q. B. D. 526) and *Western National Bank* v. *Perez*, ([1891] 1 Q. B. 304), discussed and followed. *Ib.*

"Absence of Statutory Provision."]—Ord. IX. r. 8, which provides for service of process "in the absence of any statutory provision regulating service of process," does not apply to service of a writ on a Scotch railway company owning only six miles of line in England, in respect of a cause of action arising in Scotland, because provision for such service is regulated by s. 137 of the Companies Clauses (Scotland) Act, 1845, which was incorporated by s. 1 of the company's special act. *Palmer* v. *Caledonian Ry.*, 61 L. J., Q. B. 552; [1892] 1 Q. B. 823; 66 L. T. 771; 40 W. R. 562—C. A.

Place of Business of Firm—Agent.]—Defendants were a Scotch firm having an agent within the jurisdiction, whose authority did not extend to taking orders; the name of the firm was affixed to the agent's offices:—Held, that the offices of the agent were not a place of business of the firm for the purpose of serving the writ. *Baillie* v. *Goodwin*, 55 L. J., Ch. 849; 33 Ch. D. 604; 55 L. T. 56; 34 W. R. 787.

"Head Officer."]—The defendant company, having head offices in Paris, Bordeaux, and Marseilles, had agents and correspondents, among other places, in London. Service of a writ of summons on an agent in London was set aside on the ground that it was not service on the "head officer, clerk, treasurer, or secretary of such corporation," within Ord. IX. r. 8. *Nutter* v. *Messageries Maritimes de France*, 54 L. J., Q. B. 527.

The defendants were a religious order established in France, having four branch convents in England. The writ of summons was served on the mother superior of one of the branch convents in England:—Held, that assuming the defendants to be a foreign corporation carrying on business in England, the service of the writ must be set aside, there being no evidence to shew that the person on whom the service was effected had control over all the branch convents in England so as to be the defendants' head officer within Ord. IX. r. 8. *Golding* v. *La Sainte Union des Sacrés Cœurs*, 4 R. 93; 67 L. T. 605—C. A.

Fresh Place of Business.]—A plaintiff, being ignorant of the dissolution of a partnership, served his writ under Ord. IX. r. 6, at the place of business where a former partner purported to carry on the business of the partnership firm, but which was not the place of business of the firm during the subsistence of the partnership:—Held, that the service was good service on the partnership. *Shepherd* v. *Hirsch*, 59 L. J., Ch. 819; 45 Ch. D. 231; 63 L. T. 335; 38 W. R. 745.

3. On Companies.

See COMPANY.

d. SUBSTITUTED SERVICE.

Order before Service.]—Leave to proceed by substituted instead of personal service must be obtained before proceeding to make such substituted service; and the court will not proceed upon any other than personal service, whatever be the nature of the substituted service, or the moral propriety or certitude thereof, unless it has been previously sanctioned by the court. *Boger, In re*, 3 Jur. (N.S.) 930.

General Principles Regulating.]—Substituted service of the writ will not be ordered unless reasonable ground is shewn for supposing that it will come to the notice of the person to be served. *Furber* v. *King*, 29 W. R. 535.

Leave for substituted service of writ on a defendant should not be given unless there is a probability of the defendant being thereby reached. *Wolverhampton and Staffordshire Banking Co.* v. *Bond*, 43 L. T. 721; 29 W. R. 599.

The principle on which substituted service is directed is that the person substituted must either be authorised to receive service, or else be

such a person as will certainly communicate the fact of service to the party himself. *Slade, In re, Slade* v. *Hulme*, 45 L. T. 276; 30 W. R. 28.

The principle on which substituted service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant. *Hope* v. *Hope*, 4 De G. M. & G. 328; 2 Eq. R. 1047; 23 L. J., Ch. 682; 2 W. R. 443, 545.

The principle of substituted service is agency of the persons served. The statute 15 & 16 Vict. c. 86, s. 4, does not extend the discretion which ought to be exercised in questions of substituting service. *Bones* v. *Angier*, 2 Eq. R. 1096; 18 Jur. 1050; 2 W. R. 609.

Upon an application for an order for substituted service, it must be shewn that every means of effecting personal service have been exhausted. *Firth* v. *Bush*, 9 Jur. (N.S.) 431; 11 W. R. 611.

Mode of Service.]—At the time of service of a copy of the bill on a person, substituted, by leave of the court, for the actual defendant, the original bill, and the original order allowing such substitution, ought to be produced and shewn to the person served, and that requirement ought to be stated in the order permitting such substituted service. *Jones* v. *Brandon*, 2 Jur. (N.S.) 437.

Order—Discretion.]—Orders for substituted service of process are matters of discretion. *Anon.*, 2 Ves. 23.

On Partner.]—The provisions of the Judicature Act, 1875, Ord. IX. rr. 2, 6, relative to the suing of firms and substituted service, are not applicable to the case of actions under the Bills of Exchange Act, 1855. *Pollock* v. *Campbell*, 45 L. J., Ex. 199; 1 Ex. D. 50; 34 L. T. 360; 24 W. R. 320.

Not Ordered when Personal Service could not be effected.]—When effectual personal service of a writ of summons could not be made on the persons named as defendants, the court would not order substituted service to be made. *Sloman* v. *New Zealand Government*, 46 L. J., C. P. 185; 1 C. P. D. 563; 35 L. T. 454; 25 W. R. 86—C. A.

Therefore where the persons made defendants to an action were a colonial government not incorporated, an order for substituted service upon their usual solicitor in this country was refused. *Ib.*

Where effectual personal service cannot be made upon a person "domiciled or ordinarily resident in Ireland" owing to Ord. XI. r. 1 (e), the court will not allow substituted service to be made. *Hillyard* v. *Smyth*, 36 W. R. 7.

There can be no substituted service of a writ in an action where there cannot in law be personal service of such writ. Rule 6 of Ord. LXVII. is limited in terms to cases where the writ itself can be served as a matter of law, but where it cannot, from circumstances, be promptly served personally in matter of fact. *Field* v. *Bennett*, 56 L. J., Q. B. 89.

Defendant out of Jurisdiction — Nullity or Irregularity.]—Substituted service under Ord. IX. r. 2, of a writ of summons in Form 1, issued against a defendant out of the jurisdiction, is an irregularity; but it does not annul a judgment entered upon default of appearance if the defendant has waived it by taking important proceedings in the action inconsistent with its nullity or otherwise. *Field* v. *Bennett* (56 L. J., Q. B. 89) approved. *Fry* v. *Moore*, 58 L. J., Q. B. 382; 23 Q. B. D. 395; 61 L. T. 545; 37 W. R. 565—C. A.

The plaintiff having issued a writ against the defendant, and being unable to discover her address, obtained an order for substituted service upon her solicitor. It then appeared that she had gone abroad before the writ was issued, without any intention of evading service, and had remained out of the jurisdiction ever since:—Held, that the writ being a writ for service within the jurisdiction, the order for substituted service could not be maintained. *Fry* v. *Moore* (23 Q. B. D. 395), followed. *Wilding* v. *Bean*, 60 L. J., Q. B. 10; [1891] 1 Q. B. 100; 64 L. T. 41; 39 W. R. 40—C. A.

The court has jurisdiction under Ord. IX. r. 2, to make an order for substituted service of a writ of summons issued for service within the jurisdiction where the defendant, having been within the jurisdiction when the writ was issued, has since gone abroad, although it does not appear that the defendant went abroad to evade service of the writ. (Rigby, L.J., dissenting.) *Wilding* v. *Bean* (60 L. J., Q. B. 10; [1891] 1 Q. B. 100), distinguished. *Jay* v. *Budd*, 66 L. J., Q. B. 863; [1898] 1 Q. B. 12; 77 L. T. 335; 46 W. R. 34—C. A.

Defendant Resident out of Jurisdiction — Leave to issue Writ for Substituted Service.]—A writ which is intended to be served by substituted service on a person residing within the jurisdiction may be issued without leave of the court, though the defendant be resident out of the jurisdiction. *Lewis* v. *Herbert*, 16 L. R., Ir. 340—C. A.

Writ issued for Service out of Jurisdiction.]—Where a writ has been issued for service out of the jurisdiction, and the defendant is abroad, a judge, if the attendant circumstances warrant substitution, may properly order a copy of such writ to be served within the jurisdiction, although it is not in the form used for service within the jurisdiction. *Ford* v. *Shephard*, 53 L. T. 564; 34 W. R. 63.

Where a plaintiff has exhausted all means to personally serve a writ of summons out of the jurisdiction, the court will allow substituted service by registered letter. *Seaton* v. *Clarke*, 26 L. R., Ir. 297.

On Members of Company—Clause in Articles.]—A clause in the articles of association of a company providing that notices may be served on members by leaving them at their registered place of abode, will not extend to legal proceedings, and an order for substituted service of a debtor summons at such address, that not being his last known place of abode, is bad. *Chatteris, Ex parte, Studer, In re*, 44 L. J., Bk. 90; L. R. 10 Ch. 227; 32 L. T. 290; 23 W. R. 760.

In what Cases Permitted.]—When a defendant after personal service of the bill had been effected, and an appearance entered for her by the plaintiff, absconded, the court allowed the plaintiff to file replication, and advertise the same in lieu of personal service. *Murphy* v. *Vincent*, 23 L. T. 306; 19 W. R. 47.

In a suit against five partners, three of whom had entered appearance and the other two were out of the jurisdiction and had not, substituted service of a notice of motion for an injunction and for the appointment of a receiver on any of the three partners for the two was allowed. *Leese* v. *Martin*, L. R. 13 Eq. 77.

In a creditor's administration suit for real and personal estate of an intestate, the heir-at-law had gone out of the jurisdiction of the court after service of the bill, but without having appeared. The real estate having been sold by the mortgagee, and an appearance having been entered for the heir-at-law : — Held, that substituted service of the notice of motion for decree upon the administratrix for the heir was sufficient. *Deanes* v. *Kitchen*, L. R. 13 Eq. 461 ; 25 L. T. 930 ; 20 W. R. 353.

Substituted service allowed by the Irish courts in an action for personal injury suffered in England, the contract being to carry the plaintiff between London and Dublin. *Aston* v. *L. & N. W. Ry.*, 15 W. R. 694.

An Englishman entered into a contract written in English for the purchase from a native of Hamburg of a vessel belonging to him, then on a voyage from California to England ; the purchaser to take possession immediately after the delivery of the cargo and arrival of the vessel at her port of discharge. The purchaser filed a bill for specific performance of the contract, the vessel having discharged at Sunderland, and the vendor being in Germany :—Held, that substituted service on the captain in charge of the vessel was sufficient, and that the purchaser was entitled to succeed in a motion for an injunction to prevent the removal of the vessel pending the suit. *Hart* v. *Herwig*, 28 L. T. 329 ; 21 W. R. 538. Affirmed, 42 L. J., Ch. 457 ; L. R. 8 Ch. 860 ; 29 L. T. 47 ; 21 W. R. 663.

Substituted service of copy of bill allowed on the medical officer of the asylum in which a defendant of unsound mind, but not so found by inquisition, had been placed, on an affidavit that the medical officer refused to allow any person to see the defendant, or to serve him with legal papers. *Raine* v. *Wilson*, 43 L. J., Ch. 469 ; L. R. 16 Eq. 576 ; 29 L. T. 51.

Service of a subpœna to elect will not be substituted upon the solicitor of a defendant who has gone abroad, but service will be substituted upon another defendant who is also co-trustee, if it appear that he is acting for, or in communication with, his co-defendant abroad. *Waller* v. *Fowler*, Sau. & Sc. 702.

Service upon parties in Australia, but whose address is unknown, will not be substituted upon another of the defendants within the jurisdiction, the only person known to be in communication with them. *Watts* v. *Hughes*, 8 W. R. 292.

Mode of Service Allowed—Notice and Advertisements.]—When a plaintiff is unable to effect personal service of the writ of summons, notice may be substituted for service by leaving a notice at the defendant's only known place of residence, and inserting advertisements in the "London Gazette" and two local papers. *Rafael* v. *Ongley*, 34 L. T. 124.

When husband and wife were both defendants to an action, and the husband could not be found, the court ordered substituted service on the husband by advertisement. *Whitley* v. *Honeywell*, 35 L. T. 517 ; 24 W. R. 851.

Substitution of notice for service of a bill in a suit dealing with the interest in a newspaper of an absconding defendant out of the jurisdiction, ordered to be effected by advertising the prayer of the bill, and the writ indorsed thereon, in the "London Gazette" and the "Times," and in the particular newspaper. *Hartley* v. *Dilke*, 35 L. T. 706.

Service of writ of summons, together with notice of motion, where the defendant appeared to be avoiding personal service, ordered to be effected by the documents being left at his dwelling-house, copies being at the same time left at his place of business, and addressed to him by post. *Capes* v. *Brewer*, 24 W. R. 40.

Service of the writ in an action to recover possession of leasehold houses against an absconding defendant, who had given the tenants notice to pay their rents to him, directed to be effected by leaving a copy of the writ at each of the houses, and by advertising in the "London Gazette" and the "Times." *Crane* v. *Jullion*, 2 Ch. D. 220 ; 24 W. R. 691.

In such a case the ordinary eight days' time will run from service of the copy of the writ and issue of the advertisements. *Ib.*

When a defendant was absconding, notice in lieu of service of a writ, and subsequently notice of motion for judgment, was allowed to be effected by delivery at his office and advertisement in two newspapers. *Cook* v. *Dey*, 45 L. J., Ch. 611 ; 2 Ch. D. 218 ; 24 W. R. 362.

Directions as to service where defendant sought to be served could not be found, had no place of business nor residence, and his relations stated by affidavit that they had no knowledge where he was. *Wolverhampton and Staffordshire Banking Co.* v. *Bond*, 43 L. T. 721 ; 29 W. R. 599.

Service of writ of summons, together with notice of motion, where the defendant had left his home and could not be found, and the wife of the defendant had left his home and gone to her own relations, directed to be effected by the writ and notice of motion being served on the wife, and copies thereof left at the defendant's house, and advertisements inserted in local newspapers. *Mellows* v. *Bannister*, 31 W. R. 238.

The court will permit service of a writ against a defendant who has absconded abroad, but whose address is unknown, to be served on the brother of the defendant, if the fact be duly advertised, and it be agreed that all moneys recovered be paid into court. *Coulburn* v. *Carshaw*, 32 W. R. 33.

On Solicitor in previous Action.]—A written notice by plaintiff's solicitors, "we are instructed to proceed no further with the action," is a sufficient notice of discontinuance within Ord. XXIII. r. 1. Foreign shipowners commenced an action in this country in respect of a collision at sea, and then discontinued the action. An order was made afterwards for leave to serve a writ, in an action respecting the same collision, issued against them at the suit of the defendants in the former action, by way of substituted service upon the solicitors who acted in the former action as the solicitors for the foreign shipowners. Upon its appearing that the solicitors had ceased to act for the foreign shipowners, the order was set aside. *The Pommerania*, 48 L. J., P. 55 ; 4 P. D. 195 ; 39 L. T. 642.

To support an application, that service of subpœna on bill of interpleader upon solicitor

who conducts the action, ought to be deemed good service, it is not only necessary that party applying should state that he knows not where plaintiff at law is, and that solicitor has refused to appear, but that solicitor should be stated to have positively refused to inform them where plaintiff at law is to be found, and also that the process should have been previously formally tendered to him. *East India Co.* v. *Collins*, 6 Price, 404.

When a defendant, who is abroad, is also plaintiff in a distinct suit, but touching the same lands, service of subpœna to appear will be substituted on his solicitor. *Wolfe* v. *Jackson*, 1 Moll. 250.

Service of a subpœna on the solicitor of a defendant ordered to be good service. *Lyde* v. *Hale*, 5 L. J., Ch. 342.

In 1834 S. employed B. as his agent and solicitor in the matter in question, and B., in that capacity, corresponded with W. thereon. In 1843 S., who then resided abroad, being informed that the representative of W. was about to file a bill against him on the same matter, directed that he should be referred to B., in whose hands the matter had been. B. stated that he had no authority to appear for S., and was not professionally concerned for him :—Held, that service on B. of the subpœna to appear and answer the bill, could not be substituted for service on S. *Webb* v. *Salmon*, 3 Hare, 251.

Service of the subpœna to appear and answer a bill of revivor and supplement, upon defendants residing out of the jurisdiction (in Italy), ordered to be substituted by service upon the solicitors appearing and acting for such defendants in the original suit. *Hart* v. *Tulk*, 6 Hare, 618 ; 18 L. J., Ch. 336.

Where a party, subject to costs, could not be found to be personally served, service of the subpœna for costs was ordered to be substituted on the town agent or country solicitor (or both, if both names were on the record), on motion, it appearing by affidavit that due diligence had been used to serve plaintiff personally. *Danford* v. *Cameron*, 8 Hare, 329 ; 14 Jur. 998.

The circumstances, that certain solicitors had acted as the solicitors of a defendant to a foreclosure suit, in several other matters, including a suit relating to the estate which was the subject of the foreclosure suit, and that such defendant could not be found, so as to be personally served with a subpœna, to answer the bill of foreclosure :—Held, insufficient grounds for ordering substituted service on the solicitors to be good service on him. *Hurst* v. *Hurst*, 1 De G. & Sm. 694 ; 12 Jur. 152.

A defendant to a bill of revivor had appeared to the original bill by his solicitor, but before the filing of the bill of revivor, had gone out of the jurisdiction. The court ordered that service of the subpœna to appear on the solicitor should be good service on the defendant. *Norton* v. *Hepworth*, 1 Macn. & G. 54 ; 1 H. & Tw. 158 ; 18 L. J., Ch. 172 ; 13 Jur. 244.

A defendant who had appeared by a solicitor in the original suit, but not in the supplemental suit, being in contempt, went to reside abroad. The court ordered that service on the solicitor of the proceedings in the supplemental suit should be good service. *Scott* v. *Wheeler*, 13 Beav. 239 ; 20 L. J., Ch. 331.

Where a defendant was permanently resident out of the jurisdiction, the court ordered substituted service of a subpœna to pay costs on his solicitor. *Walrond* v. *Parker*, 1 Giff. 315 ; 29 L. J., Ch. 624 ; 6 Jur. (N.S.) 948 ; 2 L. T. 79.

Where a defendant was out of the jurisdiction of the court, and had not appeared, but had himself subsequently filed a bill in respect of the same property, the court gave leave to the plaintiff in the present suit to effect substituted service on the solicitor who acted for the defendant as the plaintiff in the other suit. *Hawkins* v. *Bennett*, 1 Giff. 215 ; 6 Jur. (N.S.) 948.

In a divorce suit, G. & C. acted as solicitors for the wife :—Held, that an order directing that service of a bill in chancery by the husband, and notice of motion in that suit, on G. & C., should be deemed good service on the mother, was rightly made. *Hope* v. *Hope*, 4 De G. M. & G. 328 ; 23 L. J., Ch. 682 ; 2 Eq. R. 1047 ; 2 W. R. 443, 545.

A solicitor, who had merely written to the plaintiffs' solicitors for a copy of the plaintiffs' bill (the defendant living out of the jurisdiction), is not such an agent as to allow substituted service to be ordered. *Asiatic Banking Co.* v. *Anderson*, 13 L. T. 272.

Substituted service on a defendant's solicitor in the cause of a decree for payment of money ordered, on the ground that the defendant was permanently resident out of the country, though he had not gone abroad to avoid service, but in the discharge of his duty as consul. *Griffiths* v. *Cowper*, 2 De G. F. & J. 208 ; 29 L. J., Ch. 607 ; 6 Jur. (N.S.) 718 ; 8 W. R. 712.

When a defendant ordered by a decree for a compromise to do a particular act goes to India, the court will, in the first instance, order substituted service upon his solicitor in this country, and if he fails to do the act, then an application may be made for personal service on himself. *Piffard* v. *Beeby*, 19 L. T. 7.

Where defendants were resident out of the jurisdiction, substituted service of the copy of the bill was allowed to be made on their solicitor, who was employed by them in a suit that was pending relative to the same subject-matter. *Rees* v. *Braidley*, 22 L. T. 470.

A wife, by her husband's consent, went temporarily to reside in a convent. She subsequently went away from the convent, leaving directions that all letters should be sent to her solicitor. She was found to have gone to Paris, but no further traces of her could be discovered. Neither the lady superior of the convent nor the trustees of the wife's settlement knew where she had gone. The husband having commenced a suit for restitution of conjugal rights, the court directed substituted service upon the wife's solicitor of the petition and the demand of cohabitation. *Waters* v. *Waters*, 34 L. T. 33 ; 24 W. R. 190.

S. being abroad, substituted service was properly directed upon his attorneys in England. *Slade, In re, Slade* v. *Hume*, 45 L. T. 276 ; 30 W. R. 28.

A bill was filed for redemption of mortgaged property in the possession of mortgagees. It appeared that the mortgagees were resident abroad, and the plaintiff was unable to find their address. The court ordered that the subpœna to appear to and answer the bill should be served on a solicitor who had acted as agent and receiver of the rents for the mortgagees. *Bankier* v. *Poole*, 3 De G. & Sm. 375 ; 13 Jur. 800.

Where an application was made for service on a defendant abroad, and the case was not within the 2 Will. 4, c. 33, or 4 Will. 4, c. 82, the court

refused to order service, but under the special circumstances of the case permitted substituted service upon an attorney who acted for the defendant in an action which he had instituted against the plaintiff in a suit. *Baillie* v. *Blanchet*, 4 N. R. 48 ; 10 L. T. 365.

A bill was filed to enforce a lien upon estates in respect of unpaid purchase-money by means of a sale of those estates, and certain judgment creditors of the insolvent purchasers were, as such creditors, made parties in respect of their interests in the estates. Two of such judgment creditors were out of the jurisdiction, and it was asked that substituted service of a printed copy of the bill upon their respective attorneys in the actions in which the judgment had been recovered should be taken to be good service on them respectively, as such attorneys were still the attorneys named on the records of the judgments, and although they declined, for want of instructions, to accept service of the bill for their respective clients. The court made the order asked. *Gray-Coat Hospital* v. *Westminster Improvement Commissioners*, 27 L. J., Ch. 250 ; 4 Jur. (N.S.) 449.

On Servants or Relatives.]—If a process-server is refused admittance at the gate of the avenue leading to the defendant's house, service on the gate-keeper will be substituted for service on the defendant. *Fry* v. *Crosbie*, 1 Hog. 289.

A defendant being abroad to avoid process, the court ordered substituted service upon a person through whom his relatives held communication with him. *Dicker* v. *Clarke*, 9 Jur. (N.S.) 636 ; 8 L. T. 379 ; 11 W. R. 635.

Semble, that service of a copy of a bill, at the defendant's house, upon a member of his family, is not sufficient, unless the member of the family is an inmate of the house. *Edgson* v. *Edgson*, 3 De G. & Sm. 629.

On Agents or Attorneys.]—If the court can be satisfied that a defendant, who is out of the jurisdiction, has given a special authority to a person within the jurisdiction to act for him in the matter to which the suit relates, it will order that service of the subpœna to appear and answer on that person shall be good service on the defendant, but the evidence of agency will be closely scrutinised. *Murray* v. *Vibart*, 1 Ph. 521 ; 14 L. J., Ch. 217 ; 9 Jur. 173.

Substituted service refused in a case where it was not shewn that the party on whom such substituted service was proposed to be made, had any authority to act as the agent of the defendant, who was out of the jurisdiction. *Cope* v. *Russell*, 16 L. J., Ch. 369 ; 11 Jur. 463.

Where a defendant has been out of the jurisdiction of the court for some years before bill filed, but has a receiver, agent, or other person within the jurisdiction, upon whom substituted service can be made, an order can be obtained under the 4 & 5 Will. 4, c. 82, s. 1, to substitute such person for the defendant pro tanto, and serve the bill upon him. *Coe* v. *Bannister*, 8 W. R. 206.

A principal defendant resided in Scotland, but the whole of the transactions, which related to a contract for the sale and purchase of a chattel, took place in England. The bill was filed to set aside this contract, and restrain the negotiation of a bill of exchange given as the purchase-money. The principal defendant had a general agent in London, with whom the contract had been entered into. Substituted service of the bill on the general agent allowed. *Jones* v. *Cargill*, 11 L. T. 566.

The court will order service upon the agent of a defendant residing out of the jurisdiction, but carrying on business in England by means of such agent, where the contract, which is the subject-matter of the suit, has been made in this country through the agent. *Jackson* v. *Shanks*, 13 W. R. 287.

Service of a bill, which related to a cargo on board a ship in this country, was made on certain merchants in the city, as agents of the defendant. It appeared that a correspondence relating to the suit had been had, and that a letter from the defendant, who was abroad, had been written, requesting "that steps might be taken by the agents to defend for him any suit which might be instituted with reference to the cargo in question." *Gauter* v. *Meinertshaagen*, 14 L. T. 56.

Where a defendant to a suit out of the jurisdiction is a party, having a direct interest in the subject-matter, although he has not been heard of for eight years, when he gave a special power of attorney in relation to the matters in question, the court will order substituted service upon his attorney, allowing time according to the distance of his last known place of address. *Barker* v. *Piele*, 11 W. R. 658.

An affidavit by a clerk of the plaintiff's solicitor, stating that one of the defendants had told him that he held a power of attorney from two other defendants, who were out of the jurisdiction, to enable him to sell the property, the subject of the suit :—Held, not sufficient for the purpose of obtaining an order for substituted service on such defendant. *Brooker* v. *Smith*, 30 L. J., Ch. 670 ; 4 L. T. 545.

Where defendants were resident out of the jurisdiction, substituted service of the copy of the bill was allowed to be made on their solicitor, who was employed by them in a suit that was pending relative to the same subject-matter. *Rees* v. *Braidley*, 22 L. T. 470.

Effect of—Equivalent to Personal Service.]—The plaintiff, being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Ord. IX. r. 2, and the action proceeded to judgment against all the defendants. The defendant against whom the order for substituted service had been made applied to be let in to defend, on the ground that he had a defence on the merits, and that he had never had any notice of the action while pending :—Held, that as an order for substituted service had been properly made and service effected under it, the judgment was regular, and that the defendant could not, ex debito justitiæ, claim to be let in to defend the action ; but that the court, in the exercise of its discretion, could allow him to do so if shewn that he had no knowledge of the proceedings and had a defence on the merits ; and that, as the giving leave was discretionary, the court could impose terms. *Watt* v. *Barnett*, 3 Q. B. D. 363 ; 38 L. T. 903 ; 26 W. R. 745—C. A. Affirming 47 L. J., Q. B. 329.

Substituted service, duly effected according to the order of the court, is equivalent for all purposes to personal service. *Ib.*

Cases under Common Law Procedure Act.]—An order under s. 17 of 15 & 16 Vict. c. 76, will

in general be granted ex parte, and does not require to be served. *Barringer* v. *Handley*, 12 C. B. 682; 22 L. J., C. P. 6; 16 Jur. 1023.

The court will not interfere with the discretion of a judge in refusing to make an order to proceed as if personal service had been effected, because he was not satisfied that there had been sufficient reasonable efforts to effect service. *Tomlinson* v. *Goatley*, 35 L. J., C. P. 183; L. R. 1 C. P. 230; 12 Jur. (N.S.) 431.

The court will not grant an order to substitute service of a writ where it is not shewn that the defendant wilfully evades such service, although it may be practically impossible to serve him. *Kitchen* v. *Wilson*, 4 C. B. (N.S.) 483; 27 L. J., C. P. 253; 4 Jur. (N.S.) 539.

To entitle a plaintiff to an order to dispense with personal service of a writ upon one of two defendants, members of a firm sued as acceptors of a bill of exchange, it is not enough to shew that he has gone abroad, and has no private residence here; the affidavit must shew upon the face of it reasonable grounds for inducing the court to conclude that he is evading service of the writ. *Ib.*

To entitle a plaintiff to an order for leave to proceed, as if personal service had been effected, where the writ has been served by leaving a copy for him at a club-house of which the defendant is a member, it is not enough to shew that the copy has come to his hands. *Davies* v. *Westmacott*, 7 C. B. (N.S.) 829; 29 L. J., C. P. 150; 6 Jur. (N.S.) 636; 1 L. T. 297.

An affidavit should distinctly state that efforts had been made to discover the defendant's place of abode, and that the person seeking to serve the writ had been unable to discover it. *Ib.*

A defendant living abroad, who had been personally served with a writ, having been shewn to be making away with his property, the court made an order for the plaintiff to be at liberty to proceed without giving notice of declaration, other than by sticking notice up in the master's office requiring the defendant to plead in eight days. *Bates* v. *Bates*, 9 C. B. (N.S.) 561; 30 L. J., C. P. 191; 7 Jur. (N.S.) 728; 3 L. T. 670; 9 W. R. 255.

A shipowner of Hamburg made at Hamburg an agreement with a domiciled Englishman for the sale to him of a Hamburg ship whenever she returned from the voyage on which she was then. The ship returned, and was ordered by the owner to Sunderland. The master of the ship, who was authorised by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and master for specific performance. He obtained leave to substitute service on the master for the owner, and moved for an injunction:—Held, that substituted service on the master was effectual and proper. *Hart* v. *Herwig*, 42 L. J., Ch. 457; L. R. 8 Ch. 860; 29 L. T. 47; 21 W. R. 663.

When a British subject, having a warehouse in London, resides out of the jurisdiction of the superior courts, efforts to serve him with a writ at his warehouse, when he is in fact abroad, are not such reasonable efforts to effect personal service as to justify an order that the plaintiff be at liberty to proceed as if personal service had been effected. *Flower* v. *Allan*, 2 H. & C. 688; 33 L. J., Ex. 83; 9 Jur. (N.S.) 1250; 9 L. T. 515; 12 W. R. 160.

The exception of Scotland and Ireland in the 18th section does not, by implication, authorise proceedings against a person resident in those countries under the 2nd and 17th sections. *Ib.*

A plaintiff, having endeavoured for two years to serve a defendant personally with a writ, at length succeeded in doing so in the streets of Paris. On an application to be allowed to proceed without service of the declaration:—Held, that the plaintiff must make reasonable efforts to serve the declaration. *Thelwall* v. *Yelverton*, 16 C. B. (N.S.) 813; 10 Jur. (N.S.) 295.

A judge's order that "three days after the service of this order at the defendant's residence, the plaintiff be at liberty to proceed as if personal service of the writ of summons had been effected on the defendant," was served at his residence on the 20th of December, and no appearance having been entered by the defendant, the plaintiff signed judgment on the morning of the 23rd of December:—Held, that, under the order, the defendant had to the end of the 23rd to enter an appearance, and that the judgment ought not to have been signed till the 24th of December. *Weeks* v. *Wray*, 9 B. & S. 62; 37 L. J., Q. B. 84; L. R. 3 Q. B. 212; 17 L. T. 498; 16 W. R. 399.

e. Service out of Jurisdiction.

1. Since the Judicature Acts.

a. *Practice thereon.*

Discretion — Evidence as to Merits.]—The court will exercise discretion in allowing or disallowing service out of the jurisdiction, and in so doing will consider evidence as to the merits. *Société Générale de Paris* v. *Dreyfus*, 54 L. J., Ch. 893; 29 Ch. D. 239; 53 L. T. 463; 33 W. R. 823. Reversed on the facts, *see next case.*

On an application for leave to serve a writ out of the jurisdiction it is not sufficient that the form of the action and the nature of the relief sought bring the case within Ord. XI. The plaintiff must shew to the satisfaction of the court that he has a probable cause of action; and the court in exercising its discretion will consider the facts of the case appearing on the affidavits, so far as may be necessary for that purpose. *Société Générale de Paris* v. *Dreyfus*, 57 L. J., Ch. 276; 37 Ch. D. 215; 58 L. T. 573; 36 W. R. 609—C. A.

A sum of money was paid into court in an action in this country in which D. was the plaintiff. D. was resident in France. This fund was the subject of litigation between D. and the present plaintiffs in France, and judgment was given in the French courts that D. was entitled to the control of the fund in court subject to the liability to account to the plaintiffs. The plaintiffs brought an action in this country asking for an injunction to restrain D. from receiving or dealing with the fund in court, and applied for leave to serve the writ on D. in France:—Held, that the French court having decided that D. was entitled to the control of the fund, leave to serve the writ ought not to be given. *Ib.*

Application for Leave to Issue, and for Leave to Serve.]—Applications for leave to issue a writ for service out of the jurisdiction, and for leave to serve out of the jurisdiction a copy of the writ when issued, should be made in chambers; and such applications may be made either

simultaneously or separately. *Stigand* v. *Stigand*, 51 L. J., Ch. 446; 19 Ch. D. 460; 30 W. R. 312.

Leave to issue a writ of summons for service out of the jurisdiction, and leave to serve it out of the jurisdiction, will be given by one order. *Traill* v. *Porter*, 1 L. R. Ir. 60.

Affidavit, how Intituled.]—An affidavit to ground a motion for liberty to issue a writ for service out of the jurisdiction should, under Ord. I. r. 4, be intituled "In the matter of a proposed" plaintiff and defendant. *Blake* v. *Lever*, 6 L. R. Ir. 476.

Evidence is only requisite upon the application for leave to serve. If the applications are simultaneous, the affidavit in support of the application for leave to serve should be intituled in the matter of the intended action; if separate, in the action. Statement of the practice. *Young* v. *Brassey* (1 Ch. D. 277) not followed. *Stigand* v. *Stigand*, 51 L. J., Ch. 446; 19 Ch. D. 460; 30 W. R. 312.

The affidavit should be intituled in the contemplated action, and also in the Judicature Act. *Young* v. *Brassey*, 45 L. J., Ch. 142; 1 Ch. D. 277; 24 W. R. 110.

Affidavit in Support—Sufficiency.]—Where an ex parte application is made to the court, the person making it must observe uberrima fides; otherwise he is liable to have the order discharged at the instance of the person against whom it has been obtained. Where an ex parte order had been made, under r. 4 of Ord. XI., for service of the writ of summons in an action upon the defendants, who were resident out of the jurisdiction, but the affidavit upon which the order was obtained contained misstatements of fact, which had the effect of shewing that the plaintiffs had primâ facie an overwhelmingly good cause of action, the court held that r. 4 of Ord. XI. must be strictly enforced, and that therefore the order for service out of the jurisdiction must be discharged. *Peru Republic* v. *Dreyfus*, 55 L. T. 802.

An application under Ord. XI. r. 4, for leave to serve a writ out of the jurisdiction, cannot be supported by an affidavit in which the deponent does not state that in his belief there is a good cause of action, nor shew the grounds upon which the application is made. *Collins* v. *North British and Mercantile Insurance Co.*, 63 L. J., Ch. 709; [1894] 3 Ch. 228; 8 R. 470; 71 L. T. 58; 43 W. R. 106.

Ord. XI. r. 4, provides that an application for an order to serve a writ on a defendant out of the jurisdiction shall be supported by an affidavit shewing "in what place or country such defendant is or probably may be found." Evidence that a defendant is on board one of H.M. ships in the Mediterranean is insufficient to support an application for such an order, because it fails to shew within sufficient limits the place or country in which the defendant is or probably may be found. *Seagrove* v. *Parks*, 60 L. J., Q. B. 355; [1891] 1 Q. B. 551.

The sufficiency of the plaintiff's affidavit under Ord. XI. r. 3, considered. *Fowler* v. *Barstow*, 51 L. J., Ch. 103; 20 Ch. D. 240; 45 L. T. 603; 30 W. R. 113—C. A.

In cases where the defendant is resident in Scotland or Ireland, the omission of the statement that he is a British subject is not material. *Ib.*

The evidence required by Ord. XI. r. 3, of the grounds on which an application for service of a writ of summons out of the jurisdiction is applied for must be evidence to prove that there is a cause of action, and that such cause of action arose within the jurisdiction. *Great Australian Gold Mining Co.* v. *Martin*, 46 L. J., Ch. 289; 5 Ch. D. 1; 35 L. T. 874; 25 W. R. 246—C. A.

A company registered in England for working a mine in Australia brought an action against persons connected with the formation of the company, making a primâ facie case for relief in respect of acts within the jurisdiction. The court refused to make an order under Ord. XI. r. 1, for service of the writ in Australia upon one of the defendants, who was a British subject, until the plaintiffs produced an affidavit by their secretary that he was informed and believed that there was a good cause of action within the jurisdiction. *Ib.*

An affidavit in support of an application to serve a writ of summons on a defendant residing in Scotland is insufficient if it omits to state whether there exists in Scotland a local court having jurisdiction in the matter in question in accordance with Ord. XI. r. 1a. *Woods* v. *M'Innes*, 4 C. P. D. 67; 27 W. R. 49.

When it is necessary to serve a writ of summons on a defendant out of the jurisdiction there must be an affidavit in support of the application, and the order made under Ord. II. r. 4, will provide, if necessary, for service of interrogatories, and also for the issuing of an injunction, if it should be applied for ex parte. *Young* v. *Brassey*, 45 L. J., Ch. 142; 1 Ch. D. 277; 24 W. R. 110.

Objection to Contents of Affidavit.]—After the lapse of a year the defendant is too late to raise any objection to the order on the ground that the affidavit on which it was obtained did not fairly state the facts. *Reynolds* v. *Coleman*, 56 L. J., Ch. 903; 36 Ch. D. 453; 57 L. T. 588; 35 W. R. 813—C. A. See also *Peru Republic* v. *Dreyfus*, ante, col. 169.

Concurrent Writ against one of several Defendants.]—When one of the defendants in a probate action was a foreign subject residing out of the jurisdiction, the court ordered that he should receive notice in lieu of service of a writ of summons marked as a concurrent writ under Ord. VI. r. 2. *Beddington* v. *Beddington*, 45 L. J., P. 44; 1 P. D. 426; 34 L. T. 366; 24 W. R. 348.

Defendant not a British Subject.]—The court has jurisdiction to order the service of a writ of summons, or of a notice in lieu of a writ of summons, on a defendant resident out of the jurisdiction, who is not a British subject. *James* v. *Despott*, 14 L. R. Ir. 71.

Foreigner bringing Action here.]—Semble, that where a person resident out of the jurisdiction has brought an action in this country, he has made himself amenable to the jurisdiction with respect to matters connected with his action. *Yorkshire Tannery* v. *Eglington Chemical Co.*, 54 L. J., Ch. 81; 33 W. R. 162.

Form of Writ and Notice.]—The absence of the notice required by the prescribed form to appear on a writ for service out of the jurisdiction, is a mere irregularity, which may be cured by virtue of R. S. C. 1883, Ord. LXX. r. 1. *Dickson* v. *Law*, 64 L. J., Ch. 490; [1895] 2 Ch. 62; 13 R. 431; 72 L. T. 680; 43 W. R. 596.

The omission to copy in the notice the order giving leave to issue the writ and serve notice of it, is not such an informality as to make the service invalid. *Reynolds* v. *Coleman*, supra.

When leave is given to issue a writ for service out of the jurisdiction, the words "by leave of the court or a judge" which occur in Forms 2 and 3, given in the Rules of Court, 1875, Appendix A, Part 1, may be omitted from the writ and notice, so as to enable the plaintiff to proceed, in default of appearance, without obtaining further leave of the court or a judge before so doing. *Bacon* v. *Turner*, 3 Ch. D. 275; 34 L. T. 647; 24 W. R. 637.

Foreigner must be served with Notice, and not Writ itself.]—Under the Judicature Act, Ord. XI. r. 1, as under the Common Law Procedure Act, 1852, s. 19, where the defendant is a foreigner out of the jurisdiction, notice of the writ must be served, and not the writ itself. *Westman* v. *Aktiebolaget Snickarefabrik*, 45 L. J., Ex. 327; 1 Ex. D. 237; 24 W. R. 405.

Whether a foreign non-resident corporation can or cannot be served with process, there is nothing to prevent the issue of a writ against it. *Ib.*

In an action commenced in the chancery division the same rule applies as in the other divisions, that where a defendant is a foreigner out of the jurisdiction he must be served with notice of the writ, and not with the writ itself. *Howard, In re, Padley* v. *Camphausen*, 48 L. J., Ch. 364; 10 Ch. D. 550; 27 W. R. 217—C. A.

The plaintiffs sued the defendant, who was a foreigner residing in France, for goods sold and delivered to him in England, and obtained a judge's order for the service upon him of the writ out of the jurisdiction, the order being obtained upon an affidavit which stated erroneously that the defendant was a British subject. The writ was served upon the defendant in France, and judgment signed against him in default of appearance:—Held, that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside. *Hewitson* v. *Fabre*, 57 L. J., Q. B. 449; 21 Q. B. D. 6; 58 L. T. 856; 36 W. R. 717.

Foreign Subject—Notice of Motion—Service with Notice of Writ.]—Leave to serve notice of motion for an interlocutory injunction, with notice of the writ in an action, out of the jurisdiction, upon some of the defendants who are foreign subjects, will be given, without prejudice to any question which may arise on the order. *Overton* v. *Burn*, 74 L. T. 776—C. A.

Affidavit of Service of Notice.]—Where leave had been obtained to serve notice of the writ in lieu of service out of the jurisdiction, upon a defendant who was a Syrian resident at Beyrout:—Held, that an affidavit of service in the form adopted in the common law divisions was sufficient. *Bustros* v. *Bustros*, 49 L. J., Ch. 396; 14 Ch. D. 849; 28 W. R. 595.

Under Ord. XIII. r. 2—which requires that before taking proceedings upon default of appearance to a writ of summons, the plaintiff shall file an affidavit of service or of notice in lieu of service, as the case may be—the court, where notice of a writ is served out of the jurisdiction, has no power to allow a certificate of service to be filed in lieu of an affidavit, even where it appears that by the foreign law the process-server cannot make an affidavit as prescribed by r. 2. *Ford* v. *Miescke*, 55 L. J., Q. B. 79; 16 Q. B. D. 57; 53 L. T. 535; 34 W. R. 74.

Substituted Service—Registered Letter.]—Where the plaintiff has exhausted all means to personally serve a writ of summons out of the jurisdiction (leave having been given to do so) the court will allow substituted service by registered letter. *Seaton* v. *Clarke*, 26 L. R., Ir. 297.

No Affidavit of Indorsement of Service—Filing Statement of Claim.]—The defendant being out of the jurisdiction, an order had been obtained to serve notice in lieu of writ, and personal service had been effected. An affidavit had been made proving the fact of such service, but it did not mention the indorsement as required by Ord. IX. r. 13, of the Rules of Court, 1875:—Held, that the statement of claim might nevertheless be filed under Ord. XIX. r. 6, the court being of opinion that the provisions of Ord. IX. r. 13, did not apply to notice in lieu of writ under Ord. XI. *Dymond* v. *Croft* (34 L. T. 786) considered. *Livesey, In re, Fish* v. *Chatterton*, 47 L. T. 328; 31 W. R. 87.

Amendment of Indorsement.]—The court or a judge may allow an amendment under Ord. XXVIII. of the indorsement on a writ of summons, although the writ is for service out of the jurisdiction, and has been so served, if the action will still be one in which leave to serve the writ out of the jurisdiction might be given. *Holland* v. *Leslie*, 63 L. J., Q. B. 679; [1894] 2 Q. B. 450; 9 R. 743; 71 L. T. 33; 42 W. R. 577—C. A.

Order limiting Plaintiff's Right to Recover.]—An order having been obtained under Ord. XI. r. 1 (e), for service of notice of a writ out of the jurisdiction in an action for the price of goods supplied, and service having been effected accordingly, the defendant applied to a judge at chambers to rescind the order and to set aside the subsequent proceedings under it. The judge, being doubtful on the affidavits used whether there had been any breach of the contract within the jurisdiction, refused the application, but ordered that the plaintiff's claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial that the writ could have been properly served out of the jurisdiction:—Held, that the order of the judge at chambers was rightly made. *Thomas* v. *Hamilton (Duchess Dowager)*, 55 L. J., Q. B. 555; 17 Q. B. D. 592; 55 L. T. 385; 35 W. R. 22—C. A.

Where part of a contract only is to be performed within the jurisdiction, and a foreign defendant is sued for breach of the contract, the order giving leave for service out of the jurisdiction should expressly limit the relief to be given against such defendant at the hearing to relief in respect of the breach within the jurisdiction. *Manitoba and North-Western Land Corporation* v. *Allan*, 63 L. J., Ch. 156; [1893] 3 Ch. 432; 69 L. T. 558.

An order giving leave to serve notice upon a necessary party out of the jurisdiction ought not as a general rule to impose the condition that judgment should not be signed nor execution issued against the foreign defendant except by leave of the court or a judge. *Firth* v. *De Las*

Rivas, 9 R. 51; 69 L. T. 666; 42 W. R. 100—C. A.

Defendant moving to Discharge Order—Proceedings on.]—Where, upon an ex parte application made to a judge in chambers, leave is given to serve a writ out of the jurisdiction, the proper course for a party objecting to the order is to apply to the judge to set it aside. This is a matter of procedure under the Supreme Court of Judicature Act, 1894, and if the judge refuses to set the order aside, or refuses the order in the first instance, appeal must be to the court of appeal with the leave of the judge or of the court of appeal. No motion to set aside the order can now be made to the divisional court. *Black* v. *Dawson*, 64 L. J., Q. B. 464; [1895] 1 Q. B. 848; 14 R. 350; 72 L. T. 525; 43 W. R. 435—C. A.

Where a plaintiff has obtained leave under Ord. XI. to serve a writ out of the jurisdiction, and the defendant moves to discharge the order, affidavits are admissible to contest the question whether the cause of action arose within the jurisdiction. *Great Australian Gold Mining Co.* v. *Martin* (5 Ch. D. 1) overruled on this point. *Fowler* v. *Barstow*, 51 L. J., Ch. 103; 20 Ch. D. 240; 45 L. T. 603; 30 W. R. 113—C. A.

When the plaintiff proves that there is a cause of action, and that such cause arose within the jurisdiction, the court will not allow such evidence to be controverted, or go into the merits of the case. *Great Australian Gold Mining Co.* v. *Martin*, 46 L. J., Ch. 289; 5 Ch. D. 1; 35 L. T. 874; 25 W. R. 246—C. A.

—— **Appearance no Waiver.**]—W., a London fruiterer, issued a writ of summons, and served it personally on M. in Scotland, to recover a debt of 47*l.* money due. W. made an affidavit that there was no local court having jurisdiction in Scotland, whereon the judge gave leave to serve M. in Scotland. M. entered an appearance in the high court, and applied to set aside the writ and service on the ground that there was a local court having jurisdiction:—Held, that the writ and service must be set aside as contrary to Ord. XI., and the entering of an appearance did not estop M. from so applying. *White* v. *Macgregor*, 46 J. P. 775.

A foreigner resident out of the jurisdiction who is served with notice of a writ of summons and appears under protest, does not thereby lose his right to object to the jurisdiction. *Firth* v. *Palmer and De Las Rivas*, 62 L. J., Q. B. 403; [1893] 1 Q. B. 768; 5 R. 378; 69 L. T. 383; 41 W. R. 493.

—— **Waiver of Objection.**]—The defendant, after having given notice to the plaintiff's solicitor that the objection to service out of the jurisdiction would be raised when the case came on for trial in the county court, had answered interrogatories:—Held, that there had been no waiver of the right to raise the objection in the High Court. *Wood* v. *Middleton*, 66 L. J., Ch. 149; [1897] 1 Ch. 151; 75 L. T. 480; 45 W. R. 184.

Application to Discharge—Time for.]—Where a defendant who had been served out of the jurisdiction with a writ appeared and objected to the power of the court to issue it under the circumstances:—Held, that the application was too late under Ord. LXX. r. 2. *Tozier* v. *Hawkins*, 15 Q. B. D. 650. See *S. C.* in C. A., infra, col. 183.

An order was made by the vacation judge, on the ex parte application of the plaintiffs, for service of the writ and notice of motion on the solicitors and at the place of business in England of a foreigner residing out of the jurisdiction. Without formally entering an appearance the defendant filed affidavits in opposition to the motion, and instructed counsel, who opposed the motion on the merits:—Held, that the defendant had thereby waived the right to raise any objection as to the irregularity of the order, and must be treated as if he had been properly served and had formally appeared; that the fact that the ex parte order had been passed and entered did not prevent the right of the defendant to move to discharge it; but that r. 12 of Ord. LXIII. did not apply to such a case, and that the proper mode of proceeding (if there had been no such order as aforesaid) would have been to apply, not to the Court of Appeal or the vacation judge, but to the judge to whose court the action was assigned, to discharge the order of the vacation judge. *Boyle* v. *Sacher*, 58 L. J., Ch. 141; 39 Ch. D. 249; 58 L. T. 822; 37 W. R. 68—C. A.

Mode of raising Objection to Order.]—The question of the service of a writ out of the jurisdiction is finally determined when leave to serve it is given under Ord. XI., subject to any application by the defendant to rescind the leave and to the right of appeal, and cannot be raised in the defence. *Preston* v. *Lamont*, 45 L. J., Ex. 797; 1 Ex. D. 361; 35 L. T. 341; 24 W. R. 928.

b. *Leave, when granted.*

General Rule.]—No leave to serve a defendant with a writ out of the jurisdiction can now be given except in the cases specified in Ord. XI. r. 1. *Eager, In re, Eager* v. *Johnstone*, 52 L. J., Ch. 56; 22 Ch. D. 86; 47 L. T. 685; 31 W. R. 33—C. A.

Before leave for service of a writ out of the jurisdiction is granted, the plaintiff must prove that the cause of action arose within the jurisdiction. Ord. XI. must be held to imply that the fact of mere damages being incurred within the jurisdiction is not sufficient to enable the court or judge to give leave for service of the writ out of the jurisdiction. *Shearman* v. *Findlay*, 32 W. R. 122.

Territorial Jurisdiction.]—The phrase, "within the jurisdiction," used in Ord. XI. r. 1, means territorial jurisdiction. *Smith, In re, City of Mecca, In re*, 45 L. J., P. 92; 1 P. D. 300; 35 L. T. 38; 24 W. R. 903.

The jurisdiction of the queen does not extend from the coast beyond low-water mark unless it has been so extended by an act of parliament, and therefore Ord. XI. r. 1, which provides for the service of a writ of summons out of the jurisdiction where the act for which damages are sought to be recovered was done within the jurisdiction, does not authorise such service where the action was for the death of a person through the negligent management of defendants' vessel at sea, though within three miles of the coast of England. *Harris* v. *The Franconia*, 46 L. J., C. P. 363; 2 C. P. D. 173.

Third Party Notice.]—Ord. XI. rr. 2, 4, as to service of writs, &c., out of the jurisdiction, applies to the service of notices on third persons, under Ord. XVI. rr. 17, 18; and service of a notice on a company in Scotland was therefore

good. *Swansea Shipping Co.* v. *Duncan*, 45 L. J., Q. B. 638; 1 Q. B. D. 644; 35 L. T. 879; 25 W. R. 233—C. A.

Service of Counter-claim on Third Party.]—A defendant may not serve a third party out of the jurisdiction with a counter-claim, although he may, if necessary, commence a fresh action against him. *Potters* v. *Miller*, 31 W. R. 858.

On Foreign Corporations.]—Ord. XI. r. 1, of the Rules of Court, 1875, which provides for service of a writ of summons out of the jurisdiction, applies to actions against a foreign corporation resident out of the jurisdiction. *Scott* v. *Royal Wax Candle Co.*, 45 L. J., Q. B. 586; 1 Q. B. D. 404; 34 L. T. 683; 24 W. R. 668.

When, in such an action, the plaintiff has issued the writ and served notice thereof by leave of the court or a judge, he need not obtain any further leave to proceed and sign judgment for default of appearance under Ord. XIII. *Ib.*

The Supreme Court Procedure Law, 1872 (Jamaica), by s. 19 provides, "that in any action against a person residing out of Jamaica, it shall be lawful for the court or a judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction or in respect of a breach of contract made within the jurisdiction, and that such person carries on in Jamaica any trade or business, and that he has no known agent in Jamaica authorised to bring actions . . . to order that the service of the writ and all subsequent proceedings may be made on any servant or agent in Jamaica engaged in carrying on for such person such . . . trade or business." A company conveying mails and passengers to and from Great Britain to the West Indies, was domiciled in London, but had a superintendent in Jamaica:—Held, that the company was a "person" within the meaning of the section, and that they carried on a business in Jamaica. *Royal Mail Steam Packet Co.* v. *Braham*, 46 L. J., P. C. 67; 2 App. Cas. 381; 36 L. T. 220; 25 W. R. 651.

Held, secondly, that an order directing service on their superintendent in Jamaica was correct. *Ib.*

Action for Rent of Land in England.]—Ord. XI., r. 1, does not enable the court or a judge to allow service out of the jurisdiction of a writ in an action for nonpayment of rent due under a lease of land in England against defendants who are domiciled or ordinarily resident in Scotland. *Agnew* v. *Usher*, 54 L. J., Q. B. 371; 14 Q. B. D. 78; 51 L. T. 576.

On appeal, the court held that the plaintiffs, having failed to shew that the defendants were assignees of the lease, had not shewn reason for the leave to be granted. *Agnew* v. *Usher*, 51 L. T. 576; 33 W. R. 126—C. A.

Contract, Obligation or Liability affecting Land.]—In an action by the outgoing tenant of a farm in Yorkshire to recover from his landlord, who was ordinarily resident in Scotland, compensation for tenant-right according to the custom of the country:—Held, that a "contract, obligation, or liability affecting land" was sought to be enforced in the action, and therefore that the court had power, under Ord. XI. r. 1 (b), to allow service of the writ of summons out of the jurisdiction. *Agnew* v. *Usher* (14 Q. B. D. 78) distinguished. *Kaye* v. *Sutherland*, 57 L. J., Q. B. 68; 20 Q. B. D. 147; 58 L. T. 56; 36 W. R. 508.

The defendants had their offices in London, and the writ in the action claimed (i.) a declaration that the defendants were trustees of certain lands in Londonderry for the general objects of the plantation of Ulster, and that a scheme should be settled for the application of the rents; (ii.) a declaration that the defendants, in so far as they had sold portion of the estates conveyed to them by the Irish Society, had committed a breach of trust by such sale; and (iii.) an inquiry as to how the defendants had disposed of certain woods:—Held, that the case came within Ord. XI. r. 1, sub-s. (b), and that service of the writ out of the jurisdiction should be allowed, and by FitzGibbon, L.J., that the case also came within sub-s. (d). *Att.-Gen.* v. *Drapers Co.*, [1894] 1 Ir. R. 185—C. A.

Ord. XI. r. 1 (b) empowers the court or a judge to order service of a writ upon a defendant domiciled or ordinarily resident in Scotland in an action brought for breach of covenant to repair certain premises in England, such action being brought to enforce a contract affecting hereditaments within the meaning of the above sub-section. *Kaye* v. *Sutherland* (20 Q. B. D. 147) approved. *Agnew* v. *Usher* (14 Q. B. D. 78) distinguished. *Tassell* v. *Hallen*, 61 L. J., Q. B. 159; [1892] 1 Q. B. 321; 66 L. T. 196; 40 W. R. 221; 56 J. P. 520.

A statement in the nature of slander of title, made out of the jurisdiction concerning property within the jurisdiction, is not an act or thing affecting such property within Ord. XI. r. 1, and consequently service of the writ of summons in an action for such statement cannot be allowed out of the jurisdiction. *Casey* v. *Arnott*, 46 L. J., C. P. 3; 2 C. P. D. 24; 35 L. T. 424; 25 W. R. 46.

Person domiciled within the Jurisdiction—Abandonment of original Domicil—Permanency of Residence.]—S. was born in Ireland in 1868, where his father was temporarily located. In 1873 he returned with his father to England, and in 1883 he went to Cannes, where he resided for several years. In 1887 he went to England for the purposes of study, and in the same year his father acquired an Irish domicil, where he resided till the beginning of 1893, when he sold his property there. S. paid occasional visits to his father's house in Ireland. In 1890 he returned to Cannes. On March 25, 1892, he married the plaintiff, the widow of a French gentleman, at the British consulate at Nice. At the date of the marriage the plaintiff was entitled to considerable personal property and some real estate in Jersey. Shortly after the marriage the plaintiff left S., and threatened legal proceedings against him and his uncle, alleging that they (in breach of an antenuptial agreement) had obtained by fraud and violence some of her property and by similar means had induced her to sign a bill of exchange for a large amount. Subsequently, by deed, S. and his uncle entered into partnership with H., to carry on business at Cannes. Shortly afterwards S. registered himself with the mayor of Cannes as having declared his wish "établir (ou) avoir établi sa résidence à Cannes":—Held, that S. was not "domiciled" within the jurisdiction, and that no writ could be served on him out of the jurisdiction. *Spurway* v. *Spurway*, [1894] 1 Ir. R. 385—C. A.

Administration of Trusts of Written Instrument—No Trust Property within the Jurisdiction.] — In order that service of a writ of summons out of the jurisdiction may properly be allowed under Ord. XI. r. 1 (*d*) in an action "for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument of which the person to be served is a trustee, which ought to be executed according to the law of England," the property subject to the trusts of the written instrument must be actually situate within the jurisdiction, and must not be simply property which ought to be, or if the trusts were duly executed would be, so situate, and the period to be regarded in reference to such property must be either when leave to effect service is asked, or possibly when service is effected, or possibly at the latest when an application to set aside the service is made. *Winter* v. *Winter*, 63 L. J., Ch. 165; [1894] 1 Ch. 421; 8 R. 614; 69 L. T. 759.

Semble, if some property exists within the jurisdiction when leave to serve out of the jurisdiction is obtained, property subject to the same trusts which subsequently comes within the jurisdiction may be dealt with in the course of the same action. *Ib.*

Contract which, "according to the terms thereof," ought to be performed within the Jurisdiction.]—Service of a writ of summons out of the jurisdiction under the Rules of the Supreme Court, 1883, Ord. XI. r. 1 (*e*), which provides that such leave may be allowed where the action is founded on any breach or alleged breach of contract wherever made, "which, according to the terms thereof, ought to be performed within the jurisdiction," cannot be allowed, unless the contract expressly or (having regard to the ordinary rules of construction) impliedly requires that performance shall be within the jurisdiction. *Bell* v. *Antwerp, London, and Brazil Line*, 60 L. J., Q. B. 270; [1891] 1 Q. B. 103; 64 L. T. 276; 39 W. R. 84; 7 Asp. M. C. 154—C. A.

—— **Place of Payment—Breach within the Jurisdiction.**]—By a charter party, under which a foreign company having no place of business in England chartered a vessel from English shipowners to load a cargo in London to be carried to a foreign port, it was stipulated that all lighterage should be at the charterers' or consignees' risk and expense, the charterers indemnifying the owners from any and all lighterage at port of discharge. The charter party did not state where moneys payable under the contract of indemnity were to be paid:—Held, that the contract of indemnity was not a contract which, according to the terms thereof, ought to be performed within the jurisdiction, within Ord. XI. r. 1 (*e*). *Ib.*

The plaintiffs, a London firm, constituted the defendant, who resided in Hamburg, their agent to sell goods for them in Germany, by a letter which stipulated that cash should be paid against bills of lading. The course of business under this contract was for the plaintiffs to send the bills of lading by post, and for the defendant to remit the money to London. The plaintiffs applied under Ord. XI. r. 1, clause (*e*), for leave to issue a writ against the defendant for service abroad to recover the balance due to them under this contract:—Held, by the divisional court, that, having regard to the course of business, there was a breach within the jurisdiction of a contract which was required to be performed within the jurisdiction within the meaning of the rule:—Held, by the court of appeal, that, looking only at the terms of the contract and the circumstances existing at the time, the inference was that the money was to be remitted to London, and that the application fell within the rule. *Rein* v. *Stein*, 61 L. J., Q. B. 401; [1892] 1 Q. B. 753; 66 L. T. 469—C. A.

The plaintiff, owner of a vessel belonging to the port of Belfast, instructed N., a Belfast insurance agent, to effect a policy of insurance on the vessel; the insurance agent through his London agent, R., effected the policy in London with the defendants, and the owner paid N. the premium in Belfast, and there received the policy from him. The defendants alleged that they carried on business at Lloyd's, in the city of London only; that they neither accepted risks, received premiums, paid losses, nor had any agents out of London; that the policy was underwritten at Lloyd's in consequence of a proposal made by R. at Lloyd's; that the premium was paid and the policy delivered by and to R. in London; that they did not, nor did N. or any other person on their behalf, receive the premium or deliver the policy at Belfast; and that, in accordance with a well-known custom of Lloyd's, any money which might become due under the policy was payable at Lloyd's, and not elsewhere. The plaintiff alleged that he had no notice or knowledge of that custom before effecting the policy. The defendants refused to pay the amount of the policy to the plaintiff:—Held, that the defendants were bound to pay the amount (if any) due on the policy to the plaintiff in Belfast, that the non-payment constituted a breach of their contract with the plaintiff within the jurisdiction, and that he was entitled to an order for leave to serve a writ to recover the amount of the policy on the defendants out of the jurisdiction. *Ward* v. *Harris*, 8 L. R. Ir. 365—C. A.

A civil engineer residing at Newcastle, and having his office there, agreed with the defendants (one an Englishman and one a foreigner, who carried on business in partnership in Spain) to prepare drawings for, and superintend the construction of, certain docks in Spain; he was to visit the works during construction once in every three months, and was to be paid his travelling expenses, and also a commission of 5*l.* per cent. on the total cost in certain instalments. No place for payment was specified in the contract:—Held, in an action to recover the balance due, that the defendants' contract to pay was a contract which, according to the terms thereof, ought to be performed within the jurisdiction; and therefore a concurrent writ might be served on the foreign defendant out of the jurisdiction. *Thompson* v. *Palmer*, 62 L. J., Q. B. 502; [1893] 2 Q. B. 80; 4 R. 422; 69 L. T. 366; 42 W. R. 22—C. A.

In an application for service out of the jurisdiction, it appeared that the action was brought by the plaintiffs, engine-makers in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the island. There was no agreement as to the place of payment:—Held, that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was therefore founded on a breach within the jurisdiction, according to

Ord. XI. r. 1 (*c*), and that service out of the jurisdiction might be allowed. *Robey* v. *Snaefell Mining Co.*, 57 L. J., Q. B. 134; 20 Q. B. D. 152; 36 W. R. 224.

A contract between English coal exporters and Italian merchants provided for delivery of coals in Italy at a price specified in English money, payment to be made "in cash against receipt of the documents." In the course of previous transactions between the parties payment for cargoes of coals had been made by means of cheques upon English bankers sent through the post from the consignees in Italy to the exporters in England:—Held (Mathew, J., dissenting), that payment of the price under the contract was to be made in England, and therefore Ord. XI. r. 1 (*e*) applied. *Fry* v. *Raggio*, 40 W. R. 120.

—— **Transfer of Shares.**]—R., an American, residing in England for the purposes of his business, brought an action against C., an American resident in America, to enforce a contract by C., made in England, to transfer to R. shares in an English company. Leave was given to issue the writ, and serve notice of it in America. More than a year afterwards the defendant applied to discharge the order for service on the ground that there was no jurisdiction to order service abroad, as the contract was not one which, according to its terms, ought to be performed within the jurisdiction:—Held, that Ord. XI. r. 1, sub-s. (*c*), does not require that a contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears from a consideration of the terms of the contract, and the facts existing when the contract was made, that it was intended to be performed within the jurisdiction; that a contract made in England to transfer shares in an English company to a person resident in England was a contract which, according to its terms, ought to be performed within the jurisdiction. *Reynolds* v. *Coleman*, 56 L. J., Ch. 903; 36 Ch. D. 453; 57 L. T. 588; 35 W. R. 813—C. A. Cp. *Harris* v. *Fleming*, 49 L. J., Ch. 32; 13 Ch. D. 108; 28 W. R. 389.

—— **Commission Agent—Wrongful Dismissal.**]—A. verbally agreed in Glasgow with B., a Scotch coal merchant, to act for B. as commission agent in Ireland. After A.'s return to Dublin, some correspondence passed between the parties as to terms, but which, in the opinion of the court, was merely referential to the antecedent complete verbal contract. B. being dissatisfied with A., wrote and posted in Scotland a letter addressed to A. in Ireland, terminating the employment:—Held, that A. was not entitled to an order for liberty to serve B. out of the jurisdiction with a writ of summons claiming commission and damages for wrongful dismissal. *Hamilton* v. *Barr*, 18 L. R. Ir. 297—C. A.

—— **Delivery of Goods in London.**]—M., a merchant at New York, contracted to supply certain goods to B., a merchant in London, on certain terms. On arrival of the goods in London they were found to be defective, and not according to contract, and the defects in them were not due to the sea-voyage:—Held, that, inasmuch as the breach was continuing, the English courts had jurisdiction, and therefore that the defendant might be served with notice of a writ of summons under Ord. XI. r. 1, sub-r. (*c*) *Barrow* v. *Myers*, 52 J. P. 345.

—— **Charging Order.**]—This was a motion for leave to issue for service out of the jurisdiction a writ in an action seeking to enforce a charging order obtained by the plaintiff, a judgment creditor, upon certain shares belonging to the defendant, the judgment debtor. The Judgment Act (1 & 2 Vict. c. 110), s. 14, which, by virtue of Ord. XLVI. r. 1, regulates the effect of a charging order, provides that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Ord. XI. r. 1 provides that service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever (*c*) "the action is founded on any breach, or alleged breach, within the jurisdiction, of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction":—Held, that, assuming that the case could be treated as one of contract at all, it would only be a contract that the shares should be charged, and of such a contract there had not been any breach within the jurisdiction. *Moritz* v. *Stephan*, 58 L. T. 850; 36 W. R. 779.

—— **To supply News—Transmission through Postal Telegraph Office—Balance of Convenience.**]—A company, whose office was in London, contracted with G., the proprietor of a Dublin newspaper, for the transmission to him of news. The contract contained a condition that the company was not to be responsible for non-delivery or for delay or errors which might occur in the collection or transmission of its news supplies:—Held, that the contract was not fulfilled by the delivery of the news at the postal telegraph office in London for transmission to Dublin, and that, in an action by G. for breach of the contract in negligently and carelessly supplying him with false news, he was entitled to an order for leave to serve the writ of summons out of the jurisdiction, on the grounds that the breach of the contract occurred in Dublin, and that, having regard to the necessary witnesses, as disclosed by the affidavits on both sides, the preponderance of convenience was not against a trial in Ireland. *Gray* v. *Press Association*, 22 L. R. Ir. 1—C. A.

—— **Salvage of Foreign Ship—Lien on Ship—Place of Payment.**]—The breach of a contract to pay cannot be made the subject of an action in England under Ord. XI. r. 1 (*e*) where the contract may be performed either within or without the jurisdiction. *The Eider*, *Neptune Salvage Co.* v. *Norddeutscher Lloyd*, 62 L. J., P. 65; [1893] P. 119; 1 R. 593; 69 L. T. 622; 7 Asp. M. C. 354—C. A.

—— **Cost, Freight, and Insurance—Foreign Port.**]—The defendant contracted to sell to the plaintiff certain wood goods, c.f.i., and ship them at a port in Sweden for an English port. The ships were to be addressed to the plaintiff at the English port, and on their arrival he was to adopt the charter parties and bills of lading and pay the price. The defendant failed to perform the main portion of his contract, and the plaintiff commenced an action for damages in England, and applied for leave to serve notice of the writ of summons upon the defendant out of the jurisdiction under Ord. XI. r. 1 (*e*). The question then arose as to whether the breach had occurred within or outside the jurisdiction:—Held, that upon the true construction of the

contract all the defendant had to do was to ship the goods on board at the Swedish port: accordingly the breach occurred there, and not at the English port; and that, as no cause of action arose within the jurisdiction, no leave to serve notice of writ of summons under Ord. XI. r. 1 (*e*) could be granted. *Vaucke* v. *Wingren*, 58 L. J., Q. B. 519.

—— **No Contract—Right of Contribution.**]—The first mortgagee of a ship, with a power to collect the freight, brought an action against the second mortgagee of the ship (whose mortgage included an assignment of the freight) and others, claiming an account and payment out of the freight of the amount he had paid for the wages of the crew and the wages and disbursements of the master. The freight was in the hands of R. & Co., foreigners, resident abroad, to whom it had been paid as the agents of the second mortgagee, and who claimed to retain it in satisfaction of a debt due to them from their principal. The plaintiff sought to make R. & Co. defendants to his action:—Held, that, as no contract existed or had existed between the plaintiff and R. & Co., r. 1 of Ord. XI. did not apply; and that the equity (if any) of the plaintiff against R. & Co. was a right to contribution, in respect of which they should be sued in the ordinary way. *M'Stephens* v. *Carnegie*, 49 L. J., Ch. 397; 42 L. T. 309—C. A. Reversing 28 W. R. 385.

—— **Defendant domiciled or ordinarily resident in Scotland or Ireland.**]—An agreement by a person domiciled or ordinarily resident in Scotland that a writ for breach of contract arising within the jurisdiction may be served on him in Scotland does not authorise the court to direct service of such a writ in Scotland, as to do so would be in direct contravention of Ord. XI. r. 1 (*e*). *British Wagon Co.* v. *Gray*, 65 L. J., Q. B. 75; [1896] 1 Q. B. 35; 73 L. T. 498; 44 W. R. 113—C. A.

There is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Ord. XI. r. 1 (*e*) where the defendant is domiciled or ordinarily resident in Scotland or Ireland. *Lenders* v. *Anderson*, 53 L. J., Q. B. 104; 12 Q. B. D. 50; 49 L. T. 537; 32 W. R. 230; 48 J. P. 136.

An insurance company, whose registered office was in Scotland, and whose secretary resided there, but which also had agencies and a chief office within the jurisdiction of the high court, issued a policy through an agent within the jurisdiction, to whom the premiums were paid. The company having refused to pay a claim on the policy:—Held, that it was not domiciled or ordinarily resident within the jurisdiction, and that leave to issue a writ for service out of the jurisdiction could not be granted. *Jones* v. *Scottish Accident Insurance Co.*, 55 L. J., Q. B. 415; 17 Q. B. D. 421; 55 L. T. 218.

Injunction—Act to be done within Jurisdiction.]—Manufacturers in Switzerland, in reply to a letter from retail dealers in England asking them to send 5 lbs. of a dye which they manufactured, forwarded a letter in which they inclosed an invoice of the goods ordered. The invoice described the goods as "bought" by the dealers of the manufacturers, and stated that they were sent to a specified firm in Switzerland "to be held by them at your disposal." The plaintiffs alleged that the dye thus sold was an infringement of their patent, and commenced an action against the English purchasers and the Swiss manufacturers, claiming an injunction. The plaintiffs, having served the purchasers, applied ex parte for leave to issue a concurrent writ, and to serve notice thereof on the manufacturers out of the jurisdiction:—Held, that the plaintiffs had shewn a primâ facie case within Ord. XI. r. 1 (*f*) of a sale within the jurisdiction, and that the leave asked should be given. *Badische Anilin und Soda Fabrik* v. *Johnson*, 65 L. J., Ch. 174; [1896] 1 Ch. 25; 73 L. T. 523; 44 W. R. 308—C. A.

—— **Breach within Jurisdiction of Contract made outside.**]—The defendant, who was resident in Scotland, entered into a contract with an English mining company whereby he was to perform certain services for them in the Transvaal at a salary. The contract was executed by the defendant in Scotland, but was in English form. The defendant proceeded to the Transvaal, but returned therefrom before he had fully performed the services. He claimed a half-year's salary, which he alleged was due to him. This the company declined to pay on the ground that the defendant had broken his contract with them, and he thereupon threatened to present a petition for the winding up of the company. The company brought this action claiming (1) rescission of the contract; (2) return of certain sums paid by them in pursuance of it after setting off such salary, if any, as might be due to the defendant; and (3) an injunction to restrain the defendant from presenting or advertising any petition for the winding up of the company. An order having been made for service of the writ on the defendant in Scotland, he moved to discharge such order. He contended that the case was not within Ord. XI. r. 1 of the Rules of Court, 1883; that the action was not for a breach "within the jurisdiction" of a contract made without the jurisdiction; and that the company could not, merely by inserting in their writ a claim for an injunction, bring the case within the rule:—Held, that r. 1 of Ord. XI. applied to the case; that it was not necessary that an injunction should be the only relief sought in order to bring the case within the rule; and that the motion must therefore be refused. *Lisbon-Berlyn Gold Fields* v. *Heddle*, 52 L. T. 796.

—— **Infringement of Trade-mark—Defendant's Agents only within Jurisdiction.**]—A summons by T. A. M., a manufacturer, resident in Scotland, for leave to register a trade-mark, was pending before the high court, and was opposed by J. M., also resident and carrying on a similar manufacture in Scotland, on the ground that the mark was similar to one belonging to J. M. J. M. applied for leave to issue a writ against T. A. M. for an injunction and damages, on the ground that T. A. M. was selling his goods in England in such a way as to lead the public to believe that they were J. M.'s goods. J. M. deposed that the same witnesses would be required on the summonses and in the action, and that it would be most convenient and would save great expense if the action was brought in England, or that the summons and action could be tried together:—Held, that, as an injunction in England could only be enforced against agents of T. A. M., and not against him-

self, leave ought not to be given to issue the writ, the matter being one which was better left to the courts of Scotland. *Marshall* v. *Marshall*, 38 Ch. D. 330; 59 L. T. 484—C. A.

In an action to restrain the infringement of the plaintiff's registered trade-mark, the defendants being a company having their registered office at Glasgow, with branches in London, Manchester, and Hull, leave to serve the writ out of the jurisdiction was given, as an injunction could be enforced by sequestration against the property of the company in England. *Marshall* v. *Marshall* (38 Ch. D. 330) discussed and distinguished. *Burland's Trade-mark, In re, Burland* v. *Broxburn Oil Co.*, 58 L. J., Ch. 591; 41 Ch. D. 542; 60 L. T. 586; 37 W. R. 470; 1 Meg. 215.

—— **Restraining Defamatory Post-cards.**]—A writ of summons claiming an injunction to restrain the defendant (resident in Dublin) from sending to the plaintiffs, or either of them, in London, through the post-office or otherwise, libellous, defamatory, or obscene post-cards, &c., and also claiming damages, may by leave of the court be issued and served upon a defendant residing in Dublin, under Ord. XI. r. 1 (*f*), notwithstanding the obstacles to making the injunction available. *Tozier* v. *Hawkins*, 55 L. J., Q. B. 152; 15 Q. B. D. 680; 34 W. R. 223—C. A.

—— **Restraining Proceedings.**]—A Scotchman having died intestate in Bolivia, his sisters, who were resident and domiciled in Scotland, obtained there a finding that he was domiciled in Scotland, and were decerned executrices dative of his personal estate, and afterwards obtained an order from the probate division of the high court sealing the Scotch confirmation. The plaintiff being domiciled and resident in Bolivia, and alleging herself to be the widow of the intestate, brought this action against the executrices dative, and G. & Sons, who held in their hands the greater part of the intestate's personal estate. The plaintiff claimed by her writ (1) a declaration that the deceased died domiciled in Bolivia, and that the plaintiff was entitled to the whole of his personal estate; (2) administration by the court; (3) an injunction restraining G. & Sons from paying over to the executrices the funds in their hands, and an injunction against the executrices from taking proceedings to recover, and from receiving the intestate's personal estate; and (4) a receiver. The defendants, G. & Sons, were friendly to the plaintiff. An order having been obtained on behalf of the plaintiff for service of the writ on the executrices in Scotland, and the executrices having moved to set aside such service as not being within Ord. XI. of the Rules of 1883:—Held, that the relief asked for by the writ, if limited to an injunction restraining the executrices from suing G. & Sons within the jurisdiction, was such as would in a proper case justify the court in allowing service of the writ out of the jurisdiction under Ord. XI. r. 1 (*f*); held also, that although the plaintiff was not precluded by the sealing of the confirmation from suing here, yet, having regard to the circumstances generally, and especially to the fact that it had appeared that the plaintiff intended to take proceedings in Scotland for the revocation of the Scotch confirmation, and in any view of the case must have recourse to the court in Scotland to establish her claim to the movables there, the court, in the exercise of its discretion under Ord. XI. r. 2, ought not to allow the service out of the jurisdiction, as it was more convenient that proceedings should be taken in Scotland. *De Penny, In re, De Penny* v. *Christie*, 60 L. J., Ch. 518; [1891] 2 Ch. 63; 64 L. T. 521; 39 W. R. 571.

—— **Repetition not apprehended.**] — Leave ought not to be given under Ord. XI. r. 1 (*f*) to issue a writ for service out of the jurisdiction where the claim for an injunction is not made bonâ fide, and there is no reason to apprehend the repetition of the matter complained of. *De Bernales* v. "*New York Herald*," 62 L. J., Q. B. 385; [1893] 2 Q. B. 97, n.; 5 R. 339; 68 L. T. 658; 41 W. R. 481. Affirmed 5 R. 343, n.—C. A.

—— **Matter of Discretion.**]—A charter-party having been entered into in Scotland between the plaintiffs and a shipowner, both parties being resident in Scotland, on an ex parte motion to restrain the shipowner from dealing with the ship, which was then at a port within the jurisdiction, in a manner alleged to be inconsistent with the charter-party:—Held, having regard to the discretion given to the court by Rules of Court, 1875, Ord. XI. r. 1a, that it was not a case in which the court would grant an injunction or direct service of the writ out of the jurisdiction. *McPhail, Ex parte*, 48 L. J., Ch. 415; 12 Ch. D. 632; 41 L. T. 338; 27 W. R. 525.

Necessary or Proper Party to an Action.]—By Ord. XI. r. 1, service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever (*g*) "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." In an action against defendants in London for breach of warranty of authority it appeared that they had assumed as agents for foreign principals to enter into a contract to be performed out of the jurisdiction, and that there had been a breach out of the jurisdiction, the supposed principals having repudiated the contract as being made without their authority:—Held, that the foreign principals were "proper" parties to the action within Ord. XI. r. 1 (*g*), and that service on them out of the jurisdiction of notice of the writ might be allowed. *Massey* v. *Heynes*, 57 L. J., Q. B. 521; 21 Q. B. D. 330; 36 W. R. 834—C. A. Affirming 59 L. T. 470.

The plaintiff brought his action in England on a policy of marine insurance against several underwriters. He served his writ of summons on two of the underwriters who were within the jurisdiction, and applied for leave under Ord. XI. r. 1 (*g*) to serve his writ on the other defendants, who were residing out of the jurisdiction in Scotland, as being necessary parties to the action:—Held, that the plaintiff ought to be allowed to serve his writ out of the jurisdiction; and that Ord. XI. r. 1 (*g*) was framed to meet such a case. *Thanemore Steamship* v. *Thompson*, 52 L. T. 552; 5 Asp. M. C. 398.

The power given to the court by Ord. XI. r. 1 (*g*) to allow service out of the jurisdiction of notice of a writ of summons upon a person who is a necessary or proper party applies to the case of a foreigner resident abroad. *Firth* v. *De Las Rivas*, 9 R. 51; 69 L. T. 666; 42 W. R. 100—C. A.

The plaintiffs, an English company, entered into a contract in Spain with the defendants, who carried on business in partnership in Spain, to manufacture and deliver certain goods in Spain. The payment was to be made abroad. One of the defendants was an English subject, and the other was a Spanish subject resident in Spain. The plaintiffs brought an action to recover the price of the goods so delivered, and the writ was served on the English partner in England:—Held, that the foreign partner was a "proper party" to the action within Ord. XI. r. 1 (*g*), and that leave to issue a concurrent writ and serve notice thereof on him out of the jurisdiction might be allowed. *Massey* v. *Heynes* (21 Q. B. D. 330) followed. *Ib.*

Salvors having rendered service to a ship, freight, and cargo, commenced an action in personam, and having served the owners of ship and freight resident in this country, obtained leave, ex parte, to serve the owners of cargo who were resident in Norway with notice of the writ. On a motion to set aside the service of the notice of the writ:—Held, that the owners of cargo were "proper parties" to the action within Ord. XI. r. 1 (*g*), and therefore a motion to set aside service was dismissed. *The Elton*, 60 L. J., P. 69; [1891] P. 265; 65 L. T. 232; 39 W. R. 703; 7 Asp. M. C. 66.

In an action of tort properly brought against a person who has been duly served within the jurisdiction, the court has power to give leave for service out of the jurisdiction on any person who is a necessary or proper party to the action under Ord. XI. r. 1 (*g*). *Croft* v. *King*, 62 L. J., Q. B. 242; [1893] 1 Q. B. 419; 5 R. 222; 68 L. T. 296; 41 W. R. 394.

In an action against directors of a company for fraudulent misrepresentations in the prospectus, two of the defendants had been served within the jurisdiction:—Held (Lord Esher, M.R., dissenting), that, upon the construction of Ord. XI. rr. 1 (*g*) and 2, there was jurisdiction to give leave to serve out of the jurisdiction a third defendant, who was resident in Scotland, and that, upon the facts of the case, the discretion of the judge at chambers was wrongly exercised in setting aside such service, the comparative cost and convenience being in favour of one action in England against all the defendants. Per Lord Esher, M.R.:—If there is jurisdiction to give leave under Ord. XI. r. 1 (*g*) in an action of tort, which is doubtful, in such an action leave should be given only in very exceptional circumstances. *Williams* v. *Cartwright*, 64 L. J., Q. B. 92; [1895] 1 Q. B. 142; 14 R. 98; 71 L. T. 834; 43 W. R. 145—C. A.

—— **Similar Relief claimed.**]—A person out of the jurisdiction is not, within the meaning of Rules of the Supreme Court, Ord. XI. r. 1 (*g*), "a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction," unless the relief claimed against him in the action is the same as, or connected with, that claimed against the latter. *Collins* v. *North British and Mercantile Insurance Co.*, 63 L. J., Ch. 709; [1894] 3 Ch. 228; 8 R. 470; 71 L. T. 58; 43 W. R. 106.

—— **Substantial Defendant within the Jurisdiction.**]—Where a plaintiff brings an action in the alternative against two defendants, one of whom is within and the other without the jurisdiction, he cannot serve the latter without the jurisdiction under Ord. XI. r. 1 (*g*) unless he has a bonâ fide claim against the former, and has not joined the latter merely for the purpose of suing him in the English courts. *Witted* v. *Galbraith*, 62 L. J., Q. B. 248; [1893] 1 Q. B. 577; 4 R. 362; 68 L. T. 421; 41 W. R. 395—C. A.

On an application to serve a person out of the jurisdiction under Ord. XI. r. 1 (*g*), it must be shewn that there is within the jurisdiction a defendant against whom substantial relief is claimed, and it must also be shewn that the defendant within the jurisdiction has been previously duly served. *Yorkshire Tannery* v. *Eglinton Chemical Co.*, 54 L. J., Ch. 81; 33 W. R. 162.

—— **Defendant within Jurisdiction must be served.**]—Service out of the jurisdiction will not be allowed under Ord. XI. r. 1 (*g*) unless the defendant within the jurisdiction has previously been served. *Collins* v. *North British and Mercantile Insurance Co.*, supra.

In an action to enforce against real estate in Trinidad the trusts of a creditor's deed (which had been established by a former suit in the court of chancery), the defendants were persons in whom the legal estate was outstanding, one of them being a British subject resident in Trinidad. The other defendants resided in England. An opinion was given by a barrister practising in Trinidad that the beneficial interest in the real estate there was bound by the deed. The writ had been served on those defendants who were in England:—Held, that leave could be given to serve the writ on the defendant who was in Trinidad. *Jenney* v. *Mackintosh*, 33 Ch. D. 595; 55 L. T. 733; 35 W. R. 181.

—— **Discretion.**]—Where a testatrix resided and was domiciled in Ireland, and died in Ireland, and her will was made and proved in Ireland, and she appointed three executors, two residing in Ireland and one residing and domiciled in England, and the executors sold some consols and invested the proceeds in the purchase of some Irish land, a beneficiary brought an action against the English executor in England, claiming that the investment was improper, and the executors were liable to replace the money. Leave having been given to serve the writ on the two executors in Ireland, on motion to discharge the order giving such leave:—Held, that it was a matter of discretion for the judge, and the action having been properly brought against a man within the jurisdiction, the case fell within Ord. XI. r. 1 (*c*), and the motion must be refused. *Harvey* v. *Dougherty*, 56 L. T. 322.

Defendant in Scotland or Ireland—Comparative Convenience.]—In an action to restrain the infringement of the plaintiffs' trade-mark and the sale of the defendants' goods as those of the plaintiffs, the defendants being resident in Ireland, and having neither property nor place of business nor agents within the jurisdiction, the judge discharged an order which he had made in chambers on an ex parte application for service of the writ out of the jurisdiction, on the ground that the action could have been more easily and cheaply tried in Ireland than in England, notwithstanding that a motion was pending in this court, on behalf of the plaintiffs, for the registration of their trade-mark and the removal from the register of the defendants'

trade-mark. *Kinahan* v. *Kinahan*, 59 L. J., Ch. 705; 45 Ch. D. 78; 62 L. T. 718; 38 W. R. 655. Cp. *Marshall* v. *Marshall* and *De Penny*, *In re*, ante, cols. 183, 184.

To obtain leave to serve a defendant in Scotland, it is not enough to shew the amount of the claim, that the contract was made and the breach of it occurred in London, that the plaintiff and also the agent of the defendant (who signed the contract) reside in London, that all the plaintiff's witnesses reside in London, and that it would be more convenient and less expensive to try the action in London than in Scotland. The affidavit should go on to shew in what respect, regard being had to the facilities for trying the cause in the neighbourhood of the defendant's residence, it would be cheaper and more convenient to try in London. *Woods* v. *M'Innes*, 4 C. P. D. 67; 27 W. R. 49. Cp. *Williams* v. *Cartwright*, ante, col. 185.

On the marriage of an Englishman, domiciled in England, with a Scotch lady, a settlement in Scotch form was made of her property, under which, after the death of the wife, the property went to the children of the marriage, subject only to an annuity to the husband. On the death of the wife, the only child of the marriage, an infant, resident with his father in England, commenced an action against the trustees to have the trusts administered by the court, alleging that the trustees improperly refused to allow maintenance out of the income. The trust property was all in Scotland, and the trustees all resided there. An order having been obtained for leave to serve the writ upon the trustees in Scotland:—Held, by the court of appeal, that, assuming that there was jurisdiction under Rules of Court, 1875, Ord. XI. r. 1, to allow service of the writ in Scotland, still, under the discretion given by Ord. XI. r. 1a, such service ought not to be authorised, as it was more convenient and proper that the trusts of Scotch property held by Scotch trustees upon the trusts of a Scotch instrument should be administered by a Scotch than by an English court. Semble, that under Ord. XI. r. 1 there was no jurisdiction to order service of the writ in Scotland. *Creswell* v. *Parker*, 11 Ch. D. 601; 40 L. T. 599; 27 W. R. 897—C. A.

The plaintiff (who resided in Ireland) and the defendant entered into a partnership contract executed in London (the defendant being described as a civil engineer, of Victoria-street, Westminster) for the construction of a railway in Ireland. The defendant and his family went to reside in Ireland, he having to superintend the works in progress. The contract provided that the business should be carried on in Victoria-street and Ireland, and that the books should be kept at Victoria-street. After a very short time this clause was abandoned, and the business and the books were carried on and kept in Ireland. Disputes having arisen, the plaintiff, while residing for a short time in England, obtained leave from the chief clerk, upon an ex parte application in chambers, to issue and serve out of the jurisdiction a writ in an action for the taking of the accounts and for the appointment of a receiver and manager:—Held, under Rules of Supreme Court, rr. 1 and 1a of Ord. XI., that the application of the plaintiff was improper, and that the writ must be discharged with costs. *Tottenham* v. *Barry*, 48 L. J., Ch. 641; 12 Ch. D. 797; 28 W. R. 180.

On the 14th of May, 1877, an agreement was entered into at Bombay between the plaintiff, the defendant M. M., and the defendants N. & Co. (an Indian firm), to work certain mines in India as a joint adventure, in which N. & Co. were to find the capital and the plaintiff to acquire the mining rights, and each partner was to take one-third of the profits. N. & Co. afterwards went into liquidation in India, and their property became vested in trustees residing in Bombay. The plaintiff subsequently ascertained that on the 17th of April, 1879, an agreement had been entered into in England between the defendant H., as the agent of N. & Co.'s trustees, and G., the agent of a Scotch company, for the sale of the mining rights to the Scotch company, and that such agreement contained no mention of the plaintiff's rights. The plaintiff then brought an action against N. & Co., their Indian trustees, H. (the agent), M. M., and the Scotch company, and by the indorsement on his writ claimed a declaration that under the agreement of the 14th of May, 1877, he was entitled to one-third of the profits of the mining adventure, and that the defendants and their estates in liquidation might be declared liable to account for and pay all moneys obtained by the defendants respectively by dealing with the mining properties, and fraudulently concealing the plaintiff's interest therein, with an injunction to restrain the defendants respectively from carrying the agreement of the 17th of April, 1879, into effect, except on the footing of the plaintiff being entitled to one-third of the profits, and for ancillary relief. The plaintiff, three out of the five members of the firm of N. & Co., and H., were in England, but all the other parties to the action were out of the jurisdiction; and the plaintiff obtained, under Ord. XI. r. 1 of the Rules of Court, 1875, an order authorising service out of the jurisdiction of the writ on the Scotch company in Scotland. Upon motion by the Scotch company to discharge this order:—Held, (1) that the balance of convenience was in favour of the action being tried here; (2) that the case was substantially a partnership case, in which an English court might properly exercise jurisdiction, and that the Scotch company were not entitled to have their case separated from that of the other defendants; (3) that the order for service out of the jurisdiction on the Scotch company was rightly made under Ord. XI. r. 1, because (*a*) the action "affected," within the meaning of the second branch of the rule, the contract of April, 1879, which was made within the jurisdiction, and (*b*) because the same contract constituted a breach within the jurisdiction of a contract made abroad. *Harris* v. *Fleming*, 49 L. J., Ch. 32; 13 Ch. D. 108; 28 W. R. 389.

Rule 1a of Ord. XI., giving a discretion to the judge when the defendant resides in Scotland or Ireland, only relates to actions on contracts, and will not be applied to other actions. *Fowler* v. *Barstow*, 51 L. J., Ch. 103; 20 Ch. D. 240; 45 L. T. 603; 30 W. R. 113—C. A.

A plaintiff, who resided in London, brought an action for breach of contract against the defendant, who lived in Ireland. The contract was made and broken in England:—Held, that an order could properly be made under Ord. XI. r. 1 allowing the service of the writ of summons on the defendant in Ireland. *Green* v. *Browning*, 34 L. T. 760.

In an action founded on an alleged breach within the jurisdiction of a contract which, according to the terms thereof, ought to have

been performed within the jurisdiction, an order had been made on the plaintiff's ex parte application to serve the writ upon the defendant, who was domiciled and resident in Scotland:—Held, on a motion under Ord. XII. r. 30 to set aside this order and the service, that Ord. XI. r. 2 does not refer to the exception in clause (*e*) of the previous rule, and that there is no power under Ord. XI. r. 1 to allow service of the writ nor to exercise the discretion given by r. 2 in the circumstances of this case. *Lenders* v. *Anderson*, 12 Q. B. D. 50; 49 L. T. 537; 32 W. R. 230.

There is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Ord. XI. r. 1 (*e*) when the defendant resides in Scotland, even though the contract contains a clause that the defendant may be served in Scotland. *British Wagon Co.* v. *Gray*, 65 L. J., Q. B. 75; [1896] 1 Q. B. 35; 73 L. T. 498; 44 W. R. 113—C. A.

Transfer from County Court to High Court.]—An action commenced in the county court, in which the summons was by order served on the defendant out of jurisdiction, was, for lack of jurisdiction (the estate which it was sought to administer exceeding 500*l.*), transferred to the high court. An objection in respect of the service out of the jurisdiction, which had been raised by the defendant in the county court, but not decided, was again raised in the high court:—Held, that though, if the action had remained in the county court, the objection could not, having regard to Ord. LI. r. 23 of the County Court Rules, 1889, have been successfully urged, yet the defendant, having throughout objected to the jurisdiction, ought to have an opportunity of shewing in the high court that the action was one which could not be prosecuted there. *Wood* v. *Middleton*, 66 L. J., Ch. 149; [1897] 1 Ch. 151; 75 L. T. 480; 45 W. R. 184.

Old Practice—Slander uttered abroad, but Special Damage within Jurisdiction—"Act done."]—On an application for leave to issue a writ of summons for service out of the jurisdiction, it appeared that the cause of action was an alleged slander uttered abroad, and followed by special damage in England:—Held, by the divisional court, that the special damage in England was not an act done within the jurisdiction, so as to give the court power to allow service of the writ out of the jurisdiction under Ord. XI. r. 1; held, by the court of appeal, that the writ ought not to issue, for as it was not shewn that the slander was intended to be transmitted to England, the special damage, if it was the cause of action, was not the act of the person who uttered the slander or an act for which he was responsible, so that there was no act done by him within the jurisdiction within Ord. XI. r. 1. *Bree* v. *Marescaux*, 50 L. J., Q. B. 676; 7 Q. B. D. 434; 44 L. T. 765; 29 W. R. 858—C. A.

2. Before the Judicature Acts.

In respect of what Causes of Action, or Breaches of Contract within the Jurisdiction.]—A claim for a balance due as the result of cross consignments and remittances between a merchant here and a merchant (a British subject) domiciled and carrying on business exclusively at the Cape of Good Hope is a cause of action which arose within the jurisdiction of the superior courts at Westminster, or in respect of the breach of a contract made within the jurisdiction. *Horwood* v. *Wood*, 17 C. B. (N.S.) 749; 10 Jur. (N.S.) 1132; 11 L. T. 383; 13 W. R. 94.

A defendant, being at Florence, signed a joint and several promissory note as one of the two makers, and sent it to London to the other, who signed it, and paid it into the plaintiff's bank:—Held, that the cause of action arose in London, and the defendant could be served with process. *Chapman* v. *Cottrell*, 3 H. & C. 865; 34 L. J., Ex. 186; 11 Jur. (N.S.) 530; 12 L. T. 706; 13 W. R. 843.

On a charter party made abroad for a right delivery at a port in this country:—Held, that a cause of action for demurrage there arose within the jurisdiction. *Slade* v. *Noel*, 4 F. & F. 424.

An Irish judgment for a debt contracted in England does not constitute a cause of action which arose within the jurisdiction of the superior courts of this country, nor does its remaining unsatisfied, the debtor being in this country, constitute a breach of a contract made within the jurisdiction. *Thelwall* v. *Yelverton*, 16 C. B. (N.S.) 813; 10 Jur. (N.S.) 292; 10 L. T. 506; 12 W. R. 876.

In an action for breach of a contract made abroad, but to be performed in this country, leave to proceed by service out of the jurisdiction will not be allowed, as the whole cause of action has not arisen within the jurisdiction of the court. *Allhusen* v. *Malgarejo*, 37 L. J., Q. B. 169; L. R. 3 Q. B. 340; 18 L. T. 323; 16 W. R. 854.

The allotment of shares in a limited company and a subsequent call thereon having been made in this country, a British subject resident in India may be served with a writ in an action for the call under 15 & 16 Vict. c. 76, s. 18, although the call was directed to be paid, and was not paid, to the company's bankers in India. *Oriental Hotel Co.* v. *Pelly*, 38 L. J., Ex. 39.

It is sufficient to entitle a plaintiff to proceed under the Common Law Procedure Act, 1852, s. 18, that the breach of contract should have arisen within the jurisdiction. *Vaughan* v. *Weldon*, 44 L. J., C. P. 64; L. R. 10 C. P. 47; 31 L. T. 683; 23 W. R. 138.

The case of *Jackson* v. *Spittal*, infra, lays down the rule which will henceforward be followed by all the courts, notwithstanding the cases of *Allhusen* v. *Malgarejo*, supra, and *Cherry* v. *Thompson*, infra. *Ib.*

"Cause of action" in s. 18 of the Common Law Procedure Act, 1852, does not mean the whole cause of action, i.e. contract and breach, but the act on the part of the defendant which gives the plaintiff his cause of complaint. *Jackson* v. *Spittall*, 39 L. J., C. P. 321; L. R. 5 C. P. 542; 22 L. T. 755; 18 W. R. 1162.

A defendant while abroad was served with a writ of summons in an action for breach of promise of marriage under the Common Law Procedure Act, 1852, s. 18. The promise of marriage was made abroad, and broken in this country:—Held, per Martin, B., Pigott, B., and Cleasby, B., that the case was within the section, and the service of the writ good (dissentiente Kelly, C. B.). Per Pigott, B., and Cleasby, B.:—In actions of contract the "breach" is the "cause of action" within the meaning of s. 18. Per Kelly, C. B.:—The "cause of action" in that section includes both contract and breach. *Durham* v. *Spence*, 40 L. J., Ex. 3; L. R. 6 Ex. 46; 23 L. T. 500; 19 W. R. 162.

The words "cause of action" in the Common Law Procedure Act, 1852, s. 18, mean the whole cause of action, and therefore, in cases of contract, the contract as well as the breach must have taken place within the jurisdiction. *Cherry* v. *Thompson*, 41 L. J., Q. B. 243; L. R. 7 Q. B. 573; 26 L. T. 791; 20 W. R. 1029.

Two British subjects, residing abroad, agreed to marry one another; the one on coming to England received from the other a letter written abroad renouncing the engagement:—Held, that, supposing the breach to have occurred in England, the "cause of action" did not occur in England. *Ib.*

Held, also, that the breach did not occur in England. *Ib.*

A contract of hiring was made in London between the defendant, who resided there, and the plaintiff, who was afterwards sent to Ireland to discharge there the duties of his service; subsequently, and before the plaintiff had performed any service there, the defendant wrote and posted in London a letter of dismissal, addressed to and received by the plaintiff in Dublin:—Held, in an action for wrongful dismissal, founded upon the letter as a breach of the contract, that no part of the cause of action arose in Ireland. *Mathews* v. *Alexander*, Ir. R. 7 C. L. 575.

The plaintiff, resident in Ireland, sent to the defendant, resident in England, for his signature, a draft letter which proposed to engage the plaintiff as agent in Ireland for the defendant. The defendant signed the letter in England and returned it by post to the plaintiff, who received it in Ireland. The plaintiff was subsequently dismissed by the defendant by a letter written and posted by the defendant in England, and received by the plaintiff in Ireland:—Held, in an action for wrongful dismissal, that both the contract and the breach arose in England. *Deane* v. *Sanford*, Ir. R. 9 C. L. 228.

The defendant executed in London, where he resided, a charter party whereby he contracted with the plaintiffs that his ship Havre should proceed to Santander, load there 300 tons of flour, and deliver the cargo of 300 tons to the plaintiffs in Dublin; and he transmitted the charter party to the plaintiffs in Dublin, with a request that they would sign it, which they did, and returned it to him perfected. The ship was capable of loading 201 tons only, which were delivered to the plaintiffs in Dublin, where they paid the freight to the defendant's agent:—Held, first, that the breach in not loading 300 tons in Santander and delivering them in Dublin was a cause of action arising in Ireland. *Macken* v. *Ellis*, Ir. R. 8 C. L. 151.

Held, secondly, that a cause of action arose in Ireland for falsely warranting that the ship was capable of carrying 300 tons from Santander to Dublin; for fraudulently and falsely representing that she was capable of doing so; and for negligence in not procuring a vessel sufficiently large for that purpose. *Ib.*

A promissory note payable in London but delivered to the plaintiff abroad by the defendant, an English subject, comes within s. 18 of the Common Law Procedure Act, 1852. *Fife* v. *Round*, 6 W. R. 282.

—— **Foreigners.**]—The Common Law Procedure Act, 1854, s. 19, does not apply to foreign corporations domiciled and carrying on business exclusively abroad. *Armstrong* v. *Elbinger Actien-Gesellschaft*, 23 W. R. 94.

Sect. 19 of 15 & 16 Vict. c. 76 does not apply to foreign corporations carrying on business abroad, and the court has no power to give leave to proceed in the action upon affidavit of service of notice of the writ on the secretary of such a body as therein prescribed. *Ingate* v. *Austrian Lloyd's Co.*, 4 C. B. (N.S.) 704; 27 L. J., C. P. 323; 4 Jur. (N.S.) 975; 6 W. R. 659.

The defendant, a merchant residing in Norway, and not being a British subject, drew, indorsed, and sent in a letter by post to a merchant in London, a bill of exchange payable in London, and which was indorsed to the plaintiff and dishonoured:—Held, that there was no cause of action which arose within the jurisdiction of the superior courts, nor the breach of a contract made within their jurisdiction, and consequently the plaintiff could not proceed against the defendant under the 19th section. *Sichel* v. *Borch*, 2 H. & C. 954; 10 Jur. (N.S.) 107; 9 L. T. 657; 12 W. R. 346.

Substituted Service of Petition.]—When a respondent to a petition was out of the jurisdiction, the court made an order for substituted service, and also gave leave to the petitioner to serve the respondent abroad. *Bonelli's Electric Telegraph Co., In re, Cook's Claim*, 43 L. J., Ch. 720; L. R. 18 Eq. 655; 31 L. T. 38; 22 W. R. 856.

—— **When allowable.**]—The court has no power to authorise service out of the jurisdiction unless in cases where it is enabled to do so by statute. *Maugham, In re*, 22 W. R. 748.

Leave to serve the common order to tax on a solicitor out of the jurisdiction was not given. *Ib.*

Service on Solicitors.] — Where defendants were resident out of the jurisdiction, substituted service of the copy of the bill was allowed to be made on their solicitor, who was employed by them in a suit that was pending relative to the same subject-matter. *Rees* v. *Braidley*, 22 L. T. 470.

Effect of Appearance—Jurisdiction.]—A writ was issued with a special indorsement, stating that the defendant was sued as a member of a bank at Calcutta, on promissory notes of that bank. The writ was served on the defendant in person, who entered an appearance to it, on which a declaration was delivered, and he afterwards applied for and obtained an inspection of the notes. He likewise made an affidavit that they were made at Calcutta, and that he was not aware of the nature of the plaintiff's claim until he inspected them:—Held, that, assuming the case not to be within the 18th section of 15 & 16 Vict. c. 76, the defendant, by appearing to the action, had given the court jurisdiction over it. *Forbes* v. *Smith*, 10 Ex. 717; 3 C. L. R. 505; 24 L. J., Ex. 167; 1 Jur. (N.S.) 383; 3 W. R. 214.

If a party, served with a writ abroad, appears, he will not be allowed to set aside the writ upon the ground that the cause of action declared on did not arise within the jurisdiction of the court, and it makes no difference that the writ was not specially indorsed. *Staniforth* v. *Richmond*, 13 W. R. 724.

If the court has once acquired jurisdiction over a party in a cause, he may be effectually served with any order in the cause in any part of the world. *Anon.*, 1 Hog. 1.

If a party have appeared in a cause it is unnecessary to apply for liberty to serve him with an order of the court, although he reside out of the jurisdiction. *Smith* v. *Rooney*, Jon. & C. 104.

If a party in a suit may be served out of the jurisdiction, under the statute 4 & 5 Will. 4, c. 82, in respect of any part of the subject of the suit, the service is good for all the other purposes of the suit. *Green* v. *Pledger*, 3 Hare, 165; 13 L. J., Ch. 213; 8 Jur. 801.

Setting aside on Ground of Irregularity.]—In a suit to obtain relief against a domiciled Scotchman living at Glasgow in respect of certain transactions relating to a company which was registered and carried on business in England, and to restrain his dealing with the shares of the company in his possession, the defendant was served at his office in Glasgow under an order obtained ex parte for service of copy bill with interrogatories upon him "in Scotland or elsewhere out of the jurisdiction of the court":—Held, that, having regard to the subject-matter of the suit (shares in a company registered in this country), service out of the jurisdiction had been properly directed, and that, although the order was in terms irregular, the court would not, after it had been acted upon and service effected under it, discharge it on the ground of such irregularity. *Phospho-Guano Co.* v. *Guild*, 43 L. J., Ch. 360; L. R. 17 Eq. 432; 30 L. T. 117; 22 W. R. 526.

A British subject residing out of the jurisdiction, having been served with a writ of summons, and not having appeared, a judge's order was made that the plaintiff should be at liberty to proceed. Judgment was signed on the 28th November. The defendant on the 12th March applied to set aside the proceedings, on the ground that the cause of action did not arise wholly within the jurisdiction of the court:—Held, that the order was not void, and the defendant not having come within a reasonable time, the rule was refused. *Hutton* v. *Whitehouse*, 1 H. & N. 32; 2 Jur. (N.S.) 379; 4 W. R. 463.

In November, 1852, the plaintiff's attorney issued against the defendant a writ for service on a British subject residing out of the jurisdiction. In the following March, the defendant's attorney entered an appearance. The plaintiff's attorney not being aware that an appearance was entered, from time to time renewed the writ, and on the 31st of March served the defendant, who had always resided in England, with a copy of the renewed writ:—Held, that there was no ground for setting aside the proceedings. *Green* v. *Braddyll*, 1 H. & N. 69; 4 W. R. 487.

A writ issued and served on a British subject out of the jurisdiction may be set aside, on the application of the defendant, if it is shewn that there was no cause of action which arose within the jurisdiction. *Binet* v. *Picot*, 4 H. & N. 365; 28 L. J., Ex. 244.

When a defendant, by affidavit, states that the cause of action arose abroad, the plaintiff must, to support the writ, distinctly shew such facts as, if true, would shew that the cause of action arose or the contract was made within the jurisdiction. *Ib.*

Conditions Imposed.]—A writ having been issued for service out of the jurisdiction, the defendant applied on affidavit to set it aside, on the ground that the cause of action did not arise within the jurisdiction; and the court not being satisfied that the plaintiff did not intend to sue for matters not arising within the jurisdiction, made an order to set aside the writ, unless the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction, and to confine himself to that cause of action. *Diamond* v. *Sutton*, 35 L. J., Ex. 129; L. R. 1 Ex. 130; 12 Jur. (N.S.) 319; 13 L. T. 800; 14 W. R. 374.

The plaintiff and the defendant were British subjects, and the latter carried on business at establishments both in Paris and in London. In December, 1866, the plaintiff entered into the defendant's service in Paris, under a contract of that date made in Paris and written in the French language, by which he agreed to serve the defendant in the capacity of manager of the defendant's business, at a salary of 9,000 francs a year, payable monthly, and a commission of 10 per cent. on the balance of profits to be taken at the end of each year. In October, 1870, owing to the exigencies of the war in France, the plaintiff and the defendant came over to London, and from that time the plaintiff was occupied in the defendant's service in London up to June, 1871, when both of them returned to Paris, the plaintiff continuing on there, as before, in the defendant's service until November, 1871, when he was dismissed, there being a balance of nine months' wages due to him at that time. The plaintiff then commenced an action in this country against the defendant for a breach of contract in non-payment of wages, and for a wrongful dismissal. A rule to set aside the writ of summons and all subsequent proceedings on the ground that the cause of action did not arise within the jurisdiction was discharged by the court, upon the plaintiff undertaking to confine himself strictly to a cause of action arising within the jurisdiction, namely, the nonpayment of the salary accruing due to him in respect of his services in this country. *Arrowsmith* v. *Chandler*, 27 L. T. 242.

Waiver.]—The subject of the suit was a mine in America, in which the plaintiff and the defendants, P. and B. (all Americans), were interested. Various negotiations and contracts were made and entered into between the parties, under or by virtue of which an English company was formed here to work the mine. P. came over to this country to superintend the English company, but B. remained throughout in America. Disputes arose, and a suit was instituted here to restrain P. from selling certain shares of the English company; for an account; and for other relief. P. did not object to the jurisdiction. An order was made in the suit to serve process upon B. in America, which was done:—Held, upon a motion by B. to discharge such order, that as it did not appear that P. was B.'s agent, his not objecting to the jurisdiction did not operate as a waiver by B. of any objection which he (B.) might have to it, or of his rights as an American citizen to be sued in respect of an American contract, in the courts of his own country alone. *Davis* v. *Park*, 42 L. J., Ch. 204; 21 W. R. 136. Affirmed, 42 L. J., Ch. 673; L. R. 8 Ch. 862, n.; 28 L. T. 295; 21 W. R. 301.

A bill was filed against four trustees in India of a fund in India, and one formal defendant in England, to recover money payable in England.

The trustees were served out of the jurisdiction, appeared and answered, and entered into evidence:—Held, that as the defendants had not demurred or pleaded or moved to discharge the order for service, the court might determine the questions between the parties. *Edwards* v. *Warden*, 43 L. J., Ch. 644; L. R. 9 Ch. 495; 30 L. T. 540; 22 W. R. 669.

Practice on Discharge of Order.]—Course to be taken by a defendant who considers that an order for service upon him out of the jurisdiction ought not to have been made. *Maclean* v. *Dawson*, 4 De G. & J. 150; 28 L. J., Ch. 742; 5 Jur. (N.S.) 663; 7 W. R. 354.

A defendant may move to set aside an order for service out of the jurisdiction, on the ground of irregularity, without filing any affidavit. *National Insurance and Investment Association* v. *Carstairs*, 2 N. R. 348; 9 Jur. (N.S.) 955; 8 L. T. 717; 11 W. R. 866.

Where a plaintiff had introduced into his bill statements as to the subject of the suit, bringing it within the 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, and the defendant, on an application to discharge an order for service abroad, had filed an affidavit to disprove the statements:—Held, that the affidavit which had been rejected ought to be received. *Foley* v. *Maillardet*, 1 De G. J. & S. 389; 3 N. R. 361, 446; 33 L. J., Ch. 335; 10 Jur. (N.S.) 161; 9 L. T. 700; 12 W. R. 355.

f. Indorsement of Time of Service.

[R. S. C., 1883, Ord. IX. r. 15.]

Extension of Time for.] — Under r. 6 of Ord. LVII. of Rules of Court, 1875, the court has power to extend the time fixed by r. 13 of Ord. IX. for the making an indorsement on a writ of the date of service out of the jurisdiction. *Hastings* v. *Hurley*, 50 L. J., Ch. 577; 16 Ch. D. 734; 44 L. T. 176; 29 W. R. 440.

Where through inadvertence the date of the service of a writ has not been indorsed upon the writ within the time prescribed by Ord. IX. r. 13, the court can extend the time so as to make an indorsement made after the proper time and all subsequent proceedings valid. *Sproat* v. *Peckett*, 48 L. T. 755.

Where, upon service of a writ on a defendant, he denies that he is the party named therein, and the person serving the writ consequently omits to make the indorsement on the writ within the time required, the court will permit him to make the indorsement. *Burrows* v. *Gabriel*, 1 B. C. Rep. 159; 4 D. & L. 107.

In Case of Substituted Service.]—In the case of substituted service it is not necessary to indorse on the writ the date of service, as provided by Ord. IX. r. 13, in order to proceed by default. *Dymond* v. *Croft*, 45 L. J., Ch. 604; 3 Ch. D. 512; 34 L. T. 786; 24 W. R. 842—C. A.

Service out of the Jurisdiction.]—The provisions of Ord. IX. r. 13, do not apply to notice in lieu of writ under Ord. XI. *Livesey, In re, Fish* v. *Chatterton*, 47 L. T. 328; 31 W. R. 87.

By whom made.]—The indorsement may be made by a marksman. *Baker* v. *Coghlan*, 7 C. B. 731.

Writ in Defendant's Possession.]—Formerly, if a defendant improperly got possession of the writ, the court would allow an appearance to be entered without any indorsement, and order the defendant to pay the costs. *Brooke* v. *Edridge*, 2 D. P. C. 647.

But not when the original writ was sent by the plaintiff to the defendant at his request, and he kept it, and did not appear. *Atkinson* v. *Howell*, 7 M. & W. 213; 8 D. P. C. 872; 10 L. J., Ex. 64.

Liability for not Indorsing.]—An attorney retained to prosecute an action, and not a process server employed, is liable to an action for a breach of duty in neglecting to indorse on the writ the time of service. *Curlewis* v. *Broad*, 1 H. & C. 322; 31 L. J., Ex. 473; 10 W. R. 797.

g. Renewal of Writ.

Writ Issued before Judicature Act, 1875—Renewal under Common Law Procedure Act, 1852.]—Upon a motion to set aside the service of a writ issued in 1861, and renewed every six months under s. 11 of the Common Law Procedure Act, 1852, until March, 1890, when it was served on the defendant, on the ground that the writ had become a nullity owing to its not having been renewed in accordance with the Rules of the Supreme Court, 1883, Ord. VIII. r. 1, which require the order of the court or a judge for that purpose:—Held, that the service must be set aside, the Common Law Procedure Act, 1852, having been repealed by the 46 & 47 Vict. c. 49. The Rules of 1883 must be read together with that act, and therefore Ord. VIII. r. 1, applies here. The rules under the judicature acts apply to all writs issued either before or since the acts came into force, and the practice-masters were wrong in allowing writs to be renewed without an order. In this case Ord. LXXII. r. 2, cannot be relied on. *Hume* v. *Somerton*, 59 L. J., Q. B. 420; 25 Q. B. D. 239; 62 L. T. 828; 38 W. R. 748; 55 J. P. 38.

When Original Writ Lost.]—When an original writ of summons, issued in January, 1875, and renewed in July, was lost, the court had no power to allow a renewal of it, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 11, by ordering a verified copy to be sealed. *Davies* v. *Garland*, 45 L. J., Q. B. 137; 1 Q. B. D. 250; 33 L. T. 727; 24 W. R. 252.

Extension of Time—Statute of Limitations.]—It is a rule of practice that the court will not extend the time for renewing a writ of summons after the expiration of twelve months from the day of the date of the writ, where the claim would, in the absence of such renewal, be barred by the Statute of Limitations. But, semble (per Kay, L.J.), that the court has power to do so under exceptional circumstances. *Hewett* v. *Barr*, 60 L. J., Q. B. 268; [1891] 1 Q. B. 98; 39 W. R. 294—C. A.

When a writ was not served within twelve months from its issue, and the cause of action had in the meantime become barred by the statute of limitations, the court, following *Doyle* v. *Kaufman* (3 Q. B. D. 7, 340), refused to extend the time for its renewal, under Ord. LXIV. r. 7. *Magee* v. *Hastings*, 28 L. R., Ir. 288.

Before the expiration of six years from the falling due of a simple contract debt the plaintiff took out of the Court of Common Pleas a writ for its recovery. The writ was never served

and no further proceedings were taken in the action. Before the expiration of the writ, but after the expiration of six years from the debt falling due, the plaintiff took out a summons for the administration of the estate of his debtor, who died intestate. All these proceedings were before the passing of the judicature act:—Held that, although the debt was, at the date of his taking out the summons, kept alive in the common pleas by 15 & 16 Vict. c. 76, s. 11, it was barred in the court of chancery. *Fievet* v. *Manby*, *Manby*, *In re*, 3 Ch. D. 101; 35 L. T. 307; 24 W. R. 699.

When more than twelve months have elapsed since the date of a writ, and it has not been served on the defendant, the court has no power under Ord. LVII. r. 6, to enlarge the time appointed by Ord. VIII. r. 1, for application to be made to renew the same, if at the date of the application the plaintiff's right to sue is barred by the Statute of Limitations (21 Jac. 1, c. 16). *Doyle* v. *Kaufman*, 47 L. J., Q. B. 26; 3 Q. B. D. 7; 26 W. R. 98. Affirmed, 3 Q. B. D. 340—C. A.

Amending and Renewing.]—When a writ of summons has been amended, the twelve months during which it is in force, under Ord. VIII. r. 1, must be reckoned from the date of issue, and not from the date of amendment. *Jones, In re, Eyre* v. *Cox*, 46 L. J., Ch. 316; 25 W. R. 303.

Leave given, under Ord. LVII. r. 6, to renew a writ after the expiration of twelve months. *Ib.*

Cases under Common Law Procedure Act.]—A plaintiff took out a writ against J.; afterwards, and before service, having discovered that the real defendant was W., he altered the writ, had it resealed, and then served it for the first time, retaining the original teste:—Held, that this might be done, although before the resealing, but after the date of the teste, the defendant had made a tender, it appearing that the plaintiff had acted bonâ fide, and had been misled as to the name of the defendant by the defendant's attorney. *Gibson* or *Dixon* v. *Varley* or *Vorley*, 7 El. & Bl. 49; 26 L. J., Q. B. 79; 3 Jur. (N.S.) 318.

On the day of the expiration of a writ the plaintiff's attorney attended at the office for the purpose of having it renewed, and paid the fee; but, being suddenly called away, omitted to get the seal impressed, and did not discover the mistake until it was too late to keep the writ alive by resealing, so as to save the statute of limitations:—Held, that the court had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; but that it would have been otherwise if the omission to reseal the writ had been occasioned by a fault of the officer of the court. *Nazer* v. *Wade*, 1 B. & S. 728; 31 L. J., Q. B. 5; 8 Jur. (N.S.) 134; 5 L. T. 604.

Where a plaintiff has by inadvertence allowed the time for resealing a writ to elapse without having the writ resealed, the court will not order it to be done nunc pro tunc, unless it can see that there has been some default in the conduct of some one of its officers. *Anon.*, 31 L. J., Q. B. 61.

The six months during which a writ continues in force, after its renewal, are to be computed inclusively of the day of renewal. *Anon.*, 1 H. & C. 664; 32 L. J., Ex. 88; 7 L. T. 718; 11 W. R. 293.

Therefore, where a writ was originally issued on the 23rd of January, 1861, and successively renewed, the last renewal being on the 19th of July, 1862, and on Monday, the 19th of January, 1863, the officer, on being applied to, declined to impress the renewal seal on the writ:—Held, that the writ had expired, and the court refused to direct the officer to impress the seal, nunc pro tunc, as of that date. *Ib.*

The last day for resealing a writ, so as to save the statute of limitations, expired on Saturday, the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, and the officer having refused to reseal the writ on the following Monday, the court refused to order him to do it afterwards, nunc pro tunc. *Evans* v. *Jones*, 2 B. & S. 45; 8 Jur. (N.S.) 641; 5 L. T. 673.

A judge has no power to order the resealing of a writ which has once run out of date. If, of several resealings, one was made too late, all subsequent resealings are bad, though an attempt has been made to cure the original defect by a judge's order. *Fisher* v. *Cox*, 16 L. T. 397.

h. Concurrent Writs.

Copy not marked "concurrent."]—A copy of a concurrent writ issued pursuant to Ord. VI. r. 1, is not a true copy, unless marked "concurrent." *Collins* v. *North British and Mercantile Insurance Co.*, 63 L. J., Ch. 709; [1894] 3 Ch. 228; 8 R. 470; 71 L. T. 58; 43 W. R. 106.

When Issued.]—A concurrent writ can only be issued within six calendar months from the first commencement of the action by the original writ, although the original writ has been renewed. *Coles* v. *Sherrard*, 11 Ex. 482; 25 L. J., Ex. 59.

Several Defendants.]—Whenever different times for appearing have to be allowed to different defendants, the proper course is to issue concurrent writs. *Traill* v. *Porter*, 1 L. R., Ir. 60.

When one of the defendants in a probate action was a foreign subject residing out of the jurisdiction, the court ordered that he should receive notice in lieu of service of a writ of summons marked as a concurrent writ under Ord. VI. r. 2. *Beddington* v. *Beddington*, 45 L. J., P. 44; 1 P. D. 420; 34 L. T. 366; 24 W. R. 348.

There is no irregularity in issuing several writs of summons for the same cause of action, where there are several defendants, if they are issued on the same præcipe and dated on the same day. *Angus* v. *Coppard*, 3 M. & W. 57; 6 D. P. C. 137; 7 L. J., Ex. 10.

Where there are several defendants residing in two different counties, two writs of summons may be issued, and dated on different days. *Crow* v. *Crow*, 1 D. & L. 709; 13 L. J., Q. B. 57; 7 Jur. 1060.

Service out of the Jurisdiction—Original Writ renewed—Enlargement of Time.]—Under the Rules of Court, 1883, Ord. VI. rr. 1, 2, the court has power to give leave for the issue of a concurrent writ for service out of the jurisdiction, although the original writ was issued for service within the jurisdiction, and has been renewed, and although there is only one defendant to the action. And where the writ has been renewed

such leave may be given, notwithstanding that the enlargement of time for issuing a concurrent writ may affect the operation of the statute of limitations. *Smalpage* v. *Tonge*, 55 L. J., Q. B. 518; 17 Q. B. D. 644; 55 L. T. 44; 34 W. R. 768—C. A.

V. APPEARANCE AND PROCEEDINGS IN DEFAULT OF.

See R. S. C., 1883, Ords. XII. and XIII.

When Writ issued in District Registry.]—A writ was issued in a district registry, and an appearance entered to it in London, but no notice of appearance was given to the plaintiff's solicitor at his address within the district, out of the registry of which the writ was issued:—Held, that the plaintiff was entitled to sign judgment in default of an appearance. *Smith* v. *Dobbin*, 47 L. J., Ex. 65; 3 Ex. D. 338; 37 L. T. 777; 26 W. R. 122—C. A.

Appearance in Person—By whom Entered.]—When a defendant appears in person to a writ of summons, the memorandum required by the Common Law Procedure Act, s. 31, may be delivered to the officer by a third person duly authorised in the defendant's behalf, and need not be delivered by him in person or by an attorney for him. *Oake* v. *Moorecroft*, 10 B. & S. 848; 39 L. J., Q. B. 15; L. R. 5 Q. B. 76; 18 W. R. 115.

Pursuant to Undertaking.]—Solicitor ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook* v. *Broomhead*, 16 Ves. 133. *See also* SOLICITOR.

Form of Entry.]—In entering an appearance, the form must be followed. *Warren* v. *Love*, 7 D. P. C. 602; 2 W. W. & H. 55; 3 Jur. 363. S. P., *Codrington* v. *Curlewis*, 9 D. P. C. 968; 5 Jur. 701.

By Married Women and Infants.]—Although the Common Law Procedure Act, 1852, bound married women as to appearance to process, its provisions in that respect did not apply to infants. *Jarman* v. *Lucas*, 15 C. B. (N.S.) 474; 33 L. J., C. P. 108; 12 W. R. 202.

Entry after Time Expired.]—It is competent to a defendant, against whom a writ has been issued, to enter an appearance after the writ has expired. *Richardson* v. *Daley*, 7 D. P. C. 25; 4 M. & W. 384; 8 L. J., Ex. 13; 2 Jur. 946.

Where an appearance is entered after due time, though before judgment signed, there should be notice of it. *Rhodes* v. *Bryant*, 2 F. & F. 265. *See* Ord. XII. r. 22.

Non-appearance by some Defendants.]—A summons was taken out by two or three defendants (who were the trustees and lessees of a mining company worked on the cost-book system) that proceedings might be stayed, and that the matters in difference between the parties might be referred to arbitration. This summons was still pending. The third defendant had never appeared, but an appearance had been entered for him by the plaintiff. Under these circumstances a motion by the two co-defendants for leave to appear for and use the name of the non-appearing defendant on the summons was refused with costs. *Willesford* v. *Watson*, 26 L. T. 15; 20 W. R. 278.

The court ordered a cause to be set down for hearing notwithstanding one of the defendants, who was a trustee, had not entered an appearance. *Burrell* v. *Maxwell*, 25 L. T. 655.

When one of several defendants served has not appeared, while the others have appeared and delivered defences, the plaintiff may move for judgment, as against the defendants who have delivered defences, under the Judicature Act, Ord. XL. r. 11, upon admissions, and as against the defaulting defendant under the combined effects of Ords. XIII. r. 9, and XXIX. r. 10; but as against the latter the action must be set down on motion for judgment, and in both cases two clear days' notice of motion must be given. *Parsons* v. *Harris*, 6 Ch. D. 694; 25 W. R. 410.

When two defendants are sued by a specially indorsed writ of summons to recover a sum due by them on foot of a joint and several contract, and one of them is served with the writ of summons but does not appear within the limited time, and the other defendant is not served, final judgment for the sum claimed can be marked against the defendant who was served, but made default, without discontinuing the action against the remaining defendant. *Parker* v. *Hamilton*, 30 L. R., Ir. 156.

In an action for a liquidated demand against A. and B. on foot of a joint debt, the writ being specially indorsed, the court allowed judgment, in default of appearance, to be entered against A. without prejudice to the plaintiff's right to proceed against B., who had not been served. *Rice* v. *Dillon*, 28 L. R., Ir. 376.

By Person not a Party.]—In an action to administer real and personal estate, cross summonses, for leave to defend at the cost of the estate certain actions of ejectment, were taken out—first, by the plaintiff, who was the sole acting trustee (three others named in the bill having disclaimed), and, second, by the equitable tenant for life, who was in possession of the rents under an order of the court:—Held, that the court could not refuse the claim of the tenant for life to defend the actions of ejectment. Leave given accordingly, with liberty to use the name of the trustee for that purpose. *Longbourne* v. *Fisher*, 47 L. J., Ch. 379; 38 L. T. 216; 26 W. R. 276.

Appearance of Third Party before Service.]—A defendant set up a counter-claim in which he asked for relief against a third party, as well as the original plaintiffs, but on delivery of the defence and counter-claim to the plaintiffs' solicitors, who were also the solicitors of the third party, the defendant's solicitor told them that they must not take it as a service upon them as representing the third party, as the defendant was not sure whether he would proceed with his counter-claim against the third party, though, owing to the time for delivering the defence and counter-claim to the plaintiffs having nearly expired, he was obliged to deliver it as it was. The third party entered an appearance to the counter-claim, and delivered a defence. The defendant having made up his mind not to proceed with his counter-claim against the third party, moved to discharge his appearance:—Held, that, until service of the counter-claim, no one can consider himself as a defendant to it;

that the third party was therefore wrong in appearing without being served; and that on the defendant amending his counter-claim by omitting all mention of the third party, the third party's appearance should be discharged. *Fraser* v. *Cooper*, 52 L. J., Ch. 684; 23 Ch. D. 685; 48 L. T. 754; 31 W. R. 714.

Conditional.]—On a motion by a defendant who was in contempt for not having appeared to set aside a sequestration, he cannot be heard without first entering a conditional appearance with the registrar, which would be void if the motion should not succeed. *Davidson* v. *Hastings* (*Marchioness*), 2 Keen. 509; 7 L. J., Ch. 186, 215; 2 Jur. 756.

At Trial.]—*See* infra, TRIAL.

Setting Aside—Illusory Address for Service.]—A defendant appeared in person to a writ, and gave an address for service in the memorandum of appearance. On inquiry it was found that though the defendant had once carried on business at the address given, he had ceased to do so, and had left no instructions as to the forwarding to him of letters or documents. A letter forwarded by the plaintiff to his private address was returned through the Dead Letter Office. The plaintiff subsequently received a letter from the defendant from abroad. On an ex parte application the court made an order declaring the address for service illusory or fictitious under Ord. XII. r. 12. *Edell* v. *Cave*, 54 L. J., Ch. 308; 51 L. T. 621; 33 W. R. 208.

—— **Service of Order.**]—A judge's order to set aside an appearance is of no avail until served on the opposite party, although the clerk of appearances has struck out the appearance in pursuance of the order. *Belcher* v. *Goodered*, 4 D. & L. 814; 4 C. B. 472.

—— **Entered by Solicitor without Authority.**] *See* SOLICITOR.

—— **In other Cases.**]—Appearance once entered by attorney, can only be struck out by leave of court. *Menzies* v. *Rodrigues*, 1 Price, 92.

An appearance cannot be regularly entered without the defendant's authority. *Watson* v. *Fairlie*, 4 L. J. (o.s.) Ch. 53.

Where a solicitor, by mistake, has entered an appearance for a party for whom he is not authorised, the court will not, on the application of the solicitor alone, cancel the appearance. *Sambroke* v. *Hayes*, 4 L. J., Ch. 175.

The appearance entered in a cause by a defendant's solicitor will not be set aside on the ground that such solicitor had not at the time taken out his certificate for the year, if he was then, and still continued, duly entered on the roll. *Sparling* v. *Brereton*, 14 W. R. 515.

By the deed of settlement of a banking company, it was provided that the funds or property of the company should be vested in trustees, and that it should be lawful for the directors to direct legal proceedings on behalf of the bank, and to direct the necessary parties to commence, prosecute, or defend the same; that such parties should not release or discontinue such proceedings without the consent of the directors, and that they should be indemnified out of the property of the bank against all expenses and losses in consequence. Property was purchased by the bank, and was conveyed to H. and two others, who were then the trustees. On a bill being filed by persons claiming a beneficial interest against the three trustees, the solicitors of the bank entered an appearance for all three of them, and prepared an answer, without any express authority from, or knowledge on the part of H., who moved that the appearance for him might be cancelled or withdrawn:—Held, that the appearance had not been entered without his authority, having regard to the deed, and the fact that the suit was one in which he had no interest whatever, and the motion was refused with costs. *Henrich* v. *Sutton*, L. R. 6 Ch. 220; 24 L. T. 530; 19 W. R. 515.

Power of attorney to a solicitor in India to enter appearance and act generally for an infant in India, that being the practice there. *Ruck* v. *Barworth*, 3 W. R. 592.

Waiver of Irregularity by.]—A formal objection to a notice of motion is waived by the party appearing and requesting further time to oppose it. *Morland*, *Ex parte*, 3 Deac. & C. 248.

Subpœna was served on defendant at house in London, but he resided in country; attachments issued, and he appeared:—Held, appearance waived irregularity; that it must be considered a town cause: therefore, an order obtained for six weeks' time to answer was discharged with costs, as being irregular. *Bound* v. *Wells*, 3 Madd. 434.

A waiver of irregularity in process by appearance, does not relate back so as to bring the defendant into contempt for not appearing in time. *Robinson* v. *Nash*, 1 Anstr. 76.

An irregularity in process may be cured by the defendant's appearance. *Floyd* v. *Nangle*, 3 Atk. 569.

But not if the appearance is entered just before the long vacation for the purpose merely of avoiding an attachment. *Anon.*, 3 Atk. 567.

Irregularity (if such it was) in not stating, in an order for substituted service, where the defendant was to appear, waived by the common appearance. *Johnston* v. *Tottenham*, 11 Ir. Eq. R. 271.

Irregularity of subpœna to hear judgment waived by appearing on a motion to advance the cause, and not then taking the objection. *Carvick* v. *Young*, Jac. 524.

Where an order had been obtained, that service of a subpœna on the attorney of the defendant, who resides abroad, and had brought an action at law against the plaintiffs, should be good service; but such order was obtained, and the subpœna issued and served, two days before the filing of the bill; the court refused to discharge the order for irregularity, holding that the irregularity, if any, had been waived by a subsequent appearance of the defendant. *Royal Exchange Assurance Co.* v. *Short*, 1 Y. & J. 570.

Informal Appearance—Effect of Opposing Motion.]—An order was made by the vacation judge, on the ex parte application of the plaintiffs, for service of the writ and notice of motion on the solicitors and at the place of business in England of a foreigner residing out of the jurisdiction. Without formally entering an appearance, the defendant filed affidavits in opposition to the motion, and instructed counsel, who opposed the motion on the merits:—Held, that

the defendant had thereby waived the right to raise any objection as to the irregularity of the order, and must be treated as if he had been properly served and had formally appeared. *Boyle* v. *Sacker*, 58 L. J., Ch. 141; 39 Ch. D. 249; 58 L. T. 822; 37 W. R. 68—C. A.

If a defendant accepts a declaration, and acts as if an appearance had been entered for him, the court will not afterwards permit him to set aside a judgment for want of an appearance having been entered. *Williams* v. *Strahan*, 1 Bos. & P. (N.R.) 309.

Effect of, on Defective Writ.]—Appearance to a writ is a "fresh step" taken within the meaning of Ord. LXX. r. 2, and a writ which is irregular to the knowledge of the defendant cannot be set aside on his application after appearance. *Mulckern* v. *Doerks*, 53 L. J., Q. B. 526; 51 L. T. 429. But see *Willmott* v. *Freehold House Property Co.*, 51 L. T. 552—C. A.

The writ in an action described the defendant as "J. L. Young, carrying on business as the Edison Mineograph Co. at 60, Ludgate-hill." The defendant, who was not in fact carrying on the business, entered an appearance as "J. L. Young, sued as J. L. Young, carrying on business as the Edison Mineograph Co. at 60, Ludgate-hill, but who denies that he is carrying on business as the Edison Mineograph Co. at 60, Ludgate-hill, or elsewhere":—Held, on motion by the defendant to set aside the writ and subsequent proceedings on the ground of irregularity, that there was no irregularity in the writ, and that the mistake had been set right by the form in which an appearance had been entered by the defendant. The motion was accordingly refused. *Zuccato* v. *Young*, 38 W. R. 474.

Writ afterwards amended.]—An appearance by a defendant to the original writ stands as a good appearance to an amended writ. *Paxton* v. *Baird* (5 R. 129) followed. *Hanmer* v. *Clifton*, 10 R. 51; 42 W. R. 287.

A writ not specially indorsed within Ord. III. r. 6, was served on the defendant, who appeared thereto, and obtained unconditional leave to defend upon a summons under Ord. XIV. The plaintiff then obtained an order to amend, and did amend, the writ so as to make it a specially-indorsed writ, and again applied under Ord. XIV.:—Held, that the original appearance was an appearance to a specially-indorsed writ, and therefore Ord. XIV. applied. *Gurney* v. *Small* ([1891] 2 Q. B. 584) discussed. *Paxton* v. *Baird*, 62 L. J., Q. B. 176; [1893] 1 Q. B. 139; 5 R. 129; 67 L. T. 623; 41 W. R. 88.

Judgment in Default of — Application by Person not a Party.]—If a person who is not a party to the record seeks to set aside a judgment by which he is injuriously affected, which the defendant in the action has allowed to go by default, he ought by summons, taken out in the name of the defendant, or if not entitled to use the defendant's name, then taken out in his own name, but in that case served on both the plaintiff and the defendant, apply for leave to have the judgment set aside, and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right, or to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5. Ord. XXVII. r. 15, is designed to enable judgments by default to be set aside by those who have or who can acquire a locus standi, and does not give a locus standi to those who have none. *Jacques* v. *Harrison*, 53 L. J., Q. B. 137; 12 Q. B. D. 165; 50 L. T. 246; 32 W. R. 471—C. A.

The plaintiff issued a writ against J. to recover possession of a house, and signed judgment in default of appearance. The sheriff ejected H., who was in possession, and put the plaintiff in. H. had no knowledge of the action, and did not claim to hold through J. H. applied to have the writ and subsequent proceedings set aside for irregularity:—Held, that the right order was that the judgment and subsequent proceedings be set aside, the plaintiff to go out of any possession obtained under the judgment; the order to take effect only if H. within twelve days elect to be added as defendant; H. to be at liberty to appear upon filing an affidavit that at the time of the issue of the writ he was in possession by himself or his tenant; the order to be without prejudice to any right the plaintiff might thereafter have to sign judgment against J. upon filing a proper affidavit. *Minet* v. *Johnson*, 63 L. T. 507—C. A.

—— **Affidavit.**]—It must appear from the affidavit of service where the defendant was served. *Davis* v. *Hole*, 1 Y. & Coll. C. C. 440; 6 Jur. 335.

An affidavit that the deponent has inquired of, and been informed by, the clerk in court, and the deponent believes it to be true, that no appearance has been entered by the defendant, is sufficient to satisfy the court of that fact. *Tatham* v. *Williams*, 1 Hare, 159; 11 L. J., Ch. 117.

—— **Notice of Motion—Filing.**]—A notice of motion for judgment is a document which may be delivered, in case a defendant does not appear, by filing it with the proper officer pursuant to the Judicature Act, Ord. XIX. r. 6. *Dymond* v. *Croft*, 45 L. J., Ch. 604; 3 Ch. D. 512; 34 L. T. 786; 24 W. R. 842.

A notice of motion is a document within the meaning of the Judicature Act, Ord. XIX. r. 6, that may be served on a defendant who has failed to appear by filing the same with the proper officer. *Morton* v. *Miller*, 45 L. J., Ch. 613; 3 Ch. D. 516; 24 W. R. 723.

Notice of motion for judgment is not a document required to be delivered between the parties where the defendant has not appeared and the writ has been filed with the proper officer. *Williams* v. *Cardwell*, 25 W. R. 646.

A defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee, and served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial:—Held, that it was not necessary for the plaintiff to file the pleadings or a notice of motion for judgment as against the trustee under r. 6 of Ord. XIX. of the Judicature Act. *Chorlton* v. *Dickie*, 49 L. J., Ch. 40; 13 Ch. D. 160; 41 L. T. 467; 28 W. R. 228.

—— **Notice of Inquiry as to Damages.**]—In default of an appearance in an action for unliquidated damages, after judgment marked by the plaintiff, the notice of the inquiry before the master of the court to assess damages may be served by filing it with the proper officer. *O'Connor* v. *Hogan*, 10 L. R., Ir. 262.

—— **Liquidated Demand — Claims for Foreclosure and on Covenant.**] — The writ in an action to enforce a mortgage security claimed an account of principal, interest and costs on the mortgage and foreclosure or sale, and also the sum of 225*l.* 10*s.* for principal and interest under the covenant contained in the mortgage deed. The defendant did not appear, and no statement of claim was delivered. Upon motion by the plaintiff for the usual foreclosure judgment nisi, and for liberty to sign final judgment for the amount indorsed upon the writ :—Held, that the plaintiff was entitled under Ord. XIII. r. 3, to sign judgment for the liquidated demand, notwithstanding that the claim was joined with a claim for foreclosure, but that he was not entitled to the foreclosure judgment. *Bissett* v. *Jones*, 55 L. J., Ch. 648 ; 32 Ch. D. 635 ; 54 L. T. 603 ; 34 W. R. 591.

—— **Extent of Relief.**]—Notwithstanding the provision of r. 4 of Ord. XX., that whenever a statement of claim is delivered the plaintiff may therein extend his claim without any amendment of the indorsement of the writ, the plaintiff cannot, when the defendant does not appear to the writ and a statement of claim is delivered by filing it with the proper officer, obtain judgment in default of appearance for more than he has claimed by his writ. *Gee* v. *Bell*, 56 L. J., Ch. 718 ; 35 Ch. D. 160 ; 56 L. T. 305 ; 35 W. R. 805.

In a foreclosure action, where a mortgagee applies, on motion for judgment not only for foreclosure but also for a personal order for payment of the mortgage debt and interest against a mortgagor who has made default in entering appearance and in delivering a defence, the statement of claim ought, however shortly, to contain an express statement of the covenant upon which the personal order for payment is claimed. *Law* v. *Philby*, 56 L. T. 230 ; 35 W. R. 401.

Where no appearance has been entered by the defendant in an action, the plaintiff cannot, by his statement of claim, enlarge the scope of the claim indorsed on his writ. Where, therefore, a defendant did not enter an appearance to the writ issued in a foreclosure action, and the writ was not indorsed for payment, the court held that the plaintiff was only entitled to the usual order for foreclosure, although, on his statement of claim, he was also entitled to an order for payment against the defendant. *Law* v. *Philby*, 56 L. T. 522 ; 35 W. R. 450.

Immediate foreclosure, in case the mortgagor did not appear, was claimed by the pleading. The mortgagor made default in appearance, and the court made only an ordinary foreclosure decree. *Patey* v. *Flint*, 48 L. J., Ch. 696 ; 40 L. T. 651 ; 27 W. R. 595.

—— **Parties joined as Defendants to Counter-claim.**]—A plaintiff by counter-claim can proceed against defendants by counter-claim who do not appear in the same way as a plaintiff in an original action. A defendant to an action by which rights of common were claimed, counter-claimed against the plaintiffs, and several others whom he added as defendants, and asked for an injunction on the ground of trespass. The added defendants did not appear or defend. The plaintiff by counter-claim moved for judgment in default of appearance, and upon admissions :—Held, that the motion must stand till the trial, as if the question raised by the counter-claim was not connected with the original subject of the action, the added defendants were improperly brought before the court ; and if it was connected, then no relief should be given until trial. *Verney* v. *Thomas*, 58 L. T. 20 ; 36 W. R. 398.

—— **Statement of Claim — Delivery and Filing.**]—When a defendant makes default in appearance the plaintiff must deliver a statement of claim before setting down the action on motion for judgment. *Minton* v. *Metcalf*, 46 L. J., Ch. 584 ; 36 L. T. 683.

Where a plaintiff, in an action for infringement of a patent, upon motion for judgment, heard as a short cause, asked for such judgment as upon his statement of claim the court should consider him entitled to, and his statement of claim stated "Particulars of breaches are delivered herewith" :—Held, that the particulars of breaches might be regarded as forming part of the statement of claim. *United Telephone Co.* v. *Smith*, 61 L. T. 617 ; 38 W. R. 70.

Where a statement of claim is served personally on a defendant with copy of writ, and the defendant subsequently does not appear in the action, it is not necessary that the statement of claim should be also filed in order to obtain judgment by default against such defendant. *Renshaw* v. *Renshaw*, 49 L. J., Ch. 127 ; 42 L. T. 353 ; 28 W. R. 409.

Where a defendant has made default in appearance, and the writ and statement of claim have been served upon and delivered to him personally, there is no necessity for the statement of claim to be also filed against him. *Renshaw* v. *Renshaw* (49 L. J., Ch. 127) followed. *Phillips* v. *Kearney*, 58 L. J., Ch. 344.

Default in Appearance—Delivery of Amended Writ.]—An amended writ may be delivered to a defendant who has made default in appearance, by filing it at the central office, personal service being unnecessary. *Hartley, In re, Nuttall* v. *Whittaker*, [1891] 2 Ch. 121 ; 64 L. T. 786 ; 39 W. R. 604.

—— **Liquidated Demand—Part Payment.**]—Where a writ of summons is indorsed for a liquidated demand, and the defendant fails to appear thereto, the plaintiff may enter final judgment for any sum actually due at the time of entering judgment, not exceeding the sum indorsed on the writ, together with interest (if any) and costs. *Hughes* v. *Justin*, 63 L. J., Q. B. 417 ; [1894] 1 Q. B. 667 ; 9 R. 212 ; 70 L. T. 365 ; 42 W. R. 339 —C. A.

Where the sum indorsed on the writ has been reduced by payment, before judgment in default of appearance has been entered, and judgment is nevertheless entered for the whole sum indorsed, the defendant is entitled ex debito justitiæ to have the judgment set aside, notwithstanding that execution has only issued for the amount actually due. *Ib.*

A writ specially indorsed was issued for a debt above 20*l.* The defendant, after action, made payments to the plaintiff, reducing the debt to a sum below 20*l.* Subsequently final judgment was signed by the plaintiff, in default of appearance, for the debt indorsed on the writ of summons, and the defendant was taken in execution on such judgment under a ca. sa., indorsed, however, to levy only the balance of the debt

then due:—Held, that s. 27 of the Common Law Procedure Act, 1852, entitled the plaintiff to sign such judgment for only what was then actually due, after allowing for the payments which had been made. *Hodges* v. *Callaghan*, 2 C. B. (N.S.) 306; 26 L. J., C. P. 171; 3 Jur. (N.S.) 369; 5 W. R. 531.

Motion to set aside Judgment—On what Materials Application made.]—An application to set aside an order obtained by the plaintiff for the defendant's non-appearance may be made on affidavits contradicting those upon which the order was made, without disclosing a defence upon the merits. *Hall* v. *Scotson*, 9 Ex. 238; 23 L. J., Ex. 85; 2 W. R. 103.

On an application to set aside a final judgment signed for want of appearance, an affidavit stating the precise nature of the defence is not required, but an ordinary affidavit of merits is sufficient. *Warrington* v. *Leake*, 11 Ex. 304; 25 L. J., Ex. 27; 3 W. R. 552.

When judgment has been signed (for default of appearance) upon a writ specially indorsed, the affidavit in support of an application by the defendant to be let in to defend under the proviso in s. 27 of Common Law Procedure Act, 1852, must not merely state that he has a defence upon the merits, but must disclose or make known the nature of such defence, in order that the judge may see that it really amounts to a defence. *Whiley* v. *Wiley*, 4 C. B. (N.S.) 653; 27 L. J., C. P. 305; 4 Jur. (N.S.) 714; 6 W. R. 649.

—— **On what Terms.**]—An action was commenced by bankers to recover 3,512*l.* paid over by the plaintiffs at the request of M., agent-general of the government of the Cape of Good Hope, to his credit at the Standard Bank of South Africa. M. had paid over the money to the Cape Government. The money was part of a guarantee fund lodged by the defendant M. with the plaintiffs as security for the completion of a contract to construct a railway in South Africa, entered into between the defendant M., on behalf of his government, and F. & Co., contractors. The defendant M. was served with the writ personally, but he did not enter any appearance. On the 10th April, 1889, judgment was given against defendant M. by default, declaring, as between the plaintiffs and the defendants F. & Co., the plaintiffs were entitled to the money, subject to any claim which the colonial government might have thereon under the contract, and ordering the defendant M. to pay over such part of the money as should not be claimed by the government, and also the costs of the action. On motion to set aside the judgment on the ground that the money was not in the hands of the defendant M., having been handed over by him to the colonial government, and that the action had been brought against him really as nominee of the colonial government, and that the government could not be sued:—Held, that the agent-general must be allowed to have an opportunity of presenting his case and of defending the action, but only on the terms that all costs occasioned to the plaintiffs by his default in the action must be paid by him to the plaintiffs, including the costs of the present application. On these terms the judgment was set aside, and twenty-one days allowed to the agent-general for putting in his defence. *Wright* v. *Mills*, 60 L. T. 887.

VI. JUDGMENT UNDER ORD. XIV.

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c. Practice, 213.

a. In what Cases Applicable.

Special Indorsement under Ord. III. r. 6.]—*See ante*, col. 130.

Against Married Woman.]—An order having been obtained under Ord. XIV. r. 1, for leave to sign final judgment against a married woman in an action for the price of goods supplied to her during coverture:—Held, that the order was wrongly made, inasmuch as there can be no judgment against a married woman personally in respect of such a claim. *Durrant* v. *Ricketts*, 51 L. J., Q. B. 425; 8 Q. B. D. 177; 30 W. R. 428. *See* Married Women's Property Act, 1882.

An action for a liquidated demand which had accrued prior to the Married Women's Property Act, 1882, was brought against a married woman as sole defendant. The writ was specially indorsed, but did not seek to charge her separate estate. The court on motion under Ord. XIII. r. 1, allowed final judgment to be entered against the defendant. *Brown* v. *Morgan*, 12 L. R., Ir. 122.

The plaintiffs brought an action against the defendant, a widow, in respect of bills of exchange given by her while under coverture, and having specially indorsed the writ under r. 6 of Ord. III., took out a summons under r. 1 of Ord. XIV., to shew cause why they should not sign final judgment:—Held, that the defendant not being personally liable, r. 1 of Ord. XIV. did not apply. *Ortner* v. *Fitzgibbon*, 50 L. J., Ch. 17; 43 L. T. 60.

—— **Form of Order.**]—The proper form of judgment against a married woman under s. 1, sub-s. (2), of the Married Women's Property Act, 1882, settled by the court. *Scott* v. *Morley*, 57 L. J., Q. B. 43; 20 Q. B. D. 120; 57 L. T. 919; 36 W. R. 67; 4 Morrell, 286; 52 J. P. 230—C. A.

An order giving leave to enter final judgment against a married woman in respect of her separate estate by virtue of the Married Women's Property Act, 1882, ss. 1, 19, should state that execution is to be limited to such separate estate as the defendant is not restrained from anticipating unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself. *Bursill* v. *Tanner*, 13 Q. B. D. 691; 50 L. T. 589; 32 W. R. 827.

—— **Evidence of Separate Estate.**]—In an action against husband and wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, but before the coming into operation of the Married Women's Property Act, 1882, judgment may be entered against the wife under Ord. XIV. r. 1, making the debt and costs payable out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott* v. *Morley* (20 Q. B. D. 120), without proof of the existence of separate estate at the date of the judgment. *Downe* v. *Fletcher*, 21 Q. B. D. 11; 59 L. T. 180; 36 W. R. 694; 52 J. P. 375.

—— **Payment into Court by—Rights of Plaintiff.**]—Where money is paid into court under Ord. XIV. as a condition for leave to defend, it belongs to the plaintiff in the event of his obtaining judgment at the trial: the defendant (a married woman) therefore cannot set up after judgment that she has no separate property available for execution. *Bird* v. *Barstow*, 61 L. J., Q. B. 1; [1892] 1 Q. B. 94; 65 L. T. 656; 40 W. R. 71; 56 J. P. 196—C. A.

Foreign Judgment.]—In an action upon a foreign judgment in which the writ of summons has been specially indorsed under Ord. XIV., the plaintiff may obtain an order empowering him to sign final judgment. *Hodsoll* v. *Baxter* (El. Bl. & El. 884) followed. *Grant* v. *Easton*, 53 L. J., Q. B. 68; 13 Q. B. D. 302; 49 L. T. 645; 32 W. R. 239—C. A.

Against future Assets, quando acciderint.]—In an action against an administratrix, commenced by a specially indorsed writ, the defendant shewed that she was entitled to plead plene administravit, but did not dispute that there were outstanding assets of the deceased. Leave was given to mark judgment of assets quando acciderint. Form of order. *Findlater* v. *Tuohy*, 16 L. R., Ir. 474.

Joint Debt—Judgment against one Defendant—Right to proceed against other.]—On an application under Ord. XIV. r. 1, in an action against two joint debtors, one of the defendants consented to judgment being entered against him, and the other obtained leave to defend. The defendant, who had consented to judgment, paid the plaintiff half of the debt:—Held, that under Ord. XIV. r. 5, the plaintiff was entitled to proceed with his action against the other defendant; the principle laid down in *King* v. *Hoare* (13 M. & W. 494) and *Kendall* v. *Hamilton* (4 App. Cas. 504) not applying to such a case. *Weall* v. *James*, 4 R. 356; 68 L. T. 515—C. A.

Action against Firm—Infant Partner.]—A specially-indorsed writ was issued against a firm in which there were two partners, one of whom was an infant. Both partners appeared to the writ, the infant partner appearing by his guardian ad litem:—Held, that, notwithstanding that one partner was an infant, judgment could be signed against the firm under Ord. XIV. r. 1. *Harris* v. *Beauchamp*, 63 L. J., Q. B. 99; [1893] 2 Q. B. 534; 4 R. 550; 69 L. T. 373; 42 W. R. 37—C. A.

Solicitor's untaxed Bill of Costs.]—In an action upon a solicitor's untaxed bill of costs, where the defendant admits the retainer and the work done, and only disputes the propriety of the charges, an order giving leave to sign final judgment under Ord. XIV. r. 1, may be made after appearance and before taxation of the bill, provided that the order preserves the right of the defendant under s. 37 of the Solicitors' Act, 1843, to the costs of taxation of the bill, if more than one-sixth is taxed off it. Such an order should direct that the bill of costs be taxed pursuant to that statute, and that judgment be signed for the amount of the master's allocatur. The proper form of order settled by the court of appeal. *Smith* v. *Edwardes*, 58 L. J., Q. B. 227; 22 Q. B. D. 10; 60 L. T. 10; 37 W. R. 112—C. A.

In an action by solicitors upon an untaxed bill of costs, the court on an application for judgment under Ord. XIII. r. 2, referred the costs for taxation subject to credits, and ordered judgment to be entered for the amount certified to be due. *Larkin* v. *M'Inerney*, 16 L. R., Ir. 246.

Bond—Penalty.]—The indorsement on a writ claimed 500*l.*, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 26*l.* during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid:—Held, that the plaintiff was not entitled to proceed under Ord. XIV. r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Will. 3, c. 11, s. 8, and Ord. XIII. r. 14. *Tuther* v. *Caralampi*, 21 Q. B. D. 414; 59 L. T. 141; 37 W. R. 94; 52 J. P. 616.

The plaintiff advanced 250*l.* to a limited company, upon the security of ten mortgage debentures for 25*l.* each dated the 1st of September, 1890, and repayable the 1st of September, 1891, with interest. By his bond, dated the 1st of November, 1890, the defendant bound himself to the plaintiff in 500*l.* to repay the 250*l.* on the 1st of September, 1891, if the company should then dishonour their mortgage debentures, with a defeasance if the company should honour them. The company failed to pay, and the plaintiff issued a writ against the defendant, and applied for final judgment under Ord. XIV. r. 1. The learned judge at chambers granted the defendant leave to defend upon bringing 500*l.* into court:—Held, that this was a common money bond, and was not within s. 8 of 8 & 9 Will. 3, c. 11; that the procedure under Ord. XIV. was applicable; that the writ was specially indorsed within the rules; but that the amount to be brought into court by the defendant as a condition to defend ought to be reduced from 500*l.* to 250*l.* *Gerard* v. *Clowes*, 61 L. J., Q. B. 487; [1892] 2 Q. B. 11; 67 L. T. 204.

Foreclosure Action—Covenants to Pay in Mortgage Deed.]—Where the writ in an action for foreclosure was also specially indorsed under Ord. III. r. 6, with a claim for the amount due on the covenant to pay in the mortgage deed, an application to enter judgment against the mortgagor under Ord. XIV. r. 1, for the amount claimed, before the action was heard, was refused. *Hill* v. *Sidebottom*, 47 L. T. 224.

Where Defendants a Corporation.]—Where a writ is specially indorsed under Ord. III. r. 6, the plaintiff may apply for judgment under Ord. XIV. r. 1, though the defendants are a corporation. *Shelford* v. *South and East Coast Ry.*, 4 Ex. D. 317; 28 W. R. 407—C. A.

The provisions of Ord. XIV. apply to cases where the defendants are a corporation. By r. 1, cause may be shewn against an application under that rule by affidavit "or otherwise"; r. 3 shews that this affidavit must be made by the defendant. Consequently, a defendant corporation, not being able to make an affidavit, can only shew cause under the words "or otherwise." *Muirhead* v. *Direct United States Cable Co.*, 27 W. R. 708.

b. PRINCIPLES ON WHICH COURT ACTS.

Order to sign Judgment only in clear Cases.]—Leave to sign judgment under Ord. XIV. should be given only where there is clearly no defence to the action, and where there is any doubt the defendant should have liberty to defend. *Thompson* v. *Marshall*, 41 L. T. 720; 28 W. R. 220—C. A.

The power given by Ord. XIV. r. 1, to allow the plaintiff to sign final judgment, is intended to be exercised where it is shewn, either from the acknowledgment of the debt by the defendant, or from other circumstances, that the defence would be for mere purposes of delay. *Lloyd's Banking Co.* v. *Ogle*, 45 L. J., Ex. 606; 1 Ex. D. 262; 34 L. T. 584; 24 W. R. 678.

The procedure established by Ord. XIV. is only intended to apply where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. It is not applicable to cases in which there are serious questions of fact in dispute. *Jones* v. *Stone*, 63 L. J., P. C. 68; [1894] A. C. 122; 6 R. 437; 70 L. T. 174—P. C.

Liberty to mark final judgment on a specially-indorsed writ will not be given where a difficult question of fact or a difficult question of law is raised by the defendant's affidavit. *Crawford* v. *Gillmor*, 30 L. R., Ir. 238—C. A.

When there is "no fairly arguable point to be argued on behalf of the defendant," effect must be given to Ord. XIV. r. 1. *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197—C. A.

The same considerations apply to a case under Ord. XIV. and to proceedings under a debtor summons as to whether the latter will be stayed without security pending the trial of an action for the debt. *Jacobson, Ex parte, Pincoffs, In re*, 52 L. J., Ch. 561; 22 Ch. D. 315; 48 L. T. 197; 31 W. R. 554.

When Defendant has a Counter-claim.]—The plaintiff specially indorsed the writ for certain sums of money claimed, by virtue of promissory notes and covenants, by way of a liquidated amount. Upon the defendant appearing, the plaintiff took out a summons to sign final judgment in compliance with the terms of Ord. XIV. The defendant resisted this application on the ground that he had both a good defence to the action on the merits, and also a good counter-claim against the plaintiff:—Held, that the right to bring a counter-claim is not a right of course, but depends on the discretion of the judge. *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197—C. A.

If the counter-claim, as disclosed by the affidavits, were sufficiently connected with the cause of action, it might be set up as a defence even to a liquidated claim on a bill of exchange. *Ib.*

Leave to Defend Unconditionally.]—In an action against a surety on a specially-indorsed writ it was not shewn that the debt had been acknowledged by the principal debtor, or that particulars had been furnished to the defendant, or that he had admitted his liability:—Held, that the defendant might reasonably call on the plaintiff to prove his claim, and should be allowed to defend without paying money into court or giving security. *Lloyd's Banking Co.* v. *Ogle*, supra.

When a writ of summons is specially indorsed under Ord. III. r. 6, if the defendant makes an affidavit under Ord. XIV., and goes beyond the bare statement that he has a defence on the merits, shewing what the grounds of his defence are, and gives reason for thinking that the defence is substantial, he ought not to be compelled to pay money into court as a condition to his being let in to defend. *Runnacles* v. *Mesquita*, 45 L. J., Q. B. 407; 1 Q. B. D. 416; 24 W. R. 553.

—— **Admission in Affidavit in support of Motion of Defence to Part of Claim—Statute of Limitations.**]—Where the affidavit in support of a motion for leave to sign final judgment, under r. 1 of Ord. XIII. for the amount specially indorsed on the writ of summons, or for so much thereof as the court should deem meet, stated that the statute of limitations might be set up as a defence to part of the claim:—Held, that the motion should be refused. *Bellew (Lord)* v. *Markey*, 4 L. R., Ir. 747—C. A.

—— **Bill of Exchange—Defence that Bill Drawn in Fraud of Defendant.**]—When a plaintiff in an action on a bill of exchange alleges that he is a bonâ fide holder for value of the bill, and the defendant in his affidavit for leave to defend alleges that the bill was drawn in fraud of him, the plaintiff is not entitled to sign final judgment under Ord. XIV. r. 1, but the defendant is entitled to unconditional leave to defend, for the onus of proof that he is such bonâ fide holder for value of the bill is cast upon the plaintiff. *Fuller* v. *Alexander*, 52 L. J., Q. B. 103; 47 L. T. 443.

—— **Where Defendant has a Set-off.**]—The defendant in an action for calls, brought by the liquidator of a company which is being voluntarily wound up under the Companies Act, 1862, is entitled to have leave to defend unconditionally under r. 1 of Ord. XIV., if he has a set-off, exceeding the amount of the claim, due to him from the company. *Groom* v. *Rathbone*, 41 L. T. 591.

Leave to Defend Conditionally—Goods "upon Sale or Return."]—The defendant received from the plaintiff jewellery "upon sale or return"; the defendant delivered it to a woman who, without his authority, pledged it, and he was unable to recover it. The plaintiff thereupon issued a debtor summons against the defendant for the price of the jewellery; but proceedings upon it were stayed without calling upon the defendant to give security for the amount claimed. The plaintiff did not appeal from the decision upon the debtor summons. Subsequently the present action was commenced with a specially-indorsed writ, and a master directed, under Ord. XIV., that the plaintiff should be at liberty to sign judgment, unless the defendant paid into court the amount claimed within four days:—Held, that the order of the master could not set aside; for, although, as the plaintiff had not appealed against the decision upon the debtor summons, it might have been better to refuse to entertain an application under Ord. XIV., yet the plaintiff was otherwise entitled to sign judgment unless the condition imposed should be complied with, the defendant not setting up a clear defence upon the merits. *Ray* v. *Barker*, 48 L. J., Ex. 569; 4 Ex. D. 279; 41 L. T. 265; 27 W. R. 745—C. A.

—— **No absolute Right to Defend upon bringing the Sum claimed into Court.**] — Where a summons has been issued under Ord. XIV., the defendant, if he makes no affidavit of merits, is not entitled as a matter of right to defend the action upon offering to bring the sum claimed into court. A discretion is vested in the judge to decide whether, upon considering the other facts of the case, the defendant's offer is a sufficient ground for refusing the plaintiff's application. *Crump* v. *Cavendish*, 49 L. J., Ex. 491 ; 5 Ex. D. 211 ; 42 L. T. 136 ; 28 W. R. 562—C. A.

—— **Defendant entitled to Interrogate.**]—In shewing cause under Ord. XIV. r. 1, why the plaintiff should not be at liberty to sign final judgment notwithstanding appearance, it is sufficient if the defendant shews enough on his affidavit to entitle him to interrogate the plaintiff. *Harrison* v. *Bottenheim*, 26 W. R. 362—C. A.

—— **Primâ facie no Defence—Cross-Examination of Deponent.**]—The defendant filled up an application for shares in the plaintiff company, which stated that 1*s.* per share was paid upon application. This he did at the request of B. (not an agent of the company), who asked the defendant to do it to enable the directors to go to allotment, at the same time telling him that if the application was not made use of he would be held harmless. The amount payable upon application was paid into the company's bank, but not by the defendant. The company now sued for unpaid calls, and a clerk of the company swore by affidavit that a letter of allotment was duly posted to the defendant. The defendant swore that the letter never was received. On an application by the company to sign judgment under Ord. XIV., the divisional court gave the defendant unconditional leave to defend. But held, on appeal, that on the authority of *Household Fire Insurance Co.* v. *Grant* (4 Ex. D. 216) this was no defence to the action if the letter of allotment was posted. As the defendant, however, desired to cross-examine the clerk who swore to the posting of the letter, leave was given to defend upon the defendant paying the amount sued for into court. *Carta Para Gold Mining Co.* v. *Fastnedge*, 30 W. R. 880—C. A.

Short Cause List—Payment into Court.] — When an action is ordered to be tried in the short cause list under Ord. XIV. r. 8 (b), a defendant should not, unless under exceptional circumstances, be ordered to bring the amount in dispute into court. *Held* v. *Simons*, 10 R. 248.

c. PRACTICE.

Time for Application.]—If a plaintiff, after appearance by the defendant, takes a deliberate step to have an action tried by a jury, by serving a statement of claim, or notice in lieu of statement of claim, he cannot then move for final judgment under Ord. XIII. r. 1. *Stewartstown Loan Co.* v. *Daly*, 12 L. R., Ir. 418.

—— **After Pleadings closed.**] — After issue has been joined on a defendant's defence, a plaintiff cannot obtain final judgment on motion under Ord. XIII. r. 1. *Hackett* v. *Lalor*, 12 L. R., Ir. 44.

The writ in an action of ejectment was served on 10th November ; appearance entered and defence delivered on 30th November. After the pleadings were closed in default of reply, viz. on 15th January, the plaintiff served notice under Ord. XIV. The delay was alleged to have arisen through negotiations for a settlement and by the Christmas vacation : — Held, that the motion should be refused. *Annaly* v. *Comyn*, 30 L. R., Ir. 102.

—— **After Defence delivered.**]—Although the primary intention of the provisions of Ord. XIV. is that the plaintiff should make his application for summary judgment as soon as he can after appearance has been entered, yet he is not precluded from making such an application after defence delivered. In such a case, however, he must account for his delay. *McLardy* v. *Slateum*, 59 L. J., Q. B., 154 ; 24 Q. B. D. 504 ; 62 L. T. 151 ; 38 W. R. 349.

After a statement of claim and a defence have been delivered, the plaintiff cannot move for final judgment under Ord. XIII., r. 1. *Sligo Ry.* v. *Palmer*, 24 L. R., Ir. 58.

Plaintiff's Affidavit.] — It is not necessary under Ord. XIV. r. 1, that the affidavit of the plaintiff should be made prior to the granting of the summons calling on the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment. *Begg* v. *Cooper*, 40 L. T. 29 ; 27 W. R. 224—C. A.

—— **Who may make.**] — When a writ is specially indorsed, but the plaintiff is a corporation, an order calling upon the defendant to shew cause why final judgment should not be signed, under Ord. XIV. r. 1, cannot be obtained, because that rule requires an affidavit to be made by the plaintiff himself as to his own belief that there is no defence to the action ; and an affidavit by the officer of the corporation is not sufficient. *Bank of Montreal* v. *Cameron*, 46 L. J., Q. B. 425 ; 2 Q. B. D. 536 ; 36 L. T. 415 ; 25 W. R. 593—C. A. *See now* Ord. XIV. r. 1.

An application under Ord. XIV. r. 1, that the defendant may be called upon to shew cause why final judgment should not be signed, must be made on an affidavit that in the plaintiff's belief there is no defence to the action. The affidavit must be made by the plaintiff himself. *Frederici* v. *Vanderzee*, 46 L. J., C. P. 194 ; 2 C. P. D. 70 ; 35 L. T. 889 ; 25 W. R. 389—C. A.

—— **Sufficiency and Contents of.**] — On a motion for leave to sign final judgment under Ord. XIII. r. 1, the affidavit in support of the motion must not only verify the cause of action, but the deponent must pledge his belief that there is not any answer of any kind to the plaintiff's demand ; and the absence of this averment is not supplied by the fact of the defendant making an affidavit in answer which shews that he has not any defence to the action. *Kiely* v. *Massey*, 6 L. R., Ir. 445—C. A.

In an application for final judgment under Ord. XIII. r. 1, the affidavit of the plaintiff, after verifying the cause of action, stated that the plaintiff was "advised and believed that the defendant had no defence on the merits to the action" :—Held, that the affidavit was sufficient. *Manning* v. *Moriarty*, 12 L. R., Ir. 372.

Upon an application to sign final judgment on a writ, which was admittedly a specially-indorsed one, for goods sold and delivered, the verification of the cause of action was a paragraph in the plaintiff's affidavit in the following words :—

"The defendant herein is indebted to me in the sum of 24*l.* 16*s.*" (being the amount indorsed), "as per particulars specially indorsed on the writ of summons herein" :—Held, that the paragraph, coupled with the indorsement, was sufficient to entitle the plaintiff to judgment. *Murphy* v. *Nolan*, 18 L. R., Ir. 468—C. A.

Where a specially-indorsed writ in an action against the drawer of a dishonoured cheque alleges that notice of dishonour has been given, it is not necessary to verify this allegation specifically in the affidavit in support of an application for judgment under Ord. XIV. *May* v. *Chidley*, 63 L. J., Q. B. 355 ; [1894] 1 Q. B. 451 ; 10 R. 423.

Upon an application in an action on a dishonoured bill or cheque, for leave to enter judgment under Ord. XIV. r. 1, the affidavit sufficiently verifies the cause of action if it alleges a promise to pay, although it does not allege notice of dishonour, a promise to pay operating as evidence either of notice of dishonour or of a waiver of such notice. *Roberts* v. *Plant*, 64 L. J., Q. B. 347 ; [1895] 1 Q. B. 597 ; 14 R. 222 ; 72 L. T. 181 ; 43 W. R. 308—C. A.

Defendant's Affidavit.]—Hearsay evidence is not to be shut out on such an application. Nor is it necessary that the defendant should shew a good defence on the merits, if he can suggest some reasonable defence. *Harrison* v. *Bottenheim*, 26 W. R. 362—C. A.

A defendant corporation, not being able to make an affidavit, can only shew cause under the words "or otherwise." *Muirhead* v. *Direct United States Cable Co.*, 27 W. R. 708.

Affidavits in Reply.]—Upon an application by the plaintiff for leave to sign judgment under Ord. XIV. r. 3, the court or judge may in its or his discretion allow the plaintiff to file an affidavit in reply to the defendant's affidavit. *Davis* v. *Spence*, 1 C. P. D. 719 ; 25 W. R. 229.

Upon application by the plaintiff for leave to sign final judgment under Ord. XIV., the court or judge has a discretion to allow the plaintiff to file an affidavit in reply to the defendant's affidavit. *Rotheram* v. *Priest*, 49 L. J., C. P. 104 ; 41 L. T. 558 ; 28 W. R. 277.

Where the defendant has filed an affidavit for leave to defend, the plaintiff cannot file a counter-affidavit by way of reply on the merits. *North Central Waggon Co.* v. *Wales Waggon Co.*, 39 L. T. 628.

Upon an application by the plaintiff by summons, under Rules of Court, 1875, Ord. XIV. r. 1a, for leave to sign final judgment, the court will allow the plaintiff to read an affidavit made by him in reply to the defendant's affidavit. *Girvin* v. *Grepe*, 49 L. J., Ch. 63 ; 13 Ch. D. 174 ; 41 L. T. 522 ; 28 W. R. 123.

Strict Conformity Necessary.]—In summary applications under Ord. XIII., a strict conformity with the provisions of the order is indispensable. *Kiely* v. *Massey*, 6 L. R., Ir. 445—C. A.

Fresh Application after Refusal on Technical Grounds.]—A second application may be made for summary judgment under Ord. XIV. r. 1, where the first application has been refused upon the ground of a technical defect in the writ. *Dombey* v. *Playfair*, 66 L. J., Q. B. 328 ; [1897] 1 Q. B. 368 ; 75 L. T. 676—C. A.

Where a motion is refused with costs, the applicant cannot come in, having supplied the defect which defeated him, and get a new, but substantially similar motion granted. *Kiely* v. *Massey*, 6 L. R., Ir. 445—C. A.

Amendment of Indorsement.]—Where a writ of summons was indorsed with admittedly liquidated demands, and also with a small sum which the defendant alleged was in the nature of an unliquidated claim :—Held, that the court had power to amend the writ, by striking out the amount of the alleged unliquidated demand, and to give final judgment under Ord. XIII. r. 1, for the balance. *Robinson* v. *Ralston*, 8 L. R., Ir. 26—C. A.

On a motion for judgment, the plaintiff's affidavit verified the whole of the debt claimed in the writ of summons ; but the defendant having filed an affidavit disputing a part of the demand, the plaintiff by an affidavit in reply and by his counsel, admitted that this part of the claim could not be sustained, and had been included in the writ by mistake :—Held, that the plaintiff was entitled to judgment for the residue. *Rye* v. *Hawkes*, 16 L. R., Ir. 12.

A writ which claims payment of a sum which is in dispute, besides payment of a liquidated demand, is not specially indorsed so as to entitle the plaintiff to judgment under Ord. XIV. for the liquidated demand. *Clarke* v. *Berger*, 36 W. R. 809.

—— **After Summons taken out.**]—In order to entitle a plaintiff to enter final judgment under Ord. XIV. r. 1, the writ of summons must be a good specially-indorsed writ under Ord. III. r. 6, at the time when the summons under Ord. XIV. is taken out. Where, therefore, the indorsement on a writ was amended after the issue of a summons under Ord. XIV. by striking out an unliquidated demand :—Held, that there was no jurisdiction to make an order giving the plaintiff leave to enter final judgment. *Gurney* v. *Small*, 60 L. J., Q. B. 774 ; [1891] 2 Q. B. 584 ; 65 L. T. 754.

—— **After Application for Judgment dismissed.**]—On a summons for judgment unconditional leave to defend was granted on the ground that there was a claim for interest in the nature of unliquidated damages, and therefore the writ was not specially indorsed. The plaintiff amended his writ by striking out the claim for interest and took out a fresh summons, on which he obtained judgment :—Held, that the defendant's appearance to the original writ must stand as an appearance to the amended writ, and that the defendant having appeared to a specially-indorsed writ, there was jurisdiction to give leave to enter final judgment. *Gurney* v. *Small* ([1891] 2 Q. B. 584) discussed. *Paxton* v. *Baird*, 5 R. 129 ; 67 L. T. 623 ; 41 W. R. 88.

Leave to Defend as to Part of Claim—Form of Order.]—When upon shewing cause against an application for leave to sign final judgment under Ord. XIV., the defendant's affidavit admits part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power under r. 4 to require the defendant to pay to the plaintiff the amount admitted to be due as a condition of being allowed to defend as to the residue. The proper order is that the plaintiff have judgment for the amount admitted ; the defendant to be at liberty to defend as to the

residue. *Dennis* v. *Seymour*, 4 Ex. D. 80; 42 L. T. 31; 27 W. R. 475.

"No Order"—Time for Delivery of Defence.]—A defendant having entered an appearance requiring a statement of claim, the plaintiff moved, in vacation, for final judgment under Ord. XIII., and the judge made "no rule" on the motion, no special time being limited for the delivery of the defence:—Held, that, after the lapse of eight days from the termination of the vacation, the plaintiff might sign judgment by default without delivering a statement of claim, or notice in lieu thereof. *Rae* v. *Langford*, 10 L. R., Ir. 108.

Right to Return of the Money paid into Court.]—If a defendant, fulfilling the condition of an order under Ord. XIV. r. 6, by which he was allowed to defend an action, has brought money into court, and the final judgment of a divisional court be afterwards entered for him, he is thereupon entitled to the return of the money, although notice of appeal against the judgment may have been given by the plaintiff. *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. 213; 41 L. T. 92; 27 W. R. 914. See *Bird* v. *Barstow*, ante, col. 209.

Appeal to Court of Appeal.]—An order giving a plaintiff leave to sign final judgment under Ord. XIV. r. 1, is an interlocutory order, and an appeal from such order must therefore be brought to the court of appeal within twenty-one days. *Standard Discount Co.* v. *La Grange*, 47 L. J., C. P. 3; 3 C. P. D. 67; 37 L. T. 372; 26 W. R. 25—C. A.

Matters of Accounts—Course to be adopted.]—In a question of account a judge at chambers is not justified in making an order under Ord. XIV. r. 1, refusing a defendant leave to defend except upon condition of finding security or paying money into court. The right course to adopt in such a case is to allow judgment to be signed as an additional security for any amount found to be due on taking the account, without power to issue execution otherwise than by leave of the court; and this should be done on the terms of the plaintiff consenting to an account being taken at once. *Wallingford* v. *Mutual Society*, 50 L. J., Q. B. 49; 5 App. Cas. 685; 43 L. T. 258; 29 W. R. 81—H. L. (E.)

Payment into Court with Denial of Liability—Secured Creditors.]—Where money is paid into court by a defendant under Ord. XXII. r. 6, of the Rules of the Supreme Court, 1883, with a defence denying liability, and on the defendant's subsequent bankruptcy his trustee admits the plaintiff's claim either in part or in full, the plaintiff is to that extent a secured creditor in respect of the money so paid into court. *Gordon, In re, Navalchand, Ex parte*, 66 L. J., Q. B. 768; [1897] 2 Q. B. 516; 46 W. R. 31; 4 Manson, 141.

Leave to sign Judgment—Judgment not signed or entered—Judgment Creditor—Priority.]—An order under Ord. XIV. r. 1, giving liberty to sign final judgment for the amount claimed by the writ of summons, is not equivalent to signing or entry of judgment so as to give a judgment creditor's right of priority to a plaintiff who has failed to follow up the order by signing judgment under Ord. XLI. *Gurney, In re, Clifford* v. *Gurney*, 66 L. J., Ch. 32; [1896] 2 Ch. 863; 75 L. T. 332; 45 W. R. 92.

VII. DISCONTINUANCE AND WITHDRAWAL OF DEFENCE.

See R. S. C., 1883, Ord. XXVI.

a. *Discontinuance.*
1. Generally, 218.
2. Costs, 223.

b. *Withdrawal of Defence*, 225.

a. DISCONTINUANCE.

1. Generally.

After Entry of Action for Trial.]—Rules of Supreme Court, 1875, Ord. XXIII. r. 1, do not entitle a plaintiff to dismiss his action after it has been entered for trial. *Matthews* v. *Antrobus*, 49 L. J., Ch. 80.

After Notice of Appeal.]—A plaintiff gave notice of appeal from the refusal of an injunction. Shortly afterwards the plaintiff's solicitors wrote to the defendants' solicitors to withdraw the notice of appeal. Two days after this the plaintiff's solicitors gave the defendants' solicitors notice of discontinuance of the action. The defendants' solicitors declined to consent to the withdrawal of the appeal except on terms to which the plaintiff's solicitors did not agree, and the appeal came on in its turn:—Held, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper. *Conybeare* v. *Lewis*, 13 Ch. D. 469; 28 W. R. 330—C. A.

After Verdict.]—After a general verdict for the defendant, the plaintiff could not discontinue. *Goodenough* v. *Buttler* or *Beettles*, 2 C. M. & R. 240; 3 D. P. C. 751; 1 Gale, 163; 5 Tyr. 793; 4 L. J., Ex. 223.

Discontinuance was not allowed after a special verdict, in order to adduce fresh proof in contradiction of the verdict. *Roe* d. *Gray* v. *Gray*, 2 W. Bl. 815.

In ordinary cases the court would not grant leave to a plaintiff to discontinue where a verdict had been found against him, and was not special. *Young* v. *Hichens*, 6 Q. B. 606.

After Judgment.]—After judgment for a defendant on demurrer to one of several counts, the plaintiff took out a side bar rule to discontinue the action generally. The defendant's costs, not of the demurrer only, under 3 & 4 Will. 4, c. 42, s. 34, but of the whole action, were taxed on the rule to discontinue, treating that rule as the termination of the action, and were received by the defendant's attorney as the defendant's costs "on discontinuance of the action." Judgment was entered up on the record for the defendant on the first count only:—Held, that the discontinuance, being after judgment without leave of the court, was irregular, and that the judgment was also irregular, and the judgment was set aside without costs. *Benton* v. *Polkinghorne*, 16 M. & W. 8.

After Decree.]—After a decree merely directing accounts and inquiries, a bill may be dismissed on further consideration. *Barton* v. *Barton*, 3 Kay & J. 512; 3 Jur. (N.S.) 808.

After a decree or decretal order not directing

inquiries merely has been made, the bill cannot be dismissed. *Bluck* v. *Colnaghi*, 9 Sim. 511; 8 L. J., Ch. 89. *See Cases* infra.

Where for any reason the execution of a final decree of the court in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is not discontinued thereby. *Singh* v. *Singh*, 9 L. T. 129.

By Consent.]—After decree for an account, the bill cannot be dismissed even with consent; but the proper order is to stay all the proceedings. *Egg* v. *Devey*, 11 Beav. 221.

Dismissal of bills in which executors and trustees are parties may be by consent, but not upon terms of an agreement between the parties, unless the court has heard and sanctioned such terms. *Warwick* v. *Cox*, 9 Hare (App.) xiv.

After decree, the bill cannot be dismissed by consent; but an arrangement for disposing of the fund in court may have effect, by consent, on further directions. *Lashley* v. *Hogg*, 11 Ves. 602.

Semble, after a decree has been pronounced by the court, an order to dismiss the bill will not be made, even by consent. *Mayhew* v. *Brittingham*, 8 L. J., Ch. 89.

A bill cannot be dismissed by agreement of the parties; some step in court must be taken for that purpose. *Rowe* v. *Wood*, 1 Jac. & Walk. 345; 21 R. R. 179.

Bill dismissed without costs, upon motion, having been filed under a mistake, under which both plaintiffs and defendants were at the time. *Broughton* v. *Lashmar*, 5 Myl. & C. 136.

The court, upon a petition to enforce an agreement entered into by the parties to the cause, after the cause was at issue, to compromise the suit, refused to dismiss the bill, or to stay the proceedings in the cause. *Askew* v. *Millington*, 9 Hare, 65; 20 L. J., Ch. 508; 15 Jur. 532.

A bill containing reflections on a party ordered by consent to be taken off the file. *Clifton* v. *Bentall*, 9 Beav. 105.

Bill and answer allowed to be taken off the file by consent of plaintiff and defendant. *Tremaine* v. *Tremaine*, 1 Vern. 189. S. P., *Arnold* v. *Hardwicke*, 7 Sim. 343; 4 L. J., Ch. 152.

Bill taken off the file by consent. *Walton* v. *Broadbent*, 3 Hare, 334.

A bill containing offensive statements ordered, by consent, to be taken off the file. *Jewin* v. *Taylor*, 6 Beav. 120; 11 L. J., Ch. 397.

Sufficiency of Notice.]—A written notice by plaintiff's solicitors, "We are instructed to proceed no further with the action," is a sufficient notice of discontinuance within Ord. XXIII. r. 1. *The Pommerania*, 48 L. J., P. 55; 4 P. D. 195; 39 L. T. 642.

In an action for an injunction and damages the defence denied liability, but a sum was paid into court in respect of the claim for damages. The plaintiff accepted the sum in satisfaction of his claim for damages and informed the defendants in writing that he should discontinue the action, take the money out of court, and tax his costs:—Held, that the plaintiff's letter was not a notice of discontinuance so as to entitle the defendants to their costs under Ord. XXXI. r. 1. *Moon* v. *Dickinson*, 63 L. T. 371; 38 W. R. 278.

What amounts to—Amendment of Claim—Fresh Cause of Action set up.]—The plaintiff, by his statement of claim, alleged that he was the proprietor of the copyright in a design representing an infant asleep upon a pillow, which was duly registered by him in 1879, and that the defendant had infringed such copyright, and he claimed an injunction to restrain the defendant. The design was registered under the Fine Arts Copyrights Act, 1862. The defendant delivered a defence in which he alleged that, for certain reasons connected with registration, which he stated, the plaintiff was not the proprietor of the copyright in the design, and that the action was not sustainable. The plaintiff thereupon amended his claim by striking out the paragraph which alleged that he was the proprietor of the copyright in a design, and substituting a statement that, in 1870, he caused to be registered at Stationers' Hall a certain book, of which a subsequent edition was published, in which was contained a drawing representing an infant asleep upon a pillow. The book was registered under the Copyright Act, 1842. More than eight days after the delivery of the amended statement of claim the defendant moved that the plaintiff might be ordered to pay the costs of the action up to the time of the delivery of such amended pleading, and also the costs of the motion, and that the action might be stayed until the payment of all such costs. He contended that what had been done by the plaintiff amounted to a discontinuance of his original action and the commencement of a new one:—Held, that the motion was altogether irregular, and must be refused with costs, as the proper course was for the defendant to have moved, under Ord. XXVIII. r. 4, within eight days after the delivery of the amended pleading for a disallowance of the amendment, or allowance thereof subject to terms as to costs or otherwise, provision for the costs of such amendments being made by r. 13 of the same order. *Bourne* v. *Coulter*, 53 L. J., Ch. 699; 50 L. T. 321.

—— **Payment into Court with Denial of Liability—Costs.**]—In an action for breach of contract, in which the plaintiffs alleged several distinct breaches, the defendants, while denying all liability, paid into court in the alternative a sum by way of satisfaction of one alleged breach. The plaintiffs took out the sum so paid in, and gave notice that they accepted the same in full satisfaction of the causes of action in the statement of claim mentioned:—Held, that what the plaintiffs had done was equivalent to a discontinuance, that they were entitled to tax their costs under Ord. XXII. r. 7, and that it was not necessary for them also to give notice of discontinuance under Ord. XXVI. r. 1. *McIlwraith* v. *Green*, 54 L. J., Q. B. 41; 14 Q. B. D. 766; 52 L. T. 81—C. A.

—— **Two Actions.**]—An action and a suit in equity having been commenced for the same cause, after issue joined and notice of trial in the action, an order was made in chancery that the plaintiff should elect. He elected to proceed in equity, and the record was withdrawn at nisi prius. An order was afterwards made in chancery in favour of the plaintiff, and directing the defendant to pay the costs of the action. On appeal it was ordered that this direction be omitted, and the defendant be at liberty to proceed at law. The defendant then obtained a judge's order, "that the plaintiff do pay the defendant his taxed costs of the action, the plaintiff having

elected to proceed in equity":—Held, that this order was erroneous, as there had been nothing that amounted to a discontinuance of the action, the defendant's remedy, if any, being in chancery. *Simpson* v. *Sadd*, 16 C. B. 26; 3 C. L. R. 817; 24 L. J., C. P. 156; 1 Jur. (N.S.) 736.

In cross actions, an order had been drawn up by consent that one of the actions should abide the event of the other. Before the first came on for trial, it was discontinued on account of the death of a material witness:—Held, upon an application to have judgment entered in the second action, that the court could not hold this discontinuance to be such an event of the first action as to justify plaintiff's obtaining judgment in the second action. *Rawlings* v. *Regent's Canal Co.*, 15 L. T. 281.

Validity of Notice—"Proceedings taken in Action after Receipt of Defence."]—By Ord. XXVI. r. 1, the plaintiff may at any time after the receipt of the defendant's defence, "before taking any other proceeding in the action (save any interlocutory application), by notice in writing wholly discontinue his action against all or any of the defendants." In an action by the holder against the acceptor and the drawer of a bill of exchange, the acceptor paid money into court in satisfaction of the claim, while the drawer delivered a defence denying liability, and set up a counter-claim. The plaintiff, after receipt of the defence, paid into court the amount of the counter-claim, and took out of court the amount paid in by the acceptor, and then gave the drawer notice of discontinuance:—Held, that the plaintiff had not "taken any proceeding in the action after receipt of the defence" such as to prevent him from giving notice of discontinuance. *Spincer* v. *Watts*, 58 L. J., Q. B. 383; 23 Q. B. D. 350; 61 L. T. 711; 37 W. R. 676—C. A.

Against some Defendants only.]—Where a suit becomes useless against a particular defendant, it is a laudable course for the plaintiff to dismiss the bill against him, and he may incur censure if he brings the suit to a hearing without doing this. *Wright* v. *Barlow*, 5 De G. & Sm. 43; 15 Jur. 1149.

In an action against several defendants a notice wholly discontinuing the action as against some of the defendants is irregular, and will be set aside. The proper course for the plaintiff to adopt is to obtain leave to withdraw his cause of complaint as against such defendants. A plaintiff is entitled, under Ord. XXII. r. 1, by leave of the court or a judge, to discontinue his action wholly so far as some of the defendants are concerned, and to strike out such defendants from the statement of claim, where the causes of action against such defendants are in the alternative, and distinct from the causes of action alleged against the remaining co-defendants. *Carlisle* v. *Belfast Union*, 10 L. R., Ir. 36.

Not a Stay of Proceedings.]—A rule to discontinue is not a stay of proceedings. *Beeton* or *Baker* v. *Jupp* or *Gupp*, 15 M. & W. 149; 3 D. & L. 474; 15 L. J., Ex. 120; 10 Jur. 646.

Effect of—Upon a Counter-claim.]—By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim. *Vavasseur* v. *Krupp* (15 Ch. D. 474) overruled. *McGowan* v. *Middleton*, 52 L. J., Q. B. 355; 11 Q. B. D. 464; 31 W. R. 835—C. A.

A counter-claim is not equivalent to a separate action. Where, therefore, a defendant has delivered a defence and counter-claim, and the plaintiff then discontinued his action, the defendant cannot proceed with his counter-claim. *Vavasseur* v. *Krupp*, 15 Ch. D. 474; 28 W. R. 366.

An action commenced in the high court cannot be sent down for trial in a county court under s. 65 of the County Courts Act, 1888, where the plaintiff has discontinued, and only a counter-claim by the defendant remains to be tried. *Reg.* v. *City of London Court Judge*, 60 L. J., Q. B. 575; [1891] 2 Q. B. 71; 64 L. T. 869.

—— **On Undertaking as to Damages.**]—A plaintiff who had given an undertaking as to the damages discontinued his action:—Held, that the court would nevertheless direct a reference as to damages. *Newcomen* v. *Coulson*, 47 L. J., Ch. 429; 7 Ch. D. 764; 38 L. T. 275; 26 W. R. 350.

—— **Supplemental Action.**]—An action cannot be treated as supplemental to an action that has been discontinued. *United Telephone Co.* v. *Tasker*, 59 L. T. 852.

Leave to discontinue—Facts found by Arbitrator.]—After an action had been referred to an arbitrator to state a special case, and he had in the case found the facts with regard to all but a very small portion of the claim in the defendant's favour, the plaintiff applied under Ord. XXIII. r. 1, for leave to discontinue the action:—Held, that leave ought not to be granted. *Stahlschmidt* v. *Walford*, 48 L. J., Q. B. 348; 4 Q. B. D. 217; 40 L. T. 194; 27 W. R. 412.

—— **By some Plaintiffs only.**]—Motion by some of several plaintiffs to have bill dismissed against them with costs granted on terms. *Holkirk* v. *Holkirk*, 4 Madd. 50.

Bill dismissed by one co-plaintiff as to himself with costs without the consent of the other. *Langdale* v. *Langdale*, 13 Ves. 167. And see *Lloyd* v. *Wingfield*, 1 Hog, 192.

If several plaintiffs join in instituting a suit, one of them will not be allowed to withdraw from the prosecution of it unless he makes out, to the satisfaction of the court, that it is not consistent with prudence to prosecute the suit further. *Jeffcoat* v. *Jeffcoat*, 3 L. J. (O.S.) Ch. 45.

—— **Test Action.**]—When an action, which had been made a test action (for the purpose of deciding the rights of the plaintiffs in a number of similar actions against the same defendants), came on for trial, the plaintiff declined to proceed, on the ground that he was not in a fit state of health to attend and be examined as a witness. On a previous occasion he had moved for and obtained a postponement of the trial on the ground of his ill-health. A week before the trial an application by the plaintiff in chambers to stay all proceedings in the action had been refused on the ground that the plaintiff was not dominus litis, but a trustee for the plaintiffs in the other actions. At the trial the plaintiff asked for a postponement, or that an order of discontinuance might be made under Ord. XXIII. r. 1:—Held, that the court could not regard the rights of the plaintiffs in the other actions, but must act as if the plaintiff had not appeared at

the trial, and must dismiss the action with costs. *Robinson* v. *Chadwick*, 47 L. J., Ch. 607; 7 Ch. D. 878; 38 L. T. 415; 26 W. R. 556.

In that class of cases in which, to avoid multiplicity of suits, one person is allowed to sue on behalf of himself and all others in the same interest, the plaintiff cannot dismiss his bill after a decree, because such a decree not only provides for the rights of himself but of all others who choose to come in and take the benefit of it, but the rule only applies to suits in which a decree has been pronounced. *White* v. *Westmeath* (*Lord*), Beat. 177.

2. Costs.

Jurisdiction.]—In an application by the plaintiff to have all proceedings stayed in the action, the defence having been admitted, the judge made an order, under Ord. XXVI. r. 1, that all proceedings should be stayed, each party to bear his own costs, except such as, in the opinion of the master to whom the matter was referred for taxation, were occasioned by any proceedings unnecessarily taken by the plaintiff:—Held, that the judge had jurisdiction to make such an order; and that it was no delegation of his discretion to the master to do so. *Musman* v. *Boret*, 66 L. T. 171; 40 W. R. 352.

Upon an application by a plaintiff for leave under Ord. XXVI. r. 1, to discontinue an action, the court or judge has no jurisdiction to make the defendant pay any costs of a defence which, if undisputed, or if it had been found in the defendant's favour, would have prevented the plaintiff from maintaining his action. Where a court or judge is expressly given a discretion as to costs, the exercise of such discretion cannot be delegated. *Lambton* v. *Parkinson*, 35 W. R. 545.

Pauper.]—Pauper shall not dismiss without costs. *Pearson* v. *Belsher*, 3 Bro. C. C. 87.

Defendant rendering Action useless.]—Order made on the motion of the plaintiff to dismiss his bill without costs, the defendant having, by his own act, rendered the suit useless. *Knox* v. *Brown*, 1 Cox, 359; 2 Bro. C. C. 186.

Effect of Payment into Court by Defendant.]—On a summons under Ord. XIV. for the payment of a sum of money, the master ordered the defendant to pay money into court as to part of the claim, and gave leave to defend as to the remainder. After issue joined, the plaintiff discontinued the action. The taxing master gave the defendant the whole costs of the action from the beginning. On appeal for review of taxation:—Held, that the costs were not governed by Ord. XXVI. r. 1, but were in the discretion of the court under Ord. LXV. r. 1, and that the plaintiff was entitled to his costs up to the time of payment into court. *Langridge* v. *Campbell* (2 Ex. D. 211) distinguished. *Suckling* v. *Gabb*, 36 W. R. 175.

Originating Motion.]—When the proprietor of a trade-mark is served with an originating notice of motion to remove the mark from the register and afterwards receives a notice of discontinuance, he is entitled to apply in court for the costs of the motion. *Dyson's Trade-mark, In re*, 65 L. T. 488.

Defendant's Administratrix appearing.]—A defendant having died after issue joined and notice of trial given, a suggestion of his death was made, and his administratrix appeared and pleaded to the suggestion. The plaintiff afterwards applied to a judge for leave to discontinue on payment of the costs of the pleas to the suggestion, but the judge made the usual order, on payment of full costs:—Held, that the order was right, for that s. 138 of the Common Law Procedure Act, 1852, put the administratrix in the same position as if she had been the original defendant in the action. *Benge* v. *Swaine* or *Page*, 15 C. B. 784; 2 C. L. R. 1382; 23 L. J. C. P. 182.

What Costs allowed.]—On the discontinuance of an action, the costs of all work in preparing, briefing, or otherwise, relating to affidavits or pleadings, are allowed, provided, in the opinion of the taxing master, such work has not been prematurely done. *Harrison* v. *Leutner*, 50 L. J., Ch. 264; 16 Ch. D. 559; 44 L. T. 331; 29 W. R. 393.

By Ord. LXV. r. 27, special allowances in respect of (sub-r. 9) "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence" shall apply to all taxations in the supreme court:—Held, that under this rule a master had a discretion to allow charges and expenses properly incurred by the defendant in procuring evidence where the plaintiff, having given no notice of trial, subsequently discontinued the action. *Windham* v. *Bainton*, 57 L. J., Q. B. 519; 21 Q. B. D. 199; 36 W. R. 832.

When a plaintiff in an action, after succeeding in an interlocutory application, the costs of which are made costs in the cause, gives notice of discontinuance of the action, under Ord. XXIII., the defendant is entitled to his costs, including the costs of such application. *The St. Olaf*, 46 L. J., P. 74; 2 P. D. 113; 36 L. T. 30.

If the plaintiff discontinued before giving notice of trial, the defendant was not under any circumstances entitled to any of the costs of preparing for trial, and therefore not to instructions for brief. *Cooper* v. *Boles*, 5 H. & N. 188; 29 L. J., Ex. 141; 6 Jur. (N.S.) 150, 256; 1 L. T. 302; 8 W. R. 182. S. P., *Doe* d. *Postlethwaite* v. *Neale*, 2 M. & W. 732; 6 D. P. C. 166.

The defendant's costs of "preparing for trial" could not be allowed where a plaintiff discontinued before notice of trial, even though liberty had been reserved to the plaintiff under a judge's order to set down the cause for trial before issue joined and a special jury had been struck. *Curtis* v. *Platt*, 16 C. B. (N.S.) 465; 33 L. J., C. P. 255; 10 Jur. (N.S.) 823; 10 L. T. 383.

—— **Examination of Witnesses.**]—In an action on a marine insurance policy, owing to the plaintiff's delay in complying with an order for production of papers, the defendant did not plead until a year after declaration. Meanwhile, to save expense, the defendant examined witnesses before the master, under 1 Will. 4, c. 22, s. 4. The defendant pleaded unseaworthiness, &c., and paid 25*l.* into court on the money counts for the premium. The plaintiff took the money out of court, and joined issue on the other pleas, but afterwards discontinued:—Held, that the defendant was entitled to the costs of the witnesses examined before the master, as incurred before instructions for plea, within Reg. Gen. H. T. 1853, R. 12. *Previte* v. *Adelaide Fire and Marine Insurance Co.*, 32 L. T. 768.

Improper Joinder of Defendants.]—A cause was referred, and the arbitrator stated the facts specially on his award for the opinion of the court. On the matter coming on for argument, the plaintiffs being advised that one of the defendants was improperly joined in the action, the court permitted them to discontinue on payment of the costs of the cause (no provision being made for the costs of the reference and award), and of the motion, and undertaking not to bring any joint action against the two defendants, nor any separate action against the defendant so improperly joined. *Turner* v. *Izon*, 2 Scott, 596.

To induce the court to permit a plaintiff, who has incorrectly joined in the action one who was no party to the contract, to discontinue without paying costs, it must be clearly shewn that he was induced by the defendant's conduct to believe that the contract was entered into with the two, and that the mistake did not arise from his own negligence. *Boensgen* v. *Chanter*, 6 Scott, 300.

Enforcing Payment of.]—When a plaintiff has given notice to the defendant to discontinue the action, and the costs have been taxed, no further order of the court is required to enable the chief clerk to issue a writ to enforce payment, and the writ may be varied to suit the circumstances of the case. Ord. XXIII. has the force of an order of the judge or court. *Bolton* v. *Bolton*, 3 Ch. D. 276; 35 L. T. 358; 24 W. R. 663.

b. WITHDRAWAL OF DEFENCE.

When Delivered by Fraud of Solicitor.]—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client:—Held, that the court had jurisdiction to set aside the judgment and permit the client to withdraw the defence, and put in a fresh defence. *Williams* v. *Preston*, 51 L. J., Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555—C. A.

By one Defendant—Costs "so far as occasioned by Defence."]—Where one of two defendants to an action of ejectment withdrew his defence, and was ordered, as one of the terms on which such withdrawal was permitted, to pay to the plaintiffs their costs of the action "so far as they were occasioned by the defendant's defence" down to the date of the application to withdraw:—Held, that the effect of the order (the terms of which followed the language of the Common Law Procedure Act, 1852, s. 205, and were practically identical with that of Ord. XXIII. r. 1) [Ord. XXVI. r. 1 (1883)] was to relieve the withdrawing defendant from the general costs of the action, and to make him liable only for the additional or increased costs, over and above the general costs, occasioned by such defendant having defended the action. *Real and Personal Advance Co.* v. *McCarthy*, 18 Ch. D. 362; 45 L. T. 116; 30 W. R. 481—C. A.

—— **Terms.**]—One of the defendants to an action for the recovery of land was allowed to withdraw his defence after the action had been in the paper for trial, but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw. And, the defendant having offered in chambers what the court considered proper terms, the plaintiffs were ordered to pay the costs of an adjournment of the summons into court. *Real and Personal Advance Co.* v. *McCarthy*, 49 L. J., Ch. 615; 14 Ch. D. 188; 42 L. T. 48; 28 W. R. 418.

Infant Defendants.]—The defence of two infant defendants in an ejectment action was withdrawn under an order of court. The other defendants having made admissions, judgment was moved for, supported by an affidavit proving the statement of claim:—Held, that the correct course where infants are parties and their defence is withdrawn and judgment is moved for, is to prove the statement of claim by affidavit. *Fitzwater* v. *Waterhouse* (52 L. J., Ch. 83) followed. *Gardner* v. *Tupling*, 33 W. R. 473.

VIII. DISMISSAL FOR WANT OF PROSECUTION.

Consent Order—No Bar to Fresh Action.]—An order by consent, in the absence of an agreement to compromise the cause of action, to dismiss an action for want of prosecution is no bar to the institution of a fresh action. In this respect the practice of the old court of chancery remains unchanged. *Magnus* v. *National Bank of Scotland*, 57 L. J., Ch. 902; 58 L. T. 617; 36 W. R. 602.

Contempt—Waiver.]—The taking an office copy of the answer filed, after being in contempt, is not a waiver of the contempt so as to enable the defendant to move to dismiss for want of prosecution. *Woodward* v. *Twinaine*, 9 Sim. 301; 9 L. J., Ch. 52; 4 Jur. 120.

Effect of Order on other Proceedings.]—Where an action had been commenced against a company and continued by leave after a winding-up order, and before trial an order had been obtained to dismiss the action for want of prosecution:—Held, that the plaintiff in the action was not debarred from bringing forward a claim in the same matter in the winding-up. *Orrell Colliery and Fire Brick Co., In re*, 48 L. J., Ch. 655; 12 Ch. D. 681.

When an action which was registered as a lis pendens had been dismissed for want of prosecution, the court, on a motion made ex parte on behalf of the defendant, under 30 & 31 Vict. c. 47, s. 2, to vacate the registration, made an order nisi, the plaintiff to shew cause within one week why the order should not be made absolute. *Pooley* v. *Bosanquet*, 7 Ch. D. 541; 26 W. R. 587.

Claim and Counter-claim.]—After a defence and counter-claim have been delivered, and there is undue delay on the plaintiff's part in delivering a reply, the proper course for the defendant is to give notice of motion to dismiss the original action for want of prosecution and for judgment on the counter-claim. *Aitken* v. *Dunbar*, 46 L. J., Ch. 489; 25 W. R. 366.

After Order to Amend.]—A cause coming on to be heard, stood over, with liberty for the plaintiff to amend. He did amend, but did not proceed further. Defendant may move to dismiss the bill for want of prosecution, and it is

not necessary to set down the cause again for this purpose. *Mitchel* v. *Lowndes*, 2 Cox, 15.

Negotiation for Compromise.]—A negotiation for a compromise which had been pending:—Held to be a sufficient answer to a motion to dismiss for want of prosecution. *Att.-Gen.* v. *Nethercoat*, 7 L. J., Ch. 75.

Administration Action.]—When a decree was made in an administration suit, directing the usual accounts and inquiries, and the plaintiff took no steps to prosecute the decree:—Held, that the defendant was not entitled to move to dismiss for want of prosecution, but ought to apply to obtain the conduct of the cause. *Simons* v. *Baynoll*, 19 W. R. 217.

Default in Proceeding to Trial—Verdict set aside.]—An action, in which the place of trial was out of Dublin, was tried at the Spring Assizes, 1883, when a verdict was directed for the defendant. This verdict was set aside on the ground of misdirection, and a second trial took place at the Spring Assizes, 1884, resulting in a verdict directed for the plaintiff, which was also set aside, and a third trial ordered in the Michaelmas Sittings, 1884. The plaintiff not having served notice of trial for the next ensuing assizes, the defendant moved to dismiss the action for want of prosecution, contending that the case fell within Ord. XXXV. rr. 2, 4:—The court refused the motion. Semble, the only remedy open to a defendant under such circumstances is trial by proviso under the old practice. *Foott* v. *Benn*, 16 L. R. Ir. 247.

—— **Abortive Trial.**]—A defendant is entitled to have an action dismissed for want of prosecution after an abortive trial if the plaintiff fails to proceed. *National Bank* v. *Canning*, 16 L. R. Ir. 444.

Cause not entered for Trial.]—A plaintiff gave notice of trial, but did not enter the cause for trial within six days after the notice of trial was given, in accordance with Ord. XXXVI. r. 16:—Held, that the defendant was entitled to move to dismiss the action for want of prosecution. *Crick* v. *Hewlett*, 53 L. J., Ch. 1110; 27 Ch. D. 354; 51 L. T. 428; 32 W. R. 922.

When the plaintiff has given notice of trial but has not entered the trial, and the defendant applies to dismiss the action for want of prosecution, the court or a judge has a discretion, under Ord. XXXVI. r. 12, either to dismiss the action or to order that it be dismissed unless notice of trial be given, and the trial entered within a certain time, or to make such other order as may seem just. *Sievier* v. *Spearman*, 74 L. T. 132—C. A.

Order for Security for Costs.]—An order obtained by the defendants for security for costs, with a stay of proceedings until the security is given, does not prevent the defendant from moving to dismiss the action for want of prosecution. *London Road Car Co.* v. *Kelly*, 18 L. R. Ir. 43.

Order for Discovery.]—A defendant may dismiss a bill for want of prosecution, although he has filed interrogatories for the examination of the plaintiff, the time for answering which has not yet expired. *Jackson* v. *Icimey*, 35 L. J., Ch. 843; L. R. 1 Eq. 693.

Though Order not complied with.]—A defendant is entitled to the usual order on a motion to dismiss, although he has not complied with an order made in the suit, if he is not in contempt by reason of such non-compliance. *Howe* v. *Grey*, 36 L. J., Ch. 488; 16 L. T. 345.

Outlawry.]—A bill may be dismissed for want of prosecution while the plaintiff is an outlaw. *Knowles* v. *Rhydydefed Colliery Co.*, 1 Johns. 630; 6 Jur. (N.S.) 291; 1 L. T. 321; 8 W. R. 159.

Jurisdiction of Court of Appeal.]—The court of appeal has no jurisdiction to entertain an original application to dismiss an action for want of prosecution, although the delay relied on is in not proceeding to a new trial ordered by the court of appeal. *Roberts* v. *French*, 14 R. 210; 72 L. T. 147; 43 W. R. 258—C. A.

Service of Notice—Time for.]—If notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made. *De Genere* v. *Hannam*, 1 Russ. & M. 494.

A notice of motion to dismiss for want of prosecution is irregular if served prior to the plaintiff's being in default, although at the time when the motion is heard the plaintiff is in default. *Ponsardin* v. *Stear*, 32 Beav. 666; 2 N. R. 476; 11 W. R. 926.

A notice of a motion to dismiss for want of prosecution cannot be given till grounds for dismissal actually exist. *Sheffield* v. *Gray*, 20 W. R. 656.

—— **On Trustee of Bankrupt Plaintiff.**]—When a plaintiff had made default in delivering his statement of claim, and had since become bankrupt, notice of motion to dismiss for want of prosecution was ordered to be served on the trustee in bankruptcy, although under Ord. L. r. 1, the action had not become abated by the bankruptcy. *Wright* v. *Swindon, Marlborough and Andover Ry.*, 46 L. J., Ch. 199; 4 Ch. D. 164.

How made in Chancery Division.]—A motion to dismiss an action for want of prosecution under Ord. XXXVI. r. 4a should generally, in the chancery division, be made to the judge in chambers. *Frearson* v. *Loe*, 26 W. R. 138.

An application to dismiss for want of prosecution may, according to circumstances, be made either in chambers or to the court. If the usual notice of motion is given, and the plaintiff does not at once submit to speed the cause and tender the costs of the notice, the defendant, if the usual order is made, will have his costs of making the motion in court. *Evelyn* v. *Evelyn*, 49 L. J., Ch. 18; 13 Ch. D. 138; 41 L. T. 499; 28 W. R. 73.

Further Time — Discretion.]—When on a motion to dismiss for want of prosecution the judge of the court below has, by way of indulgence, given further time to the plaintiff, the court of appeal will not interfere with the order so made in the discretion of the judge of the court below. *Sheffield* v. *Sheffield*, 44 L. J., Ch. 304; L. R. 10 Ch. 206; 23 W. R. 378.

Application by one Defendant.]—Where one of several defendants had delivered a defence and the time had expired for delivery of a reply,

but the plaintiff had allowed the other defendants time to deliver their defences, the one defendant could not have moved to dismiss the action for want of prosecution. *Ambroise* v. *Evelyn*, 48 L. J., Ch. 686 ; 10 Ch. D. 759 ; 27 W. R. 639.

Costs.]—A defendant, knowing the plaintiff has used due diligence, is liable to pay costs of his motion to dismiss for want of prosecution. *Ingle* v. *Partridge*, 33 Beav. 287.

A plaintiff, on being served with a notice of motion to dismiss for want of prosecution to which he was open, at once proceeded with the suit, and tendered to the defendants 20*s.* for the costs of the motion. They had, however, already delivered counsel's briefs, and incurred costs to a greater extent than the tender:—Held, that he was liable to pay the defendants their costs actually incurred. *Wakefield* v. *Cruickshank*, 41 L. J., Ch. 277 ; 20 W. R. 433.

The statutable right of a defendant to the costs of an action in the chancery division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Ord. XXXIII. r. 10, of the Chancery Consolation Orders of 1860, was preserved by s. 4 of 42 & 43 Vict. c. 59, yet Ord. LXV. r. 1, of the rules of 1883 has changed such practice, so that the costs of a defendant where such action has been dismissed for want of prosecution are now in the discretion of the judge, and therefore his order as to such costs is by s. 49 of the Judicature Act, 1873, not subject to appeal. *Snelling* v. *Pulling*, 29 Ch. D. 85 ; 52 L. T. 335 ; 33 W. R. 449—C. A.

Discharge of Order.]—Where a bill is inadvertently dismissed as against one of the defendants, and it afterwards appears that he is still a necessary party, the order of dismissal will be varied or discharged, so as to place him again on the record. —— v. *Morland*, 1 L. J. (O.S.) Ch. 212.

A bill which had been dismissed for want of prosecution restored, on an affidavit that the plaintiff's solicitor had been abroad for his health, and that his clerk had made a mistake. *Southampton Steamboat Co.* v. *Rawlins*, 34 L. J., Ch. 287 ; 11 Jur. (N.S.) 230 ; 13 W. R. 512.

Order dismissing a bill for want of prosecution discharged on payment by the plaintiffs of the costs of the motions in both courts. *Jones* v. *Jones*, 34 L. J., Ch. 11 ; 10 Jur. (N.S.) 1167—L.JJ.

IX. THIRD PARTIES—NOTICE CLAIMING CONTRIBUTION OR INDEMNITY.

See R. S. C., 1883, Ord. XVI. rr. 48—55.

a. In what Cases, 229.
b. Practice, 237.

a. In what Cases.

Express or Implied Contract — Right to Damages Insufficient.]—A land company had an agreement from B. to demise to them certain lands for building purposes, the agreement to be voidable as to all land not actually demised if the buildings were not completed within a certain time. B. agreed to sell part of the land to a railway company subject to the building agreement. The time for building having expired without the buildings being erected, the railway company took possession and treated the building agreement as at an end. The land company thereupon brought their action against the railway company, alleging that an agreement had been made between them and B. for extension of the time, and that the railway company bought with notice of it, and seeking to restrain the railway company from interfering with the land till they compensated the land company, pursuant to the Lands Clauses Act. The railway company applied for leave to serve B. with a third-party notice on the ground that he sold to them free from all incumbrances, except the building agreement, and without notice of the extension of time, and was bound to indemify them against any claim the land company could establish :—Held, that in order to bring a case within Ord. XVI. r. 48, it is not enough that if the plaintiff succeeds the defendant will have a claim for damages against the third party, but the defendant must have against the third party a direct right to indemnity as such, which right must—generally, if not always—arise from contracts express or implied, and that here there was no ground for implying such a contract. *Birmingham Land Co.* v. *L. & N. W. Ry.*, 56 L. J., Ch. 956 ; 34 Ch. D. 261 ; 55 L. T. 699 ; 35 W. R. 173—C. A.

Indemnity after Service of Writ.]—Leave may be given to a defendant to serve notice of claim for indemnity on a third party, under Rules of Supreme Court, 1883, Ord. XVI. r. 48, whether the indemnity has been given after or before action brought. *Edison Electric Light Co.* v. *Holland*, 56 L. J., Ch. 124 ; 33 Ch. D. 497 ; 55 L. T. 587 ; 35 W. R. 178.

Company—Payment of Dividends out of Capital—Contribution from Shareholders.]—On a misfeasance summons under s. 10 of the Winding-up Act, 1890, to render directors liable for dividends paid out of capital, the court has no jurisdiction, by analogy to the third-party procedure in an action, to give leave to the directors to serve notice on shareholders, who have received the dividends, claiming contribution. *Land Securities Co., In re*, 13 R. 341 ; 2 Manson, 127.

—— **Forged Transfer of Shares—Transferee.**]—The plaintiff, who was the owner of stock in a public company registered in her name, ascertained that it had been transferred to F. by virtue, as she alleged, of a forged transfer. She brought an action against the company to have her name reinstated in the books of the company. The company obtained leave to serve F. with a claim for indemnity:—Held, without deciding that the claim for indemnity was valid, that leave to serve F. was rightly given. *Speller* v. *Bristol Steam Navigation Co.* (13 Q. B. D. 96) distinguished. *Carshore* v. *North-Eastern Ry.*, 54 L. J., Ch. 760 ; 29 Ch. D. 344 ; 52 L. T. 232 ; 33 W. R. 420—C. A.

Covenant—Restrictive—Constructive Notice.]—In 1857 A. granted a lease of a house for a term of ninety-three years, with a restrictive covenant against the user of the house for any art, trade, or business. The term granted by the lease became vested in B., and in October, 1883, B. granted a lease of the house to C. for twenty-one years, with an express permission that he might use the house in his profession of teaching music

and singing, and with the usual covenant for quiet enjoyment. There was constructive notice of the original lease in the under-lease, but C. had no personal knowledge or notice of the restrictive covenant. A breach of this covenant having been committed by C., the devisees in trust of A. brought an action against B. and C., claiming an injunction and damages. By his defence C. claimed to be indemnified by B. against all expenses and damages occasioned by the breach of the covenant for quiet enjoyment, and served a third-party notice upon B., to which he appeared:—Held, that C. was not entitled to any relief against his co-defendant B., inasmuch as the claim was not one for "contribution or indemnity" within the meaning of r. 55. *Tritton* v. *Bankart*, 56 L. J., Ch. 629; 56 L. T. 306; 35 W. R. 474.

—— **To Repair—Under-lessee.**]—The plaintiff sued the defendant for breach of a covenant to repair contained in a lease of a dwelling-house for a term of twenty-one years from Michaelmas, 1861. The defendant obtained leave to serve, and served a third-party notice, claiming contribution or indemnity from a sub-lessee to whom he had let the premises from Midsummer, 1869, for the remainder of the original term, less ten days. The under-lease contained a covenant to repair, which was in terms precisely similar to those of the covenant in the original lease, and for breach of which the defendant claimed relief against the sub-lessee:—Held, that, inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age and character of the premises at the time of the demise, the covenant in the under-lease could not be construed as a covenant to indemnify the defendant against or to perform the covenant in the original lease; that the defendant's claim was not one for contribution or indemnity from the third party within Ord. XVI. r. 52, and that, therefore, no directions as to trial could be given under that rule. *Pontifex* v. *Foord*, 53 L. J., Q. B. 321; 12 Q. B. D. 152; 49 L. T. 808; 32 W. R. 316.

—— **To Repair—Assignee.**]—In an action against the personal representatives of a deceased lessee on a covenant to repair in the lease, the defendant having obtained leave to serve a third-party notice on an assignee of the lease, applied for directions under Ord. XVI. r. 53 (English Ord. XVI. r. 52):—Held, that as the third party was not liable for any breach of covenant prior to the assignment, the plaintiff had reasonable grounds for objecting to the question of the liability to indemnify the defendant for subsequent breaches being tried in the action, and that the third party should be dismissed. *Greville* v. *Hayes*, [1894] 2 Ir. R. 20.

—— **To Make New Street.**]—A.'s predecessor in title demised lands to B. in 1872, and covenanted to make a new street beside them. In 1890 A. demised adjacent land to C., and in this lease C. covenanted with A. to complete and finish all new streets on lands abutting on these lands, so far as A. was bound to do, subject to certain terms. B., by action against A., claimed damages for breach of the covenant in the lease of 1872. A. sought to join C. as an indemnifying defendant:—Held, that A., under the circumstances, was not entitled so to do. *Morris* v. *Kennedy*, 30 L. R. Ir. 461.

Lessee against Assignee—Previous Action by Lessor—Costs between Solicitor and Client.]—In an action by a lessee against his assignee to recover sums paid by the lessee for rent, damages, and costs in a previous action brought against him by the lessor, and his own costs of such previous action, the defendant admitted his liability for the sums paid for rent and damages, but brought in a further assignee as third party, who admitted his liability to indemnify the defendant. The court decided that the plaintiff was entitled to recover portion of the amount paid by him to the lessor for costs of the previous action, and also the plaintiff's own costs of the same:—Held, that the plaintiff was entitled to recover from the defendant his costs of the present action, including orders as to the third party as between solicitor and client; and that the defendant in addition to the amounts paid by him was entitled as against the third party to his costs of the action and the third-party proceedings, those of the action to be taxed as between solicitor and client, the fact that they were payable by the third party being taken into consideration. Form of order. *Wiley* v. *Smith*, [1894] 1 Ir. R. 153.

Insurance—Underwriters—Suing and Labouring Clause.]—The defendant insured his ship under a policy containing the usual suing and labouring clause. In an action to recover for work alleged to have been done and expenses incurred by the plaintiffs for the defendant, at his request, in respect of attempting to save the ship during the continuance of the policy:—Held, that the defendant was not entitled to bring in the underwriters as third parties under Ord. XVI. r. 48, because they did not, by the suing and labouring clause, contract to indemnify the defendant in respect of any contract made by him with the plaintiffs. *Johnston* v. *Salvage Association*, 19 Q. B. D. 458; 57 L. T. 218; 36 W. R. 56; 6 Asp. M. C. 167—C. A.

—— **Mortgage of Policy—Discharge—Mortgagor.**]—M., a married woman, on the 6th November, 1879, effected a policy of insurance on her own life for 3,000*l.* M. and her husband, on the 19th of October, 1880, mortgaged the policy to T. to secure the repayment of 2,534*l.* 7*s.*, with interest at 6*l.* per cent. In the mortgage deed there was a power of attorney by M. and her husband to T., but there was not any special receipt clause empowering T. to give a valid discharge to the assurance society. The deed also contained a provision that if the covenants were fulfilled, T. should not call in the money before the 1st of May, 1890. T. gave notice to the assurance society of the mortgage. M. died, and probate of her will was granted to her husband. At the date of her death 2,762*l.* 12*s.* 6*d.* was due on the policy, and there was due to T., for principal and interest, 2,618*l.* 18*s.* 7*d.*, besides a sum of 28*l.* for costs due to T. as solicitor for M. and her husband. T. called upon the insurance company to pay him the whole of the moneys due on the policy, but they refused to do so unless M.'s husband, as her personal representative, joined in the receipt, which he declined to do, except upon terms which T. rejected; and the company having persisted in their refusal, T. brought an action against them, and the company moved for leave to bring in M.'s husband as a third party:—Held, that the company was entitled to have M.'s husband brought before the court, and that they should be at liberty to lodge in court the amount due on the policy. *Tench* v. *Eykyn*, 18 L. R. Ir. 45.

Shipping—Collision—Ship in Hands of Shipbuilder.]—A shipowner is not entitled to "indemnity" within Ord. XVI. r. 48, over against a shipbuilder in respect of an action brought against such shipowner for a collision which occurred while the ship was under the control of the shipbuilder. *The Jacob Christensen*, 64 L. J., P. 92; [1895] P. 281; 11 R. 795; 72 L. T. 902; 8 Asp. M. C. 21.

—— **Loss and Demurrage.**]—An action was brought by shipowners against the defendants for not having unloaded the plaintiff's ship at the port of discharge pursuant to the terms of the charterparty, which stipulated that the ship should be discharged at port of delivery "as customary." After the execution of the charterparty the defendants sold the cargo to D., who contracted that the cargo should be taken "from over the ship's side as fast as the captain can deliver," failing which it was to be resold at the defendant's discretion, D. being liable for "any loss, demurrage, or other expenses arising therefrom." The ship arrived, and D. took delivery of the cargo:—Held, that leave ought not to be given to the defendants to issue a third-party notice under Ord. XVI. r. 48, against D., as the contract by D. as to loss and demurrage was not a contract to indemnify the defendants against their liability to the plaintiffs under the charterparty. *Constantine* v. *Warden*, 73 L. T. 450; 44 W. R. 162; 8 Asp. M. C. 100—C. A.

—— **Damage to Cargo—Charterer against Owner—Warranty.**]—Where a defendant is not entitled to claim contribution against a person not a party to the action, he can only be entitled, under Ord. XVI. r. 48, to issue a third-party notice to such person, where under a contract, expressed or implied, he is entitled to indemnity over against him. Therefore, where the defendants were sued for damages to the plaintiffs' goods while on board a vessel of the defendants on a certain voyage, by reason of the vessel being not seaworthy for the voyage:—Held, that the defendants were not entitled to a third-party notice, under Ord. XVI. r. 48, to the persons of whom the defendants had hired the vessel with a warranty that she was tight, staunch, strong, and fitted for the service. *Speller* v. *Bristol Steam Navigation Co.*, 53 L. J., Q. B. 322; 13 Q. B. D. 96; 50 L. T. 419; 32 W. R. 670; 5 Asp. M. C. 228—C. A.

Trustee—Breach of Trust.]—A. and B. were trustees of the marriage settlement of X. and Y.; some of the investments were sold and the proceeds placed to the credit of A., who advanced the moneys in breach of trust to the husband X.; in an action commenced by the children of X. and Y. against A. and B., for such breaches of trust, A. and B. gave each other cross-notices of claim for contribution:—Held, that Ord. XVI. r. 55, enabled the court to make an order for contribution in such a case. *Sawyer* v. *Sawyer*, 28 Ch. D. 601.

The claim of a trustee, who is being sued to replace a trust fund lost by the default of his co-trustee, to have the loss made good by the partners of the defaulting trustee, is not a claim for indemnity enforceable by the third-party procedure under Ord. XVI. r. 48, on the ground that the trustee's right to recover the trust fund from the partners is not dependent on his own liability to replace the same. *Wynne* v. *Tempest*, 66 L. J., Ch. 81; [1897] 1 Ch. 110; 75 L. T. 624; 45 W. R. 183.

Vendor and Purchaser—Misrepresentation—Auctioneer.]—An action by a vendor against the purchaser of a house and premises, and the auctioneer who advertised and sold them, for specific performance of the contract or damages. The purchaser stated that he was induced to purchase the property in consequence of the advertisement in the newspapers inserted by the auctioneer, representing that the purchase-moneys would be allowed to remain on mortgage. The representation was alleged to have been unauthorised, and the purchaser applied by summons under Rules of Supreme Court, 1883, Ord. XVI. r. 55, for leave to serve his co-defendant, the auctioneer, with a notice claiming indemnity from him against the claim of the vendor:—Held, that this was not a case for indemnity within r. 55, and that the summons must be dismissed. *Pontifex* v. *Foord* (12 Q. B. D. 152) followed. *Catton* v. *Bennett*, 53 L. J., Ch. 685; 26 Ch. D. 161; 50 L. T. 383; 32 W. R. 485.

Claim against Plaintiff in another Capacity.]—Where a defendant claims contribution or indemnity over against a plaintiff in a capacity other than that in which such plaintiff sues, the court will not give leave to issue a third-party notice. *Gilson, In re, Gilson* v. *Gilson*, 63 L. J., Ch. 555; [1894] 2 Ch. 92; 8 R. 382; 70 L. T. 728; 42 W. R. 425.

Originating Summons.]—A third-party notice is not aplicable to proceedings by originating summons. *Wilson, In re, Att.-Gen.* v. *Woodall*, 60 L. J., Ch. 101; 45 Ch. D. 266; 63 L. T. 100; 39 W. R. 58.

Rules of 1875—Whole Question need not have been the same.]—In order to entitle a defendant to serve a notice on a third person under Ord. XVI. rr. 17, 18, it is not necessary that the whole question between the plaintiff, the defendant, and the third person should be identical; it is sufficient if it is primâ facie made out that a material question in the action is also a question between the defendant and the third person; and under such circumstances the court will order service of the notice, if the plaintiff will not be prejudiced or delayed by the introduction of the third person. *Swansea Shipping Co.* v. *Duncan*, 45 L. J., Q. B. 638; 1 Q. B. D. 644; 35 L. T. 879; 25 W. R. 233—C. A.

In an action for money lent the defendant set up a counter-claim in which he joined one T. as defendant to the counter-claim under Ord. XXII. r. 5, and alleged a contract between himself and T., and a breach thereof by T.; that the contract had been transferred from T. to the plaintiffs; and that the plaintiffs had broken it. He then claimed damages against the plaintiffs, and, in the alternative, against T.:—Held, that T. was not properly joined as co-defendant to the counter-claim under Ord. XXII. r. 5, but that the defendant should have applied to have the question determined as against T. under Ord. XVI. r. 17. *Central African Trading Co.* v. *Grove*, 48 L. J., Ex. 510; 40 L. T. 540; 27 W. R. 933—C. A.

—— **In what Cases.**]—In an action against the defendant, a shipowner, to recover damages for

injury to certain goods shipped on board his ship, to be carried from Newport to Montreal, caused by the unseaworthiness of the vessel, the defendant sought to bring in the shipbuilder, who had built and delivered the ship at Sunderland, as a third party under Ord. XVI. rr. 18 and 21 :—Held, that the defendant was not entitled to bring in the shipbuilder as a third party, on the ground that it would inconvenience and prejudice the plaintiffs at the trial, and that the question of seaworthiness of the ship, as between the plaintiffs and the defendant, and the defendant and the shipbuilder, was not identical in point of time. *Blaina Iron Co.* v. *Garbutt*, 46 L. T. 162.

A. sold and delivered goods to B., who before payment became bankrupt. A. then brought an action for the price of the goods against C., alleging that B. had bought them on the joint account of B. and C., or on account of C. as undisclosed principal. The defendant C. thereupon served the trustee in the bankruptcy with a third-party notice under Ord. XVI. r. 18, claiming indemnity out of the bankrupt's estate in respect of the contract, but the trustee obtained an order in bankruptcy restraining all proceedings upon the notice :—Held, that the order must be discharged, as the court of bankruptcy could not dispose of the whole matter, and the case was one expressly provided for by Ord. XVI. r. 18. *Smith, Ex parte, Collie, In re*, 45 L. J., Bk. 116 ; 2 Ch. D. 51 ; 34 L. T. 603 ; 24 W. R. 310—C. A.

Where only one of several parties, jointly liable on a promissory note, is sued, and claims to be, and is entitled to contribution from such other parties, leave will be given to serve them with notice under Ord. XV. r. 18. *Bank of Ireland* v. *Forbes*, 6 L. R., Ir. 19.

Where a defendant by his separate statement of defence raised certain questions affecting the rights of his co-defendants, but did not make any counter-claim against them, and did not deliver his defence to them, and the co-defendants moved to strike out the paragraphs containing these allegations as embarrassing, the court being of opinion that the questions raised by the defence were material questions to be determined at the trial of the action, and the defendant being unwilling to raise them against his co-defendants, leave was given to the latter to serve a notice on the other defendant under Ord. XVI. r. 17, for the purpose of raising the questions as between him and them. *Steel* v. *Dixon*, 42 L. T. 765 ; 28 W. R. 796.

The plaintiffs had purchased property from the defendant for 14,000*l.*, and they claimed in this action to have 2,000*l.* part returned to them. The defendant was being sued in the exchequer division by persons who claimed the same 2,000*l.* as commission moneys. The court refused to make an order that the plaintiffs in the exchequer division should be served with a third-party notice, or made defendants to this action under Ord. XVI. r. 17. *Associated Home Co.* v. *Whichcord*, 47 L. J., Ch. 652 ; 8 Ch. D. 457 ; 38 L. T. 602 ; 26 W. R. 774.

Actions having been brought by the owner in fee of two adjoining pieces of land against the respective sub-lessees in possession in respect of waste committed by the digging of sand contrary to the terms of the superior leases, the defendants obtained orders ex parte to serve Miss N., the intermediate lessee, with third-party notices under Ord. XVI. r. 18. The orders were obtained on an affidavit that the defendants claimed indemnity against the intermediate lessee under the covenants for quiet enjoyment contained in the sub-leases. These covenants were restricted in the ordinary way to disturbance by the original lessee and those claiming under her. The plaintiff applied to discharge the orders, and the defendants for directions as to the mode of trial. Subsequently to the plaintiff's notice of motion in each action, affidavits were filed by each defendant setting out a claim to be indemnified by Miss N. on the ground (1) that she had represented to him that he would have the right to dig out sand for the purpose of building on the land ; and (2) that the sub-leases contained clauses which amounted in each case to an implied covenant or warranty that such digging was lawful. The defendants in each action admitted that they had dug out and sold certain sand beyond what was necessary for building, and they brought the amounts received in respect thereof into court. The lease containing the restrictive covenant had determined since the acts complained of, so that damages only could be granted in respect of them :—Held, that the case against Miss N. was neither a sufficiently good primâ facie case, nor were the issues in it to a sufficient extent identical with the issues between the plaintiff and the defendants for the order bringing in Miss N. to be sustained. *Corrie* v. *Allen*, 48 L. T. 464—C. A.

When the plaintiff and defendant allege that a suit is occasioned by the conduct of a third party, the court will give leave that he may be served with notice of the suit, so as to enable the court to grant relief against him. *Trelearen* v. *Bray*, 45 L. J., Ch. 113 ; 1 Ch. D. 176 ; 33 L. T. 827 ; 24 W. R. 198—C. A.

Service of a notice by a defendant on a third party is only for the purpose of binding the third party by the judgment in the action, as between the plaintiff and defendant. In order to obtain relief against the third party, the defendant must bring an independent action against him. *Ib.*

A purchaser filed a bill for specific performance. The defendant, by his answer, stated that he was desirous of completing the contract, but that he was only equitable owner, the legal estate being outstanding in a trustee for him, who refused to join in conveying to the plaintiff. The defendant moved ex parte for leave to serve the trustee with a notice stating the nature of the suit, and that he claimed indemnity against the trustee, and also to compel him to join in the conveyance :—Held, that with the consent of the plaintiff, leave might be given to serve the notice. But that the defendant could not set up a counter-claim against the trustee. *Ib.*

—— **Joint Tortfeasors.**]—In an action for tort for injury sustained by the plaintiff through the defendants' negligence, the defendants obtained an order under Ord. XVI. r. 17, that third parties who, it was alleged, through their negligence, had caused the injury should be added as defendants:—Held, that the defendants were not entitled to have such third persons made parties to the action. *Horwell* v. *London Omnibus Co.*, 46 L. J., Ex. 700 ; 2 Ex. D. 365 ; 36 L. T. 637 ; 25 W. R. 610—C. A.

In an action of tort, for injury sustained and damages suffered by the plaintiffs through the defendants' negligence, the defendants obtained on an ex parte application liberty to issue a

notice under Ord. XV. r. 18, claiming to be entitled to contribution, or indemnity, or relief over against the corporation of Dublin, who, as the defendants alleged, caused an accident:—Held, upon motion by the corporation to rescind the ex parte order, that the defendants were not entitled to bind the corporation by such notice, and that the order should be set aside. *Rice* v. *Alliance and Dublin Consumers' Gas Co.*, 12 L. R. Ir. 172.

—— **Collision—Tug and Tow.**]—Where in an action for damage by collision the defendants had by notice brought in the owner of a tug towing the defendant's ship, and sought to make the tug liable for improper navigation and disobedience to orders, and the defendants applied for directions as to the mode of having the questions in the action determined, the court declined to give directions, and dismissed the third party from the action upon the ground that questions between the defendants and the third party, totally different from those between the plaintiffs and the defendants, might arise in the case, and would be embarrassing to the plaintiffs. *The Bianca*, 52 L. J., P. 56; 8 P. D. 91; 48 L. T. 440; 31 W. R. 954; 5 Asp. M. C. 60.

A collision took place between the ship S. and the C., which was being towed by a tug. The owners of the S. brought an action against the owners of the C., alleging the collision to have been occasioned by the negligence of the C. and her tug, or one of them. The owners of the C. obtained leave to serve notice on the owner of the tug that they claimed to be entitled to indemnity, and the court made an order that the owner of the tug should be at liberty to appear and defend, "being bound as between him and the defendants by any decision the court may come to in this action as to the cause of collision." At the hearing the owner of the tug appeared, but the defendants did not, and the judge of the admiralty court pronounced that the collision was occasioned by the default of the master and crew of the C., and condemned the owners in damages and costs, and declared that they were not entitled to indemnity from the owner of the tug:—Held, on appeal, that the order giving the owner of the tug liberty to appear and defend did not put matters in train for trying any issue between him and the defendants, and that so much of the judgment as negatived the right to indemnity from the owner of the tug must be struck out. *The Curtsburn*, 5 P. D. 59; 41 L. T. 711; 28 W. R. 378—C. A. Reversing 49 L. J., P. 14.

b. PRACTICE.

Matter of Discretion.]—The exercise of the power of allowing a defendant to issue a notice to a third party under Rules of Supreme Court, 1875, Ord. XVI. r. 18, is a matter of discretion; and where the court sees that the introduction of a third party will tend to prejudice and cause additional expense to the plaintiff, leave to issue the notice will not be given. *Associated Home Co.* v. *Whichcord*, 47 L. J., Ch. 652; 8 Ch. D. 457; 38 L. T. 602; 26 W. R. 774.

—— **Trial in same Action—Difficult Question.**]—Third-party procedure should be applied only when all the disputes between the plaintiff and defendant and between the defendant and the third party can be tried in the same action. When the question of contribution or indemnity is difficult and complicated, involving the construction of a section of an act of parliament, the judge at chambers is justified in refusing upon that ground to give directions, and in thereby dismissing the third party from the action. *Baxter* v. *France*, 64 L. J., Q. B. 337; [1895] 1 Q. B. 591; 14 R. 265; 72 L. T. 183; 43 W. R. 341—C. A.

Merits—Validity of Claim.]—On the application for leave, the court will not go into any question as to the merits of the action or the validity of the claim for indemnity. *Edison Electric Light Co.* v. *Holland*, 56 L. J., Ch. 124; 33 Ch. D. 497; 55 L. T. 587; 35 W. R. 178.

In giving leave to a defendant to serve notice of a claim for contribution or indemnity on a third party, the court will not consider whether the claim is a valid one, but only whether the claim is bonâ fide, and whether, if established, it will result in contribution or indemnity. *Carshore* v. *N. E. Ry.*, 54 L. J., Ch. 760; 29 Ch. D. 344; 52 L. T. 232; 33 W. R. 420—C. A.

Plaintiff not to be Embarrassed.]—An action was brought against a railway company to compel them to re-transfer stock which the plaintiffs alleged to have been transferred out of their names by means of forged transfer deeds. The transferees were not made parties, but the company, under Ord. XVI. r. 48, served them with third-party notices, claiming indemnity. The company, in their defence, set up all the grounds of defence that could be relied on against the plaintiff's claim. Some of the third parties desired to defend, and liberty was given to them to appear at the trial and take such part as the judge should direct. Two of them appealed from this order, asking that they might be at liberty to deliver a defence, appear at the trial, and put in evidence, and cross-examine the plaintiff's witnesses:—Held, that the third parties were not, under the old practice, necessary parties to the action, and that as the company had raised all proper grounds of defence, and was bonâ fide defending the action, the order gave the third parties all reasonable protection, and that the appeal must be dismissed, for that while, on the one hand, the court ought to take care that the third parties had full opportunity of seeing that the questions in the cause were fairly tried, it ought, on the other hand, to take care that the plaintiffs were not embarrassed and put to expense by unnecessarily allowing persons, who were not necessary parties to the action, to take all the same steps as if they had been made defendants. *Barton* v. *L. & N. W. Ry.*, 57 L. J., Ch. 676; 38 Ch. D. 144; 59 L. T. 122; 36 W. R. 452—C. A.

In an action by a company against its directors and others, seeking to make the defendant personally liable in respect of certain dividends alleged to have been improperly paid out of capital, the defendants applied under Ord. XVI. r. 18, for leave to serve third-party notices on all the shareholders of the company, 450 in number, on the ground that if they, the defendants, were held liable, they would have a right over against the shareholders to recover from them the sums received by them by way of dividend:—Held, that the granting of the leave asked for would materially embarrass the plaintiffs in the conduct of their action, and that, therefore, the court, in the exercise of its discretion, ought to refuse the application. *Wye Valley Ry.* v. *Hawes*

50 L. J., Ch. 225 ; 16 Ch. D. 489 ; 43 L. T. 715 ; 29 W. R. 177—C. A. See also *Associated Home Co.* v. *Whichcord*, supra.

The court has power to order a notice to be served upon a third person, if there is one question common to all the parties, though the whole question to be tried between the plaintiff and the defendant is not the same as that which would arise between the defendant and the third person. But the exercise of the power is discretionary, and if the introduction of the third person will tend to prejudice or delay the plaintiff, leave will not be given to serve the notice. *Bower* v. *Hartley*, 46 L. J., Q. B. 126 ; 1 Q. B. D. 652 ; 24 W. R. 941—C. A. See *Swansea Shipping Co.* v. *Duncan*, 45 L. J., Q. B. 638 ; 1 Q. B. D. 644 ; 35 L. T. 879 ; 25 W. R. 233—C. A. *Blaina Iron Co.* v. *Garbutt*, 46 L. T. 162. *The Bianca*, 52 L. J., P. 56 ; 8 P. D. 91 ; 48 L. T. 440 ; 31 W. R. 954 ; 5 Asp. M. C. 60.

Service of Notice out of the Jurisdiction.]—Where, in an action for a breach within the jurisdiction of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, the defendant claims to be entitled to an indemnity from a third party, the court may allow service out of the jurisdiction of a notice of such claim, unless the third party is domiciled or ordinarily resident in Scotland or Ireland. *Dubout* v. *Macpherson*, 58 L. J., Q. B. 496 ; 23 Q. B. D. 340 ; 61 L. T. 689 ; 38 W. R. 62.

By Ord. XI. r. 1, service out of the jurisdiction of a . . . notice of a writ of summons may be allowed by the court or a judge whenever . . . (g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction :—Held, that Ord. XI. r. 1 (g), does not apply to service out of the jurisdiction of a third-party notice on a third party domiciled or ordinarily resident in Scotland. *Speller* v. *Bristol Steam Navigation Co.*, 53 L. J., Q. B. 322 ; 13 Q. B. D. 96 ; 50 L. T. 419 ; 32 W. R. 670 ; 5 Asp. M. C. 228—C. A.

Ord. XI. rr. 2, 4, as to service of writs, &c., out of the jurisdiction, applies to service of notices on third persons under Ord. XVI. rr. 17, 18 ; and service of the notice on the company in Scotland was therefore good. *Swansea Shipping Co.* v. *Duncan*, 45 L. J., Q. B. 638 ; 1 Q. B. D. 644 ; 35 L. T. 879 ; 25 W. R. 233—C. A.

A defendant may not serve a third party out of the jurisdiction with a counter-claim, although he may, if necessary, commence a fresh action against him. *Potters* v. *Miller*, 31 W. R. 858.

The court refused leave to serve the notice on a foreign company not carrying on business in the United Kingdom, against whom the defendant claimed indemnity. *Bank of Ireland* v. *Forbes*, 6 L. R., Ir. 19.

Notice to Co-defendant.]—Under r. 55 of Ord. XVI., a defendant need not obtain the leave of the court or a judge before issuing to a co-defendant a notice claiming contribution or indemnity from him. *Towse* v. *Loveridge*, 53 L. J., Ch. 499 ; 25 Ch. D. 76 ; 49 L. T. 466 ; 32 W. R. 151.

A third party may be introduced into an action by adding him as a defendant, under Ord. XXII. r. 5, under the same circumstances in which a third-party notice might have been given to him under Ord. XVI. r. 17. And the term "notice" in the Judicature Act, 1873, s. 24, sub-s. 3, includes notice to a defendant by including him in a counter-claim. *Dear* v. *Sworder*, 46 L. J., Ch. 100 ; 4 Ch. D. 476 ; 25 W. R. 124.

In an action by A. against his trustees, B. and C., to make them jointly and severally liable for the loss occasioned by an investment on insufficient security, in breach of trust, of the trust fund, B., in his statement of defence and counter-claim, claimed contribution from C., as the trustee primarily liable for the alleged breach of trust, if established. The defence was delivered to C., but there was no order that that should be sufficient notice. A decree for an account and payment having been made against B. and C. :—Held, on further consideration, that C. had sufficient notice within Rules of Court, 1875, Ord. XVI. r. 17, of B.'s claim for indemnity ; and that B. was entitled to an inquiry how and in what proportions, as between B. and C., the sums ordered to be paid to A. should be borne and paid. *Butler* v. *Butler*, 49 L. J., Ch. 742 ; 14 Ch. D. 329 ; 42 L. T. 728 ; 28 W. R. 825.

One defendant, by his statement of defence, made certain allegations affecting the rights of his co-defendants. The latter purchased a copy of the defence, which was not delivered to them in any other way :—Held, that the purchase of the statement of defence did not affect the co-defendants with notice, under Ord. XVI. r. 17. *Steel* v. *Dixon*, 42 L. T. 765 ; 28 W. R. 796.

Questions between co-defendants may be raised by a pleading which states both a defence as against the plaintiff and a claim against a co-defendant ; but such pleading is not a counter-claim under the Judicature Act, Ord. XXI. r. 5, and should not be so intituled. Delivery of such pleading to the co-defendant is sufficient notice under Ord. XVI. r. 17. *Furness* v. *Booth*, 46 L. J., Ch. 112 ; 4 Ch. D. 586 ; 25 W. R. 267.

Plaintiff jointly with defendant B. entered into a contract with defendant E. to work a trading adventure on lands belonging to E. Plaintiff by his claim alleged that E. had obtained the contract from him and defendant B. by misrepresentation, and asked for rescission, and in the alternative for dissolution. Defendant B. delivered a pleading, which was at the same time his defence in the action, a reply to a counter-claim by E., and a new claim as in an action against E. :—Held, that he was entitled to prosecute in this action his claim against E. ; and that delivery to the defendant E. of the said pleading should be notice, under the statute, of the claim of defendant B. against him. *Bagot* v. *Easton*, 11 Ch. D. 392 ; 27 W. R. 404.

Leave to Third Party to serve Notice on Fourth.]—Leave was given to third party under Ord. XVI. r. 18, to serve notice on a fourth party. *Witham* v. *Vane*, 49 L. J., Ch. 242 ; 41 L. T. 729 ; 28 W. R. 276.

In an action by a shipower against the consignee of goods under a bill of lading to recover damages for delay in unloading, the defendant obtained an order to bring in a third party, viz., the London Banking Association, who had bought the cargo afloat. The court gave leave to the Banking Association to give notice to and bring in a fourth party to whom they had resold the cargo afloat. *Fowler* v. *Knoop*, 36 L. T. 219.

Quære, whether the provisions of Ord. XVI. extend to bringing in any parties beyond the third party. *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 49 L. J., Q. B. 527 ; 5 Q. B. D. 268 ; 42 L. T. 367 ; 28 W. R. 505.

Order—How Obtained.]—An application by the defendant in an action for leave to serve a third-party notice under Ord. XVI. r. 18, ought to be made on notice to the plaintiff, and not ex parte. *Wye Valley Ry.* v. *Hawes*, 50 L. J., Ch. 225; 16 Ch. D. 489; 43 L. T. 715; 29 W. R. 177—C. A. *See now* Ord. XVI. r. 48.

Time for making Application.]—After his defence had been delivered, the pleadings closed and the action set down for trial, a defendant took out a summons for leave to issue a notice to a third party:—Held, that the application was made too late, and must, therefore, be refused. *Associated Home Co.* v. *Whicheord*, 47 L. J., Ch. 652; 8 Ch. D. 457; 38 L. T. 602; 26 W. R. 774.

An application for a defendant for leave to issue a third-party notice under r. 58 of Ord. XVI. of the Rules of Court, 1883, should be made promptly; the time contemplated by the order as that within which the application is to be made being, as a general rule, within the time limited for delivering the defence, and at the latest before the pleadings are closed. *Birmingham Land Co.* v. *L. & N. W. Ry.*, 56 L. T. 702.

Semble, the application should not as a rule be made before defence delivered. *Gilson, In re, Gilson* v. *Gilson*, 63 L. J., Ch. 555; [1894] 2 Ch. 92; 8 R. 382; 70 L. T. 728; 42 W. R. 425.

Summons for Directions.]—No questions can be determined between a defendant and a third party brought into the action by the defendant, unless an order be obtained under Ord. XVI. r. 17, giving directions that such questions shall be determined. *Piller* v. *Roberts*, 21 Ch. D. 198; 46 L. T. 527; 30 W. R. 595.

Where a defendant serves a co-defendant with a third-party notice, but omits to take out a summons for directions under Ord. XVI. r. 52, he will not be entitled to any relief as against him. *Tritton* v. *Bankart*, 56 L. J., Ch. 629; 56 L. T. 306; 35 W. R. 474.

—— **Refusal to give Directions.**]—Where a third-party notice has been issued and a summons taken out for directions as to the mode of trial, if the judge refuses to give directions, he thereby dismisses the third party from the action. *Baxter* v. *France*, 64 L. J., Q. B. 337; [1895] 1 Q. B. 591; 14 R. 265; 72 L. T. 183; 43 W. R. 341—C. A.

In an action against the defendants for non-delivery of certain iron rods of the quality contracted for, the defendants proceeded to bring in H., a foreigner, as a third party, under Ord. XVI. r. 18, on the ground that they had contracted with him in respect of the iron rods so supplied, and upon the same terms. It was not denied that the clause as to quality was the same as between the plaintiff and the defendants on the one hand, and the defendants and H. on the other. The plaintiff, however, relied upon certain admissions made by the defendants as regards the subject-matter of the contract, which shewed that the action was, as between the plaintiff and the defendants, an undefended one. It further appeared that the case had already been set down for trial, and would be reached in a day or two. Upon application made by the defendants, under Ord. XVI. r. 21, to give directions as to the mode of trial:—Held, that the court had power to consider whether the case was one in which a third party ought to be allowed to come in, and ought to refuse the application where the effect of such third party being introduced would be to embarrass and delay the plaintiff. *Schneider* v. *Batt*, 50 L. J., Q. B. 389; 45 L. T. 371—C. A.

In an action against the defendants for breach of contract, they served P., as third party, with a notice under r. 18 of Ord. XVI. The defendants then applied to the court to give directions as to mode of trial; but the court held that the matters could not all be decided at one trial, and declined to give any directions. Pleadings having been, by direction of the queen's bench division, delivered between the defendants and the third party, the defendants then gave the third party notice of trial, the action between the plaintiff and the defendants having been already tried:—Held, that as the court had decided that all the questions could not be determined in one trial, the third party ought to be dismissed from the action, and that the notice of trial should, therefore, be set aside. *Schneider* v. *Batt*, 50 L. J., Q. B. 525; 8 Q. B. D. 701; 45 L. T. 371; 30 W. R. 420—C. A.

—— **Indemnity claimed against Co-defendant.**]—Where a defendant in an action issues a third-party notice against a co-defendant, the proper time for raising the question as to his liability to contribution or indemnity is on the application for directions under Ord. XVI. r. 52. The third-party notice being in such cases issued without leave, there is no order of the court against which an appeal or a motion to set it aside can be brought, and the judge, on the application for directions, must consider whether there is a question to be tried as to the liability to contribution or indemnity. *Baxter* v. *France*, 64 L. J., Q. B. 335; [1895] 1 Q. B. 455; 14 R. 212; 72 L. T. 146; 43 W. R. 227—C. A.

—— **Judgment on Application.**]—Under Ord. XVI. r. 52, judgment against a third party who has appeared pursuant to a third-party notice, but, at the hearing of an application by the defendant for directions, declines to state any defence, may be ordered, if the judge is not satisfied that there is any question proper to be tried as to the liability of the third party. The rule is consistent with the Judicature Act, 1873, s. 24, sub-s. 3, and the Judicature Act, 1875, s. 24, and is not ultra vires. Such judgment under the rule may, since the Married Women's Property Act, 1882, be ordered against a married woman, third party, as a feme sole, declaring her separate estate chargeable even in respect of a liability created before that act. *Gloucestershire Banking Co.* v. *Phillips*, 53 L. J., Q. B. 493; 12 Q. B. D. 533; 50 L. T. 360; 32 W. R. 522.

A defendant who is entitled to an indemnity from a co-defendant upon a special agreement is entitled to sign judgment against his co-defendant for the amount of his (the defendant's) liability before he has actually paid anything in discharge of it. *English and Scottish Trust Co.* v. *Flatau*, 36 W. R. 238.

Setting aside Notice.] — If the third party objects, it is unnecessary for him to serve notice to be dismissed, as the court has power to dismiss him on the hearing of the application for directions. *Greville* v. *Hayes*, [1894] 2 Ir. R. 20.

Orders to bring in third parties, made on ex parte applications, are in the nature of conditional orders obtained at the peril of the party

applying, and can be set aside upon motion by the third party. *Rice* v. *Alliance and Dublin Consumers' Gas Co.*, 12 L. R., Ir. 172.

A co-defendant served with a third-party notice may move to set aside the service. *Towse* v. *Loveridge*, 53 L. J., Ch. 499; 25 Ch. D. 76; 49 L. T. 466; 32 W. R. 151.

Liberty to appear at Trial or Defend Action.]—Where, in an action for damages in respect of alleged injury to the plaintiff's premises, the defendant, claiming to be entitled to indemnity over against a person not a party to the action, had served such person with a third-party notice under Ord. XVI. r. 48, and he had appeared thereto, the court, upon a summons for directions taken out by the defendant, gave the third party, who did not admit his liability, liberty to appear at the trial of the action and take such part as the judge should direct, and be bound by the result, and ordered the question of his liability to indemnify the defendant to be tried at the trial of the action, but subsequent thereto. In case a third party served with notice appears and admits his liability to indemnify, the court will give him leave to defend the action. *Coles* v. *Civil Service Supply Association*, 53 L. J., Ch. 638; 26 Ch. D. 529; 50 L. T. 114; 32 W. R. 407.

A lessor sued the assignee of the lease for breach of the covenant to repair; the executors of the original lessee were subsequently made parties, and served a third-party notice on a person who had been in possession of the premises, under an agreement for sale from the lessee, claiming indemnity from him, and an order was made giving him leave to appear and oppose the plaintiff's claim so far as he might be affected thereby. The third party then admitted his liability to indemnify the executors and offered to pay a sum of money into court and applied for leave to defend the action on the ground that the defence put in by the lessee's executors did not raise the chief grounds on which the third party could rely:—Held, that leave to defend ought not to be granted. *Barton* v. *L. & N. W. Ry.* (38 Ch. D. 147) followed. *Byrne* v. *Brown*, 37 W. R. 592.

An action was brought for specific performance of a contract. The defendant pleaded that he was not liable on the ground that he signed the contract as agent for another person. The defendant served a third-party notice on the other person who appeared and took no further proceedings. The defendant obtained an order that the question as to the liability of the third party should be tried as soon as might be after the trial of the action:—Held, that the third party might appear by counsel and have the question tried immediately after the trial of the action, without having obtained directions as to pleading or otherwise; and that if the defendant wished for such directions he should have taken steps to have them given. *Blore* v. *Ashby*, 58 L. J., Ch. 779; 42 Ch. D. 682; 61 L. T. 766; 38 W. R. 141.

To a claim by the plaintiff for not accepting 183 chests of shellac according to contract, the defendants raised the defence that the shellac was not of the quality contracted for. The defendants had contracted with Messrs. R. and Messrs. T. respectively, for the sale to them of 50 chests, on the same terms as their contract with the plaintiff, and the defendants cited Messrs. R. and T. under Ord. XVI. r. 18. Messrs. R. consented to be bound by the judgment in the action as to the quality of the shellac:—Held, that Messrs. R. and T. had been properly cited; and the court directed that Messrs. T. should be at liberty to appear and defend the action so far as regarded the question of the quality of the shellac, and that they should be bound by the finding of the jury on that question. *Benecke* v. *Frost*, 45 L. J., Q. B. 693; 1 Q. B. D. 419; 34 L. T. 728; 24 W. R. 669.

In an action on a bill of exchange accepted by the defendant in part payment of a ship sold to him by the plaintiff, the defendant pleaded that he bought the ship on behalf of and for a company; that the ship was afterwards transferred to them; and that the defendant was induced to make such purchase and to accept the bill by the fraudulent misrepresentation and concealment of the plaintiff with reference to the sale of the ship; and he set up by way of counter-claim, a claim against the plaintiff for damages for the misrepresentation and concealment. The company having been served by the defendant with notice under Ord. XVI. r. 18, was allowed to defend the action, though not to plead any fresh defence, but only to support the existing counter-claim jointly with the defendant by the same solicitor and counsel, and to be jointly liable with the defendant for the costs of the action, and to be entitled to only one set of costs with the defendant as against the plaintiff. *Norris* v. *Beazley*, 46 L. J., C. P. 515; 36 L. T. 409.

What Defences open to Third Party.]—A third party served with notice under Ord. XVI. r. 18, was allowed to put in a defence to the plaintiff's statement of claim, limited to points not raised by the defence of the defendants. *Witham* v. *Vane*, 49 L. J., Ch. 242; 41 L. T. 729; 28 W. R. 276.

When a third party has been given leave to defend under Ord. XVI. r. 53, he is at liberty to raise any defences which the defendant might have raised against the plaintiff's claim, although the defendant may, by admission or otherwise, have debarred himself from raising any particular defence. *Callender* v. *Wallingford*, 53 L. J., Q. B. 569; 32 W. R. 491.

Judgment against Third Parties.] — Defendants to an infringement action served a third-party notice for indemnity upon the B. company, who were not parties to the action. The B. company appeared as third parties in the action, and admitted their liability to the defendants; and the court ordered that they should have liberty to appear at the trial, and should be bound by the decision of the court on any question as to the indemnity arising between them and the defendants, but not otherwise. The B. company were not made defendants, and filed no pleadings, but they appeared at the trial as third parties, and the court gave judgment partly in favour of the plaintiffs and partly in favour of the defendants; but made no special order as to the third parties. The plaintiffs appealed, and after judgment had been given allowing their appeal, with costs against the defendants, the plaintiffs asked for an injunction and costs against the third parties (who had appeared on the appeal), and, if necessary, for an order to amend so as to make them defendants:—Held, by Cotton, L.J., that the court had no jurisdiction to give a judgment against these third parties as if they were defendants, and that it would be wrong after judgment on appeal to grant liberty to amend so as to enable the court to give relief

against the third parties which was not asked for at the trial; by Lindley, L.J., that the court had jurisdiction to grant the liberty to amend applied for, but that it should not be exercised in the present case. *Edison & Swan United Electric Light Co.* v. *Holland*, infra.

Counter-claim by Third Party.]—The court has no power to give a third party, who has been served with notice by a defendant under Ord. XVI. r. 48, leave to file a counter-claim against the original plaintiff. *Eden* v. *Weardale Iron and Coal Co.*, 54 L. J., Ch. 384; 28 Ch. D. 333; 51 L. T. 726; 33 W. R. 241—C. A.

A third party brought in as defendant to a counter-claim cannot counter-claim in the action. *Street* v. *Gover* (46 L. J., Q. B. 582; 2 Q. B. D. 498) followed. *Alcoy and Gandia Ry.* v. *Greenhill*, 65 L. J., Ch. 99; [1896] 1 Ch. 19; 73 L. T. 452; 44 W. R. 117—C. A.

Discovery—Third Party to Plaintiff.]—Persons who are served by a defendant with a third-party notice are not thereby made defendants within the definition of the word in the Judicature Act, 1873, s. 100, nor do they become defendants by putting in a defence. But where persons had been served with a third-party notice by the defendant for the purpose of claiming an indemnity, and had obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2) that they should be at liberty to appear at the trial of the action and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—Held, that the third parties had been placed by the order in the position of defendants, and had a right to examine the plaintiff by interrogatories under Ord. XXXI. r. 1. *Eden* v. *Weardale Iron and Coal Co.*, 56 L. J., Ch. 400; 35 Ch. D. 287; 56 L. T. 464; 35 W. R. 507—C. A.

—— **By Plaintiff to Third Party.**]—Persons who had been served by a defendant with a third-party notice for the purpose of claiming indemnity, obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2) that they should be at liberty to appear at the trial of the action, and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—Held, that the third parties had put themselves in the position of "opposite parties" to the plaintiff; and the plaintiff had a right to examine them by interrogatories. *MacAllister* v. *Rochester* (*Bishop*) (5 C. P. D. 194) followed. *Eden* v. *Weardale Iron and Coal Co.*, 56 L. J., Ch. 178; 34 Ch. D. 223; 55 L. T. 860; 35 W. R. 235—C. A.

When third parties have appeared under Ord. XVI. r. 20, and have been given liberty to defend under r. 21, the plaintiff has the right to obtain discovery from them. *MacAllister* v. *Rochester* (*Bishop*), 5 C. P. D. 194; 42 L. T. 481.

Costs.]—As between the plaintiff and the defendant the court held that the defendant was liable, but that the defendant was to be indemnified by the third party, and the latter was ordered to pay the costs of the third-party proceedings between him and the defendant; but the defendant having set up a defence which failed, must pay the costs of the action. *Blore* v. *Ashby*, 58 L. J., Ch. 779; 42 Ch. D. 682; 61 L. T. 766; 38 W. R. 141.

Where liberty is given to a third party to appear and defend the action, the question of costs is usually reserved until after the trial. *Benecke* v. *Frost*, 45 L. J., Q. B. 693; 1 Q. B. D. 419; 34 L. T. 728; 24 W. R. 669.

—— **Defendant ordered to Pay Costs of Third Party.**]—There is power to order a defendant to pay costs to a third party who appears in consequence of being served by the defendant with a notice under Ord. XVI. r. 18. *Yorkshire Waggon Co.* v. *Newport Coal Co.* (infra) explained. *Dawson* v. *Shepherd*, 49 L. J., Ex. 529; 42 L. T. 611; 28 W. R. 805—C. A.

There is no jurisdiction under the provisions of Ord. XVI. r. 21, to impose any terms with regard to the payment of the costs of a party brought in by notice under r. 18 upon the party bringing him in. *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 49 L. J., Q. B. 527; 5 Q. B. D. 268; 42 L. T. 367; 28 W. R. 505. *But see preceding case.*

—— **Plaintiff ordered to Pay Costs of Third and Fourth Parties.**]—D. covenanted by deed that he and his heirs or assigns would pay S. a royalty on coals, which should be got from land purchased from S., and which should be shipped for sale. D. did not execute the deed. In an action on the covenant, D.'s representative brought in his assigns as third parties, and they brought in fourth parties:—Held, that there was no jurisdiction to throw the costs of the third and fourth parties on the plaintiffs. *Witham* v. *Vane*, 32 W. R. 617—H. L. (E.) Affirming 44 L. T. 718—C. A.

A third party, who was under a contract to indemnify the defendant, obtained leave to appear at the trial, and appeared accordingly, and succeeded in his object of reducing the damages to a sum already paid into court by the defendant:—Held, that he was not entitled to costs against the plaintiff. *Williams* v. *S. E. Ry.*, 26 W. R. 352.

The court has complete jurisdiction over the costs of a third party brought in under Ord. XV. r. 18; and even where the order, giving directions as to the mode in which the questions are to be tried, reserves all questions between the defendant and the third party, including the question of costs, the court may order the plaintiff to pay the costs of the third party. *Hanbury* v. *Upper Inny Drainage Board*, 12 L. R. Ir. 217.

—— **Third Party ordered to Pay Plaintiff's Costs.**]—The high court has jurisdiction to order a third party to pay to an unsuccessful defendant the costs payable by such defendant to the plaintiff. The plaintiff let to the defendant a house for twenty-one years, with option to determine the lease at the end of seven or fourteen, by deed containing covenants by the defendant to repair and paint and leave in repair. The defendant, after having occupied for five years, sub-let the house to H. for the remainder of the first seven years by a writing with a clause, that "the letting should be subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." At the end of the seven years, the defendant having determined the lease in the exercise of his option, the plaintiff claimed from the defendant, and the defendant claimed from H., the amount at which

dilapidations had been assessed by the plaintiff's surveyor. H. declined to pay or to give the defendant an indemnity, or to take any responsibility in the matter. The plaintiff sued the defendant, who brought in H. as a third party. The issues, as between the plaintiff and the defendant, and the defendant and H., were referred separately to an official referee, who reported that the sum claimed by the plaintiff was due from the defendant to the plaintiff, and that a similar sum was due from H. to the defendant. A divisional court (Lord Coleridge, C.J., and Field, J.), on adopting the second report, ordered H. to pay all costs as between the plaintiff and the defendant:—Held, by the court of appeal (Jessel, M.R., Brett and Cotton, L.JJ.), that these were costs within the discretion of the high court, and therefore that this order was not appealable. *Hornby* v. *Cardwell*, 51 L. J., Q. B. 89; 8 Q. B. D. 329; 45 L. T. 781; 30 W. R. 263—C. A.

The court has power under Ord. XVI. r. 21, to order the third party brought into the action to pay to the plaintiff the costs occasioned by his defence. *Piller* v. *Roberts*, 21 Ch. D. 198; 46 L. T. 527; 30 W. R. 595.

Under Ord. XVI. r. 54, the court has jurisdiction to order third parties to pay the costs both of an appeal and the costs below. Where third parties have in reality fought the plaintiffs and failed, an order for the payment of such costs must be made against them as well as against the defendants. *Edison & Swan United Electric Light Co.* v. *Holland*, 58 L. J., Ch. 524; 41 Ch. D. 28; 61 L. T. 32; 37 W. R. 699—C. A.

Service of Notice of Appeal on Third Party.]—An action was brought against a trustee to compel him to make good a loss occasioned by an improper investment. The trustee claimed to be indemnified by a third party whom he served with a third-party notice. At the trial the defendant was held not liable, and the plaintiff appealed, but did not serve the third party with notice of the appeal:—Held, that the third party was not a party directly affected by the appeal within Ord. LVIII. r. 2, and therefore it was not the duty of the plaintiff to serve the third party with notice of the appeal, but that the defendant ought before the hearing of the appeal to have applied to the court of appeal for leave to serve the third party with notice. *Salmon, In re, Priest* v. *Uppleby*, 42 Ch. D. 351; 61 L. T. 146; 38 W. R. 150—C. A.

X. INTERMEDIATE PROCEEDINGS.

a. PAYMENT INTO AND OUT OF COURT.

See R. S. C., 1883, Ord. XXII.

1. With or Before Defence.
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5. Under Trustee Relief Act—*See* TRUST AND TRUSTEE.
6. Funds in Court—*See* infra, FUNDS IN COURT.

1. With or Before Defence.

a. *In what Cases.*

Tender.]—A defence of tender of the sum paid in cannot be pleaded to a claim for unliquidated damages. *Davys* v. *Richardson*, 57 L. J., Q. B. 409; 21 Q. B. D. 202; 59 L. T. 765; 36 W. R. 728—C. A.

Tender of payment of damages by way of defence to an action in a county court cannot be made after the question of liability has already been determined by judgment. *The Recepta, Gordon* v. *Francis*, 62 L. J., P. 118; [1893] P. 255; 1 R. 644; 69 L. T. 252; 41 W. R. 561; 42 W. R. 73—C. A.

Counter-claim.]—Money may be paid into court by a plaintiff who is defendant to a counter-claim, in respect of the counter-claim, notwithstanding Form No. 10 of the Supreme Court Funds Rules, 1886. *Hutchinson* v. *Barker*, 13 R. 371; 71 L. T. 625.

Bonds.]—Principal and interest due on bonds conditioned for payment of moneys by instalments, may be paid into court. *Bonafous* v. *Rybot*, 3 Burr. 1370.

A plaintiff having declared on a bond, dated in 1775, for 2,400*l.* proclamation money of North Carolina, averring that it was of a certain value, the court would not permit the defendant to pay the 2,400*l.* proclamation money into court. *Cuming* v. *Monro*, 5 Term Rep. 87.

The whole penalty of a bastardy bond may be paid into court. *Benjamin* v. *Perrot*, 2 W. Bl. 1190.

Payment into court under 4 & 5 Anne, c. 16, s. 13, of the principal, interest and costs due on a bond, cannot be pleaded in bar to an action on the bond. *England* v. *Watson*, 9 M. & W. 333; 1 D. (N.S.) 398; 6 Jur. 763.

In a declaration on a bond conditioned for the nonpayment of a certain sum at the expiration of seven years, and interest half-yearly in the intermediate time, which was the breach assigned (the principal not having become due), the defendant cannot plead payment of money into court under 8 & 9 Will. 3, c. 11, s. 8, and 4 & 5 Anne, c. 16, s. 13, but he may, under the latter statute, plead, as far as regards the interest alone, a plea of solvit post diem. *Hodgkinson* v. *Wyatt*, 1 D. & L. 668; 13 L. J., Q. B. 73; 8 Jur. 216.

The 15 & 16 Vict. c. 76, s. 71, did not enable a defendant to pay money into court in answer to an action for the penalty of a bond, with breaches assigned in the declaration. *London (Bishop)* v. *M'Neil*, 9 Ex. 490; 2 C. L. R. 561; 23 L. J., Ex. 111; 18 Jur. 314; 2 W. R. 232.

In an action on a bond conditioned for the payment of money instalments, a plea of payment into court of money sufficient to satisfy the claim of the plaintiff, in respect of the unpaid instalment for default in payment of which the action was brought, is bad, on the ground that a money bond payable by instalments is not within either the 4 & 5 Anne, c. 16, s. 13, or the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 25. *Preston* v. *Dania*, 42 L. J., Ex. 33; L. R. 8 Ex. 19; 27 L. T. 612; 21 W. R. 128.

b. *Pleadings.*

Subsequent Defence denying Liability—Joinder of Issue.]—In an action by the holder of a bill of lading for short delivery the defendants paid money into court, and served on the

plaintiff a notice stating that the money paid in was enough to satisfy the plaintiff's claim. A month later they delivered a defence denying liability, on which the plaintiff joined issue:—Held, that the defence and the joinder of issue ought to be struck out, and that the only question for the court was as to the amount of damages. *Dumbelton* v. *Williams*, 76 L. T. 81—C. A.

Defence need not specify Items.]—Where a plaintiff claims for distinct pieces of work and labour, alleged in separate paragraphs of the statement of claim, a defendant who has paid money into court generally need not specify in his defence how much is paid in respect of each head of claim. *Paraire* v. *Loibl*, 49 L. J., C. P. 481; 43 L. T. 427—C. A.

But where the defendants in an action for libel admitted part of the innuendo and denied the other, and added a plea under Lord Campbell's Act, with a payment into court generally:—Held, that the defence ought to state to what part of the libel the payment was intended to apply. *Mackay* v. *Manchester Press Co.*, 54 J. P. 22.

Particulars of Items.]—The court has a discretion to order a defendant to give particulars of the items of claim in respect of which he pays money into court, but it can only make such an order when the trial of the action will be facilitated and neither party embarrassed by it. *Orient Steam Navigation Co.* v. *Ocean Marine Insurance Co.*, 34 W. R. 442.

An action was brought by the plaintiff as lessor, against the defendants, as lessees, of certain premises for—(1) possession; (2) mesne profits; (3) damages for dilapidations and non-repair. The defence was a general denial of all liability, and a payment of 30*l.* into court, as sufficient to satisfy the plaintiff's claim in the action. A judge at chambers having made an order that the defendants should give to the plaintiff particulars in writing, stating in respect of which of the two heads of claim (mesne profits and damages for dilapidations) the payment into court was made, and if in respect of both, how much for each head:—Held, that the order was right, as the defendants ought to give the particulars asked for, apportioning the sum paid into the different heads of claim. *Rowe* v. *Kelly*, 59 L. T. 139.

When a declaration contains a number of causes of action (not being different actions), the practice of the court, on a plea of payment into court pleaded generally, is not to grant particulars of such payment, specifying the items of claim to which the money is appropriated. *Thames Ironworks and Shipbuilding Co.* v. *Royal Mail Steam Packet Co.*, 10 C. B. (N.S.) 375; 30 L. J., C. P. 265; 7 Jur. (N.S.) 972; 4 L. T. 250; 9 W. R. 577.

But in an action against a carrier, the declaration alleging the loss and damage of a variety of goods which he undertook to carry for the plaintiff to numerous places at different times, and the plaintiff having delivered particulars of his claim, and the defendant having pleaded payment into court of a sum in satisfaction, the court ordered the defendant to deliver an account of the particular items of the plaintiff's demand in respect of which the money was paid into court. *Baxendale* v. *G. W. Ry.*, 6 H. & N. 95; 30 L. J., Ex. 63.

Inconsistent Defence—Traversing and Paying into Court.]—In an action for nuisance, payment into court, together with a denial of the right of action in respect of which the payment is made, cannot be allowed. *Spurr* v. *Hall*, 46 L. J., Q. B. 693; 2 Q. B. D. 615; 37 L. T. 313; 26 W. R. 78. *But see following cases.*

Where a defendant has so pleaded, the defence will be amended as embarrassing under Ord. XXVII. r. 1. *Ib.*

As a general rule a defendant may, by his defence, deny the plaintiff's causes of action, and at the same time plead payment into court in respect of the whole or any part of them. *Spurr* v. *Hall* (supra) doubted. *Berdan* v. *Greenwood*, 47 L. J., Ex. 628; 3 Ex. D. 251; 39 L. T. 223; 26 W. R. 902—C. A.

The defendant, in an action for libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of the innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper, under 6 & 7 Vict. c. 96, and also a payment of 40*s.* into court:—Held, that the offering of an apology and payment into court, and of a justification, could be pleaded together. *Hawkesley* v. *Bradshaw*, 49 L. J., Q. B. 333; 5 Q. B. D. 302; 42 L. T. 285; 28 W. R. 557; 44 J. P. 473—C. A. *See* Ord. XXII. r. 1.

The defendant in an action for libel, after admitting publication, pleaded that, except as afterwards admitted, the words used by him were fair comment on a matter of public interest, and, to the extent of the facts to be stated afterwards, were true in substance and in fact. He then proceeded to justify the various statements in the alleged libel, but admitted that he had used words of the plaintiff, being the words complained of, which were not wholly justified by the facts, and could not be considered in every respect fair comment, and he paid the sum of forty shillings into court, and said the same was sufficient to satisfy the plaintiff's claim:—Held, that, as the defendant had pleaded justification to the whole of the libel, and had paid money into court in respect of a portion, such a plea was both embarrassing and contrary to the provisions of Ord. XXII. r. 1, and ought to be struck out. *Fleming* v. *Dollar*, 58 L. J., Q. B. 548; 23 Q. B. D. 388; 61 L. T. 230; 37 W. R. 684.

c. *Effect of, as an Admission.*

Generally.] — Where a declaration contains two inconsistent counts, and the defendant pays money into court upon the second count, which the plaintiff accepts, the defendant cannot read the second count and the proceedings thereon to the jury as conclusive, or as any evidence to negative an allegation in the first count. *Gould* v. *Oliver*, 2 Scott (N.R.) 241; 2 Man. & G. 208.

A declaration alleged that in consideration that the plaintiff would ship goods on board a vessel, the defendant guaranteed that the vessel should sail with, if not before, any other vessel in the berth for Havana, under a penalty of forfeiting one half the freight of the goods. Breach, that the vessel did not sail with or before any other vessel in the berth for Havana, and by reason of the premises the plaintiff became entitled to the half freight. The defendant pleaded payment into court of 10*l.*, and the plaintiff replied damages ultra. At the trial it appeared that the whole freight exceeded 20*l.* but no actual damage was proved:—Held, that

the half freight was liquidated damage, and not a penalty, and that, by paying the money into court, the defendant admitted that the plaintiff was entitled to recover it. *Sparrow* v. *Paris*, 7 H. & N. 594 ; 31 L. J., Ex. 137 ; 8 Jur. (N.S.) 391 ; 5 L. T. 799.

A declaration for tolls contained six counts ; three for tolls payable to the plaintiff as owner of a manor ; two for tolls payable to the plaintiff as owner of a port ; and the sixth for tolls generally. The particulars of demand claimed a sum of money for tolls and port dues in respect of iron ore. Pleas, payment of 10*l.* into court upon the counts for manorial tolls and upon the sixth count, and non assumpsit as to the residue. Replication to first plea as to the sum in the introductory part of that plea, no damages ultra. At the trial the jury found a verdict for the plaintiff for 8*l.* 6*s.* 8*d.*, being the amount of port dues which they found to be payable to the plaintiff in respect of iron ore :—Held, that the parties having gone down to trial to try the right of the plaintiff to take port dues in respect of iron ore, the defendant was not entitled to apply the verdict for the plaintiff to the sixth count, upon which he had paid money into court. *Brune* v. *Thomson*, 4 Q. B. 543 ; D. & M. 221 ; 12 L. J., Q. B. 251 ; 7 Jur. 395.

In an action for the stipulated price of a specific chattel, the defendant pleaded payment into court of a sum which the plaintiff took out in satisfaction :—Held, that the defendant in that action was not estopped thereby from suing the plaintiff for negligence in the construction of the chattel. *Rigge* v. *Burbridge*, 15 M. & W. 598 ; 4 D. & L. 1 ; 15 L. J., Ex. 309.

A defendant who pays money into court in part satisfaction of the demand for which he is sued, and pleads a set-off as to the remainder, does not admit the debt so as to estop him from suing the plaintiff in respect of the set-off so pleaded. *Williams* v. *Stear*, 16 L. T. 397.

If a plaintiff by a misrepresentation induces a defendant to believe that the only point to be tried is a question of fraud, and suffers him to prepare his evidence accordingly, he will not be allowed to object to that evidence at the trial, on the ground that the contract had been admitted by the defendant having paid a sum of money into court generally on the whole declaration. *Muller* v. *Hartshorne*, 3 Bos. & P. 556.

Common Counts.]—Payment of money into court upon a general count in indebitatus assumpsit, or in debt, admits only a cause of action to the amount paid into court, and operates as an admission for no other purpose. *Perren* v. *Monmouthshire Railway and Canal Co.*, 11 C. B. 855 ; 22 L. J., C. P. 162 ; 17 Jur. 532 ; 1 W. R. 354.

A declaration contained a special count against defendants as partners, and also the common counts :—Held, that payment of money into court under the latter counts was no admission of the partnership alleged in the former. *Charles* v. *Branker*, 1 D. & L. 989 ; 11 M. & W. 743 ; 13 L. J., Ex. 332.

In an action for rent on a demise for years, with a count for fixtures sold, the plaintiff claimed by his particulars 5*l.* 5*s.* for rent, and 12*l.* for fixtures. The defendant paid 11*l.* 5*s.* into court :—Held, no admission of his liability, in respect of fixtures, to a greater amount than had been paid into court. *Goff* v. *Harris*, 5 Man. & G. 573 ; 12 L. J., C. P. 273.

The plea to an indebitatus count amounts to an admission, that, by virtue of some contract of the nature declared on, the defendant is indebted or liable to the plaintiff to the amount paid in, but it does not primâ facie amount to a recognition of his liability on any particular contracts on which the plaintiff may choose to rely. *Bingham* v. *Robins*, 5 M. & W. 94 ; 7 D. P. C. 352 ; 3 Jur. 364.

Where there were several counts, only one of which was applicable to the plaintiff's demand :—Held, that it only admitted a cause of action on that count. *Stafford* v. *Clark*, 2 Bing. 377 ; 9 Moore, 724 ; 1 Car. & P. 24, 403 ; 3 L. J. (o.s.) C. P. 48.

Even in every transaction relating to the subject-matter in dispute, which is capable of being converted into a contract by the assent of the parties. *Bennett* v. *Francis*, 1 Bos. & P. 550 ; 4 Esp. 28. *See* 3 R. R. 644, n.

Therefore, where a defendant, who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally, upon a declaration containing a count for goods sold and delivered :—Held, that he had thereby admitted the transaction to have been converted into a contract ; and that the plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered. *Ib.*

Payment of money into court on a declaration containing special and common counts, founded on a variety of dealings between the parties, cannot be applied by the plaintiff to any particular count only, but the defendant may so apply it to the damage therein stated to have been incurred. *Drake* v. *Lewin*, 4 Tyr. 730.

Special Contracts.]—Payment of money into court upon a declaration on a special contract, admits the contract and the breach or breaches. *Perren* v. *Monmouthshire Railway and Canal Co.*, 11 C. B. 855 ; 22 L. J., C. P. 162 ; 17 Jur. 532 ; 1 W. R. 354.

A plea of payment into court to a special count is an admission of the contract declared on and of the breach. *Bingham* v. *Robins*, 5 M. & W. 94 ; 7 D. P. C. 352.

In an action of assumpsit against two defendants, the declaration contained an indebitatus count for work and labour, and the ordinary money counts ; the amount claimed was 44*l.* 12*s.* 4*d.* The defendants jointly paid into court the sum of 30*l.* and pleaded that beyond that amount they did not promise :—Held, that by that payment into court the defendants admitted their liability only as far as the 30*l.*, and were entitled to dispute their further liability. When the declaration is upon a special contract, and the defendant pays money into court, that payment admits the whole contract. *Archer* v. *English*, 1 Scott (N.R.) 156 ; 1 Man. & G. 873 ; 9 D. P. C. 241 ; 10 L. J., C. P. 15.

The payment admits the contract as stated in each count, and a breach of it, and that something is due on each count thereon ; but it does not admit the amount of the breach therein stated. *Stoveld* v. *Brewin*, 2 B. & Ald. 116.

It narrows the inquiry to the quantum of damages sustained by the breach thereof. *Yate* v. *Willan*, 2 East, 128. S. P., *Piggott* v. *Dunn*, 2 East, 134.

And precludes the defendant from impeaching the existence of the contract. *Dyer* v. *Ashton*, 1 B. & C. 3 ; 2 D. & R. 19 ; 1 L. J. (o.s.) K. B. 8.

In a count on a policy, the risk was stated to continue until the ship was unloaded :—Held, that the premium having been paid into court, generally, was an admission of the contract stated. *Andrews* v. *Palsgrave*, 9 East, 325.

In an action on a special contract the plaintiff declared that he was engaged as a newspaper editor "at a certain salary, to wit, 400*l*.," and claimed a quarter's salary as damages for dismissal without notice. Plea, payment of 37*l*. 10*s*. into court, and no damages ultra. Replication of damages ultra :—Held, that the precise sum of 400*l*. in the declaration was not in its nature material; and that, as it was laid under a videlicet, the plaintiff, if the contract had been denied, would not have been bound to prove the precise sum. And that the defendant therefore had not by his plea of payment into court admitted a contract for the specific salary of 400*l*. *Cooper* v. *Blick*, 2 Q. B. 915; 2 G. & D. 295; 11 L. J., Q. B. 85; 6 Jur. 368.

To an action on a breach of a contract to grant the plaintiff a good and valid lease, the defendant pleaded payment into court, and no damages ultra :—Held, that the plaintiff might recover damages beyond his expenses for the loss which he had sustained by reason of the non-performance of the contract. *Robinson* v. *Harman*, 1 Ex. 850; 18 L. J., Ex. 202.

Held, also, that evidence to shew that the plaintiff knew that the defendant had no title, was inadmissible under the plea of payment into court, which admitted the contract. *Ib.*

Where, upon a count on a promissory note payable by instalments, averring nonpayment of such instalments, the defendant pleads non assumpsit, and brings into court a sum of money less than the amount of the instalments, he thereby admits the special contract, but does not admit the nonpayment of the instalments, except to the extent of the money brought in. *Reid* v. *Dickens*, 2 N. & M. 369; 5 B. & Ad. 499.

In an action on a special contract, and for money had and received, the defendant pleaded the general issue, and to the common counts a tender; and he paid money into court, not applying in terms to any particular count :—Held, that such payment could not be referred exclusively to the counts as to which a tender was pleaded, but that it applied to the whole declaration, and admitted the special contract. *Bulwer* v. *Horne*, 1 N. & M. 117; 4 B. & Ad. 132; 2 L. J., K. B. 11.

In Actions on Covenants.]—If the payment is made on any one of the breaches in an action on a covenant, it is unnecessary to prove the deed. *Randall* v. *Lynch*, 2 Camp. 357; 11 R. R. 727.

Generally, a payment into court, to a declaration setting out several covenants, and assigning a general breach, admits some damage upon every part of the breach. *Wright* v. *Goddard*, 3 N. & P. 361; 8 A. & E. 144; 1 W. W. & H. 230; 7 L. J., Q. B. 174; 2 Jur. 840.

Of Validity of Contract.]—Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill as to prevent the necessity of proving the drawer's handwriting. *Gutteridge* v. *Smith*, 2 H. Bl. 374.

And, after such payment, the defendant cannot object to the sufficiency of the stamp on which the bill is drawn. *Israel* v. *Benjamin*, 3 Camp. 40.

Of Facts stated in Claim.]—Though payment of money into court admits every legal cause of action stated, yet where a plaintiff alleges in his declaration multifarious and inconsistent facts, as the grounds for one and the same claim, it is not competent for the plaintiff to apply the payment into court of a sum insufficient to meet all the demands alleged, as evidence to prove such one of the claims as he may elect; but he must prove his case by other evidence of the fact. *Everth* v. *Bell*, 1 Moore, 158: 7 Taunt. 450.

It admits all the facts stated in the counts on which the money is paid in. *Godsall* v. *Boldero*, 9 East, 72.

But on those counts only. *Baillie* v. *Cazalet*, 4 Term Rep. 579.

In an action against a railway company for negligence, whereby a passenger was injured, the company pleaded payment into court of money, and no damages ultra :—Held, that the payment into court admitted the contract to carry, and the breach of the duty founded upon that contract, so as to dispense with proof of negligence, the damages being single, and depending upon nothing beyond the mere breach of duty admitted. *Perren* v. *Monmouthshire Railway and Canal Co.*, 11 C. B. 855; 22 L. J., C. P. 162; 17 Jur. 532; 1 W. R. 354.

In an action for negligence in not properly securing a cow of the defendant in a slaughterhouse, the declaration stated, that in consequence thereof the cow "ran at, butted at, gored, killed, and destroyed" a cow of the plaintiff. Plea, a payment of 30*s*. into court, and that the plaintiff had sustained no greater damages :—Held, that the defendant could not go into evidence to shew that his cow had not killed the plaintiff's cow, as the contrary was admitted by the plea. *Lloyd* v. *Walkey*, 9 Car. & P. 771.

Payment of money into court in an action on a policy, admits that the ship was seaworthy. *Harrison* v. *Douglas*, 5 N. & M. 180; 3 A. & E. 396; 1 H. & W. 380.

But payment of money into court to the amount of a partial loss upon a valued policy is not an admission of a total loss. *Rucker* v. *Palsgrave*, 1 Taunt. 419; 1 Camp. 557. And see *Waldron* v. *Coombe*, 3 Taunt. 162; 12 R. R. 629.

And, in an action on a valued policy, the payment of money into court upon a count which states a total loss, is not an admission of such total loss by capture. *Ib.*

But it admits the interest of the plaintiff as averred. *Bell* v. *Ansley*, 16 East, 146; 14 R. R. 322.

A plea of tender without payment into court admits the contract and facts stated in the declaration. *Cox* v. *Brain*, 3 Taunt. 95.

So, by paying money into court on a plea of tender, a defendant admits that a promise to pay the debt of a third person was in writing. *Middleton* v. *Brewer*, Peake, 15; 3 R. R. 643.

A declaration against assignees of a bankrupt stated that the plaintiff agreed with the bankrupt, before the bankruptcy, to permit him to take stones from the plaintiff's quarry at a certain price, for a church which he, the bankrupt, had undertaken to build, and that he took therefrom stones to the amount of 50*l*.; that the defendants, as his assignees, adopted his contract for building the church, and thereby became bound by its equities, and so liable to pay the plaintiff the 50*l*., and that afterwards they took from the quarry stones, for the same purpose, to the amount of 40*l*. Plea, as to the agreement of the plaintiff with the bankrupt, non assumpsit;

as to the residue of the causes of action, payment into court of 6*l.* 12*s.* 11*d.*, which the plaintiff accepted in satisfaction of that sum. The jury having found for the defendant on the first issue :—Held, that the admission in the plea of payment into court did not entitle the plaintiff to have a verdict for him on the other issue. *Tcemlow* v. *Askey*, 3 M. & W. 495 ; 6 D. P. C. 597 ; 1 H. & H. 172 ; 7 L. J., Ex. 233.

Of Plaintiff's Character and Right to sue.]—In an action brought in a county court for work and labour done, the claim contained several items : the defendants paid money into court without denying liability :—Held, that the payment into court was an admission of some liability but not that something was due on every item of the account. *Stevenson* v. *Berwick Corporation* (1 Q. B. 154) followed. *Hennell* v. *Davies*, 62 L. J., Q. B. 220 ; [1893] 1 Q. B. 367 ; 5 R. 209 ; 68 L. T. 220 ; 41 W. R. 284.

After payment of money into court by a defendant, in an action brought against him on 2 & 3 Edw. 6, by a farmer of tithes, he cannot object to the plaintiff's title to the tithes, because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages. *Broadhurst* v. *Baldwin*, 4 Price, 58.

So, in an action by a surgeon, it admits his title to sue as such. *Lipscombe* v. *Holmes*, 2 Camp. 441.

Payment of money into court for work and labour, is an admission that the contract was with the party suing, where it appears that there was in fact only one contract. *Walker* v. *Rawson*, 5 Car. & P. 486 ; 1 M. & Rob. 250.

In an action for the use and occupation of premises, containing a count for fixtures bargained and sold, the defendant pleaded first, as to 12*l.* parcel, &c., payment into court ; and to the residue non assumpsit :—Held, that he was not estopped by the former plea from shewing at the trial that no contract to take the fixtures was ever entered into between himself and the plaintiff. *Bingham* v. *Robins*, 5 M. & W. 94 ; 7 D. P. C. 352.

In an action for use and occupation, payment of money into court admits the contract, and therefore it is not open to him to contend that the plaintiff is without a title, or that another co-plaintiff should have joined in the action, although these facts may appear doubtful on the plaintiff's own evidence. *Dolby* v. *Iles*, 3 P. & D. 287 ; 11 A. & E. 335 ; 9 L. J., Q. B. 51.

When by the terms of a policy in a mutual insurance club the amount of the loss is not to be drawn before a specified day, the defendant in an action on the policy, by paying money into court, precludes himself from objecting that the action is brought too soon. *Harrison* v. *Douglas*, 5 N. & M. 180 ; 3 A. & E. 396 ; 1 H. & W. 380.

Payment of money into court on a declaration for goods sold, and also a particular stating that the action is brought for the price of a certain lot of goods sold to the defendant on such a day by A., the plaintiff's broker, does not admit that the goods purchased by the defendant of A. on the days specified were the property of the plaintiff. *Blackburn* v. *Scholes*, 2 Camp. 341 ; 11 R. R. 723.

Payment of money into a superior court is an admission of the plaintiff's right to sue in such court, and bars a plea of the Court of Conscience Act. *Miller* v. *Williams*, 5 Esp. 19.

If money is paid in generally, it does not exclude the benefit of the Statute of Limitations. *Long* v. *Greville*, 4 D. & R. 632 ; 3 B. & C. 10 ; 2 L. J. (o.s.) K. B. 205.

To a declaration for non-performance of a contract to receive and pay for a copper, made to order at a specified price per pound weight, the defendant pleaded the payment into court of a sum :—Held, that he could not, under this plea, give in evidence that he had countermanded the order when only a part of the work had been done. *Stevens* v. *Ufford*, 7 Car. & P. 97.

Where a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts, which would be a bar to the action, is not admissible in mitigation of damages. *Speck* v. *Phillips*, 5 M. & W. 279 ; 7 D. P. C. 470 ; 8 L. J., Ex. 249, 277.

Thus, where, to an action for wrongfully discharging the plaintiff from the defendant's service, the defendant pleads only payment of money into court, he cannot prove, in mitigation of damages, that he discharged the plaintiff for misconduct. *Ib.*

Of Joint Liability.]—A plea of payment into court by two admits only that the plaintiff has a cause of action on one or more of the contracts declared on, to the amount of the sum paid in, and does not admit their joint liability to any greater amount, although the plaintiff gives evidence aliunde to fix one of them with liability to a greater amount. *Stapleton* v. *Nowell*, 6 M. & W. 9 ; 8 D. P. C. 196 ; 9 L. J., Ex. 132 ; 4 Jur. 90.

In an action of assumpsit against two defendants, the declaration contained an indebitatus count for work and labour, and the ordinary money counts ; the amount claimed was 44*l.* 12*s.* 4*d.* The defendants jointly paid into court the sum of 30*l.* and pleaded that beyond that amount they did not promise :—Held, that by that payment into court the defendants admitted their liability only as far as the 30*l.* and were entitled to dispute their further liability. *Archer* v. *English*, 1 Scott (N.R.) 156 ; 1 Man. & G. 873 ; 9 D. P. C. 21 ; 10 L. J., C. P. 15.

In an action by the master of a ship, for wages, against A. W., D. S. W. and S. W., the plaintiff proved a contract in the handwriting of W., signed A. W. & Co., by which contract he was engaged as master of a vessel, at a yearly salary. He also proved services under the contract for several years ; and he then put in a rule to pay into court a sum of money which was not equal to the amount of the wages. It appeared on the part of the defendants, that D. S. W. was not a member of the firm of A. W. & Co., and was not an owner of the ship in question. The defendants, in the course of their case, went into accounts, including a variety of items, being disbursements on ship's account on the one hand, and items to the credit of the owners on the other :—Held, that the whole account was referable to one contract, and that the four defendants, having paid money into court, were precluded from setting up, that D. S. W. was not a party to the contract. *Ravenscroft* v. *Wise* or *Wylie*, 1 C. M. & R. 203 ; 2 D. P. C. 676 ; 4 Tyr. 741 ; 3 L. J., Ex. 309.

Extent of Admission.]—But it is only an acknowledgement that the plaintiff is entitled to recover the sum so paid, it does not preclude him from taking any objection to the action beyond that sum. *Coe* v. *Parry*, 1 Term Rep. 464.

And it is only an admission of a legal demand. *Ribbans* v. *Cricket*, 1 Bos. & P. 264.

Payment of money into court, for goods sold

and delivered, only amounts to an admission of the plaintiff's right of action to the amount of the sum paid in, and applies only to a legal demand, and not to all the items contained in a bill of particulars, in which the goods are stated to have been supplied at different times. *Seaton* v. *Benedict*, 2 M. & P. 66; 5 Bing. 28; 6 L. J. (o.s.) C. P. 208.

It is competent for a defendant to shew that the goods in question were not made according to order, but that he had, at the request of the plaintiff, retained and used some of them for a trial. *Mainworthy* v. *Page*, 3 Jur. 126.

Payment into court to common counts is not an admission of any liability ultra the sum paid in, however special the particulars of demand may be. *Stevenson* v. *Berwick Corporation*, 4 P. & D. 546; 1 Q. B. 154; 1 Arn. & H. 265.

A defendant may shew that the items in the plaintiff's demand above the sum paid into court were not due from himself. *Booth* v. *Howard*, 2 D. P. C. 438; W. W. & D. 54; 1 Jur. 55.

It is competent to a defendant to urge any objections to the plaintiff's right to recover further damages. *Lucy* v. *Walrond*, 5 Scott, 52; 3 Hodges, 215; 6 L. J., C. P. 290.

Payment of money into court generally upon a declaration upon a policy of insurance, and the money counts, is only an admission of the contract, but does not preclude the defendant from disputing his liability, beyond such payment, for goods which were not loaded according to the terms of the policy. *Mellish* v. *Allnutt*, 2 M. & S. 106; 14 R. R. 599.

A. and B. were jointly indebted to C.; after more than six years had elapsed since the debt accrued, A. promised in writing, signed by him, to pay his proportion when applied to. Payment of money into court on a special count, framed on such new promise to pay the defendant's proportion, and averring the amount of such proportion under a videlicet, does not admit or preclude the defendant from disputing the amount of such proportion. *Lechmere* v. *Fletcher*, 1 C. & M. 623; 3 Tyr. 450; 2 L. J., Ex. 219.

If in trover the declaration enumerates a great number of articles, and the defendant pays money into court, and pleads that the plaintiff has sustained no greater damages, the plaintiff must shew what articles the defendant has converted; and, a declaration in trover being general, the defendant, by this plea, does not admit anything beyond his payment into court. *Cook* v. *Hartle*, 8 Car. & P. 568.

In Actions of Tort.]—A plea of payment of money into court in an action of tort is a mere admission that the plaintiff has some cause of action, for which he is entitled to recover damages to the extent of the sum paid in. *Story* v. *Finnis*, 6 Ex. 123; 2 L. M. & P. 198; 20 L. J., Ex. 144.

In an action for pound breach and rescue, the defendant pleaded payment into court of a certain sum, alleging that the plaintiff had not sustained damages ultra; the plaintiff replied damages ultra:—Held, that the plea did not admit either that the pound was the plaintiff's or that the defendant had been guilty of the rescue. *Ib.*

Payment of money into court in an action of tort amounts to no more than an admission that the plaintiff has a cause of action, to the extent of the money paid in, from some wrongful act of the defendant, and does not necessarily admit that the latter is guilty of the wrongful act charged in the declaration. *Schreger* v. *Carden*, 11 C. B. 851; 21 L. J., C. P. 135; 16 Jur. 568.

A declaration against A. and B. stated that they wrongfully and injuriously seized the goods of the plaintiff as a distress for rent, claimed and pretended by them to be due to A., and afterwards, under that pretence, wrongfully sold the goods as such distress; whereas a small part only of the amount claimed was due. A. paid money into court:—Held, that the sale was not mere aggravation, but the distraining and selling were distinct substantive trespasses, and that A., by the payment into court, admitted the sale as well as the seizure. *Leyland* v. *Tancred*, 16 Q. B. 664; 19 L. J., Q. B. 313; 14 Jur. 695.

But held, in the exchequer chamber, reversing this judgment, that it could not be intended, from the payment into court, that in fact the amount taken or sold was unreasonable in respect of what was actually due. *Tancred* v. *Leyland*, 16 Q. B. 669—Ex. Ch.

Payment of money into court in an action of tort may, according to the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to general common counts; thus, where the declaration is general and unspecific, the payment into court admits a cause of action, but not the cause of action sued for; on the other hand, if the declaration is specific, the payment into court admits the cause of action so specifically stated. *Perren* v. *Monmouthshire Ry.*, 11 C. B. 855; 22 L. J., C. P. 162; 17 Jur. 532; 1 W. R. 354.

A plea of payment into court has a different effect when pleaded to a count in trover and to a count for money had and received. *Goldy* v. *Goldy*, 26 L. J., Ex. 29.

In the former case, it admits any evidence admissible under not guilty to reduce the damages. In the latter case it admits of no evidence which, admitting a debt for a certain cause, goes to reduce its amount by proof of payment or set-off. *Ib.*

Therefore, in trover and for money had and received, brought by an administratrix against a party who, by mistake, had acted as an executor de son tort:—Held, that, under a plea of payment into court to the whole declaration, the defendant could not prove in reduction of the amount recoverable under the common count payments made by the defendant, and which the administratrix would have been bound to make in the course of rightful administration. *Ib.*

To part of the trespasses stated in a declaration, the defendant pleaded a justification. He also pleaded to all the trespasses payment of money into court, and non damnificatus ultra. The plaintiff replied damnificatus ultra. The jury found a verdict for the defendant upon the justification, and for the plaintiff 20*s.* damages ultra:—Held, to be no objection to the verdict as to the 20*s.* that it must be taken to apply, in part, to the trespasses justified. *Thompson* v. *Jackson*, 3 Man. & G. 621; 4 Scott (N.R.) 234; 11 L. J., C. P. 44.

d. *Practice relating to.*

Fact not to be communicated to Jury.]—Ord. XXII. r. 22, which provides that no communication shall be made to the jury either of the fact that money has been paid into court or of the amount paid in until after the verdict is given, does not conflict with s. 22 of the Judicature Act, 1875, by which nothing in any

rule made under the powers of the Judicature Acts, 1873 and 1875, is to take away the right of any party to an action to have the issues for trial by jury submitted to the jury. The issue as to the amount of the debt or damages is not whether the sum paid into court is sufficient to satisfy the plaintiff's claim, but to what sum the plaintiff is entitled, and the rule is a rule of procedure only, providing the manner in which the issue is to be left to the jury, and is therefore within the powers of the rule committee appointed under the judicature Acts to make rules for (inter alia) regulating the procedure in the high court. *Williams* v. *Goose*, 66 L. J., Q. B. 345 ; [1897] 1 Q. B. 471 ; 76 L. T. 143 ; 45 W. R. 308—C. A.

Plaintiff may prove that Defendant applied to pay Larger Sum into Court.]—Where a defendant has paid a sum into court, and has pleaded that the plaintiff has sustained no greater damages, the plaintiff may give in evidence a judge's summons taken out by the defendant two days before the trial to allow him to pay a larger sum into court, although that summons was abandoned, and no order made upon it. *Domett* v. *Young*, Car. & M. 465.

Interrogatories to ascertain Extent of Loss.]—When in an action for breach of contract the defendant admits himself to be liable to compensate the plaintiff, and intends to pay into court a sum sufficient to cover the damage sustained, the defendant will be allowed to administer interrogatories in order to ascertain the extent of the loss which the plaintiff has incurred. *Horne* v. *Hough*, 43 L. J., C. P. 70 ; L. R. 9 C. P. 135 ; 22 W. R. 412. S. P., *Frost* v. *Brooke*, 32 L. T. 312 ; 23 W. R. 260 ; *Clarke* v. *Bennett*, 32 W. R. 550.

Alternative Payment—Defendant succeeding at Trial—Right to Judgment.]—Where the defendant succeeds at the trial on an issue on money paid into court under Ord. XXX. r. 1 of the Rules of 1875, with a defence stating such payment as an alternative defence to the action, he is entitled to have judgment entered for him in the action. In an action for trespass, in breaking and entering the plaintiff's land, the defendants paid money into court under Ord. XXX. r. 1 of the Rules of 1875, and in their defence denied the plaintiff's possession of the land, and also stated that, without admitting any kind of liability, the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences, but failed at the trial to establish any damages exceeding the sum paid into court, though he succeeded on the other issue. The court of appeal treated such defence of payment into court as an alternative payment, and as it went to the whole cause of action :—Held, that the defendants were entitled to judgment. *Wheeler* v. *United Telephone Co.*, 53 L. J., Q. B. 466 ; 13 Q. B. D. 597 ; 50 L. T. 749 ; 33 W. R. 295—C. A. S. P., *Goutard* v. *Carr*, 53 L. J., Q. B. 467, n. ; 13 Q. B. D. 598, n. ; 33 W. R. 295, n.—C. A.

Bankruptcy of Defendant.]—Where money was paid into court to abide the event of a suit by a defendant, who afterwards became bankrupt :—Held, that the plaintiff, who subsequently to the bankruptcy obtained a verdict, was not "a creditor having security for his debt" within 12 & 13 Vict. c. 106, s. 184, and was therefore entitled to the money as against the assignees. *Murray* v. *Arnold*, 3 B. & S. 287 ; 32 L. J., Q. B. 11 ; 9 Jur. (N.S.) 461 ; 7 L. T. 385 ; 11 W. R. 147.

Money paid into court under the Bills of Exchange Act, 18 & 19 Vict. c. 67, pursuant to a judge's order "to abide the event" of an action then pending, forms no part of the debtor's estate, but is a security to the creditor for the payment of the amount recoverable in the action, notwithstanding that the matters in dispute in the action have been referred, and bankruptcy supervened before any proceedings are taken in the matter of the arbitration. *Tate, Ex parte, Keyworth, In re*, 43 L. J., Bk. 102 ; L. R. 9 Ch. 379 ; 30 L. T. 620.

An interlocutory order directing payment of money into court is not a judgment within the bankruptcy law, but a specific equity upon the fund, protecting it for the parties ultimately entitled, against the assignees under a bankruptcy taking place between the order and the decree. *Hitchens, Ex parte, Congreve, In re*, Mont. 225.

Mistake of Arbitrator.]—A declaration contained a count on a policy of insurance upon a ship and cargo, and also the money counts. The defendant, as to the first count, pleaded that he had not broken his covenant, and paid into court, under the money counts, the amount of the premiums, and the plaintiff took the money out of court. The cause having been referred to arbitrators to fix the amount of the loss, which they had done irrespective of the amount which had been paid into court :—Held, that the court had power to prevent injustice being done to the defendant, and that the plaintiff was only entitled to judgment for the balance which remained after deducting the amount of premiums paid into court. *Carr* v. *Royal Exchange Assurance Corporation*, 5 B. & S. 941 ; 34 L. J., Q. B. 21 ; 11 Jur. (N.S.) 265 ; 11 L. T. 595 ; 13 W. R. 204.

Receipt in full Discharge.]—A defendant paid money into court, and the plaintiff agreed to take the money and his costs. The costs were taxed, and paid by the defendant, and received by the plaintiff. The plaintiff, altering his mind, did not take the money out of court, and offered to return the costs, which the defendant refused to take. The plaintiff discontinued the action, and the costs of the discontinuance were taxed and paid to the defendant. These facts do not support a plea in another action for the same demand, alleging that the plaintiff received the money paid into court and the costs in full discharge of the action. *Power* v. *Butcher*, 5 M. & Ry. 327 ; 10 B. & C. 329 ; 8 L. J. (O.S.) K. B. 217.

e. *Payment out.*

Denial of Liability—Not accepted in Satisfaction.]—Where money is paid into court with a defence denying liability, and the plaintiff does not accept it in satisfaction, an order for payment of such money out of court cannot be made until after the trial or other determination of the action. *Maple* v. *Shrewsbury (Earl)*, 56 L. J., Q. B. 601 ; 19 Q. B. D. 463 ; 57 L. T. 443 ; 35 W. R. 819—C. A.

Where a defendant, by his defence, denies that he is under any liability to the plaintiff, and at the same time pays money into court, and pleads

that, although he is under no liability, the sum paid in is enough to satisfy the plaintiff's claim, the plaintiff may obtain payment out under r. 3 of Ord. XXX., and may either under r. 4 accept it in satisfaction of his claim, and tax his costs and sign judgment for the costs so taxed, or may go on with his action for the purpose of recovering more; and whether the plaintiff succeeds or fails in recovering more or even fails altogether in establishing that the defendant is under any liability, he will be entitled to retain the money so taken out of court. *Emden* v. *Carte*, 45 L. T. 328; 30 W. R. 17—C. A.

Where a defendant traversed the causes of action and also paid money into court in satisfaction of the whole of the plaintiff's claim:—Held, that the plaintiff was entitled to draw out of court the money lodged, though not accepting it in full satisfaction, and to proceed with the action. *Coughlan* v. *Morris*, 6 L. R., Ir. 405—C. A.

Libel—Newspaper—Apology.]—The plaintiff in an action for libel contained in a newspaper is not entitled to draw out money lodged in court with a defence of an apology, under the 6 & 7 Vict. c. 96, s. 2, and to proceed with the action for the purpose of recovering greater damages. *Harris* v. *Arnott*, 24 L. R., Ir. 404.

Payment in by Mistake.]—In an action for 1,349*l.*, the defendants paid 167*l.* into court without regard to the regulations prescribed by the Rules of Court, 1883, and the Supreme Court Funds Rules, 1884. On the day of payment into court the defendants' solicitors wrote to the plaintiff's solicitor stating that they had that day paid 167*l.* into court to the credit of the action, "in discharge of the plaintiff's claim in this action." On the same day the defendants delivered a defence, which contained a denial of liability to the plaintiff, and stated that the sum paid into court was sufficient to satisfy the plaintiff's claim if any should be established. The plaintiff took the money out of court and then continued the proceedings in the action:—Held, that in the circumstances the plaintiff must either keep the money and let all further proceedings except as to costs be stayed, or pay the money into court again and go on with the action. *Stamford (Earl), In re, Savage* v. *Payne*, 53 L. T. 512; 33 W. R. 909—C. A.

A court of equity refused an injunction to restrain the plaintiff in an action from taking out of court money which the defendant had paid into court in ignorance that upon such payment the plaintiff was entitled to stay his action and take the sum so paid. *G. W. Ry.* v. *Cripps*, 5 Hare, 91.

Discovery of Mistake or Fulfilment of Condition.]—The only case where a party will be bound by the payment of money made by mistake is where it is paid into court under a rule. *Malcolm* v. *Fullarton*, 2 Term Rep. 645; 1 R. R. 567.

Therefore the court refused to order money paid into court by a defendant through a mistake to be restored to him. *Vaughan* v. *Barnes*, 2 Bos. & P. 392.

Though perhaps in case of fraud they might. *Ib.*

A new trial having been granted on the ground of the absence of a material witness, and upon condition of the defendant's paying money into court, the defendant was not permitted to take the money out of court upon a suggestion that, though the witness was now accessible, the plaintiff had refused an answer, and was in contempt for not answering a bill in chancery, filed by the defendant for a discovery, which would have been an answer to the action. *Jackson* v. *Hopkinson*, 5 M. & Ry. 511; 7 Bing. 557; 1 D. P. C. 227.

On Lunacy of Plaintiff.]—A defendant being sued for a sum which he admitted to be due to the plaintiff, paid the money into court under a judge's order. The plaintiff before and at the time of action and of the application was suffering from temporary derangement, and an inmate of Bethlehem Hospital, but no commission of inquiry into the state of his mind had been issued, and no committee of his estate or person had been appointed. On application by his wife, the court ordered the money to be paid out to her or to the plaintiff's attorney in the action. *Gliddan* v. *Treble*, 9 C. B. (N.S.) 367; 30 L. J., C. P. 160. S. P., *Rock* v. *Slade*, 7 D. P. C. 22; 1 Arn. 346; 2 Jur. 993.

Upon Death of Parties.]—Where, upon putting off a trial, the bail paid 2,000*l.* into court for the defendant to abide the event of the suit, and the suit afterwards abated by his death, they were permitted to take the money out of court, notwithstanding the plaintiff and the administrator of the defendant insisted that it should be paid over to the plaintiff or to the administrator of the defendant. *Ward* v. *Lowning*, 2 Smith, 49.

Money is paid into court by a defendant, who dies before verdict or interlocutory judgment, whereby the suit abates. The money can be paid out of court only to the personal representative of the defendant. An application on the part of his attorney will not be entertained. *Palmer* v. *Reiffenstein*, 1 Man. & G. 94.

An action having been brought in this country on a cause which had arisen abroad, to which the defendant paid a sum of money into court to abide its further order; and before the trial of the cause the plaintiff having died:—Held, that the court had no power to order the money to be detained to abide the event of a fresh suit, about to be instituted for the same cause of action by the personal representative of the plaintiff. *Anon.*, 3 Jur. 251.

When an Admission.]—When money has been paid into court short of the plaintiff's demand, and is taken out of court, it is admissible to shew quo animo it was done; but it is not to be taken as an admission that the rest of the demand was unfounded. *Hildyard* v. *Blowers*, 5 Esp. 69.

Order for Repayment to Defendant—Liability not denied.]—The words "unless the court or a judge shall otherwise order" at the end of Ord. XXII. r. 5, render the right of the plaintiff to receive or be credited with money paid into court by a defendant who does not deny liability conditional upon no order being made to the contrary. Therefore, where a defendant's only plea was payment into court of 5*l.*, and there was a verdict for a farthing:—Held, that the judge at the trial had jurisdiction to order that 4*l.* 19*s.* 11¾*d.* should be paid out of court to the defendant. *Gray* v. *Bartholomew*, 64 L. J., Q. B. 125; [1895] 1 Q. B. 209; 14 R. 50; 71 L. T. 867; 43 W. R. 177—C. A.

In an action for libel the defendants pleaded

that the libel was published without malice or gross negligence, published an apology, and paid 50*l.* into court. The jury were not informed of the payment into court, and found a verdict for the plaintiff with one farthing damages :—Held, that the plaintiff was entitled to the 50*l.* in court, as Ord. XXII. r. 22, made no alteration in the practice where money is paid into court without a denial of liability. *Dunn* v. *Devon and Exeter Newspaper Co.*, 63 L. J., Q. B. 342 ; [1895] 1 Q. B. 211, n. ; 10 R. 167 ; 70 L. T. 593.

Payment improperly made to Plaintiff's Solicitor—Liability to refund.]—In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice, or, in the alternative, three months ; that before action the defendant made tender of three months' salary, which the plaintiff refused ; that the defendant had paid the amount into court, and that it was enough to satisfy the plaintiff's claim. The request for lodgment in court contained a statement that the money was paid in, with a defence setting up tender. The plaintiff's solicitor, without obtaining an order, but on the written authority of the plaintiff, took the money out of court, and the plaintiff proceeded with the action. At the trial, judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary. The defendant applied for an order against the solicitor to refund so much of the money taken out of court as represented the difference between one month's and three months' salary. The solicitor had acted bonâ fide in taking the money out of court, and had paid it over to the plaintiff before the application to make him refund it was made :—Held, that although the plaintiff ought not to have had the money out of court, because a defence of tender of the sum paid in could not be pleaded to a claim for unliquidated damages, yet under the circumstances the solicitor ought not to be ordered to refund it. *Davys* v. *Richardson*, 57 L. J., Q. B. 409 ; 21 Q. B. D. 202 ; 59 L. T. 765 ; 36 W. R. 728—C. A.

f. *Costs.*

Plea of Tender—Acceptance in Satisfaction.]—By the indorsement of his writ the plaintiff claimed 87*l.* The defendants paid 38*l.* into court, and pleaded a tender of that amount before action. The plaintiff did not join issue upon this plea, but took the 38*l.* out of court in full satisfaction under Ord. XXII. r. 7. The plaintiff then carried in his costs for taxation, when the taxing master held that he had no authority to tax, there being a plea of tender on the record undisposed of :—Held, that the plaintiff was not entitled to the costs of the action. *Griffith* v. *Ystradyfodwg School Board*, 59 L. J., Q. B. 116 ; 24 Q. B. D. 307 ; 62 L. T. 151 ; 38 W. R. 425.

Acceptance in Satisfaction of Whole Claim.]—In an action for an injunction and damages, the plaintiff moved for an interlocutory injunction, but by consent no order was made on the motion except that the costs were to be costs in the action. The defendants in their defence denied liability, but paid money into court in respect of the claim for damages ; the plaintiff accepted the money in satisfaction of his claim for damages, and wrote that he should discontinue the action, take the money out of court, and tax his costs. The plaintiff then took out a summons for taxation of his costs of the action :—Held, that, as the money was paid into court only in respect of and accepted only in satisfaction of the claim for damages, and as the entire claim or cause of action was not thereby satisfied, Ord. XXII. r. 7, did not authorise the taxation of costs thereunder, and that the plaintiff's application to tax the whole costs of the action was not right. *Moon* v. *Dickinson*, 63 L. T. 371 ; 38 W. R. 278.

In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches, and alternatively paid money into court with regard to one of the breaches. The plaintiffs gave notice under Ord. XXII. r. 7, that they accepted the money paid into court in full satisfaction of the causes of action in the statement of claim :—Held, that plaintiffs were entitled, without proceeding to judgment, to their costs of the action ; for by accepting the money paid into court in satisfaction of all their alleged causes of action they had in effect discontinued or withdrawn the action as to the breach in respect of which the money was not paid in. *M'Ilwraith* v. *Green*, 54 L. J., Q. B. 41 ; 14 Q. B. D. 766 ; 52 L. T. 81—C. A.

Where money is paid into court and taken out in satisfaction of part only of the plaintiff's demand, there being other issues upon which the parties are proceeding to trial, the plaintiff is not entitled to tax his costs. *Cauty* v. *Gyll*, 4 Man. & G. 907 ; 5 Scott (N.R.) 819.

Payment in for Debt and Costs under Agreement after Action.]—In an action for a money demand, the defendant pleaded an agreement, after action brought, by the plaintiffs to take a certain sum for debt and costs, and brought that amount into court on foot of debt and costs. The plaintiffs' solicitor served notice on the defendant's accepting the sum so paid into court, "in satisfaction of the plaintiffs' claim in respect of which it was paid in" :—Held, that the plaintiffs were not entitled to any costs beyond the sum lodged in court. *Goodbody* v. *Gallaher*, 16 L. R., Ir. 336.

Plaintiff accepting Sum paid in—Discretion of Court.]—When a defendant in an action pays money into court in respect of any claim, the plaintiff acquires a vested right to the costs incurred up to that time in respect of such claim, provided that he takes the money out under Ord. XXX. r. 4, in satisfaction of such claim. *Langridge* v. *Campbell*, 46 L. J., Ex. 277 ; 2 Ex. D. 281 ; 36 L. T. 64 ; 25 W. R. 351. But see *Buckton* v. *Higgs*, infra.

Ord. XXX. applies only to an action which is strictly brought to recover a debt or damages. If an account is claimed the order does not apply, and even if the plaintiff accepts in satisfaction of his whole cause of action a sum paid into court by the defendant, the court has a discretion as to the costs. *Nichols* v. *Evens*, 52 L. J., Ch. 383 ; 22 Ch. D. 611 ; 48 L. T. 66 ; 31 W. R. 412.

Two of the plaintiffs were the legal owners of a leasehold interest in a house, and claimed 37*l.* from the defendant for the use and occupation of it during the last three months of their term. They authorised him to pay this amount to another of the plaintiffs, who was owner of the reversion. She called on the defendant, who expressed his willingness to pay her the money,

though he did not make any actual tender of it, but she refused to receive it, and demanded more. The plaintiffs then sued the defendant for the use and occupation, and claimed 238*l.* The defendant paid 37*l.* into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more, and also that the defendant was entitled to the costs of the action from the time of the payment into court. *Gretton* v. *Mees*, 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

Where Plaintiff takes Money out and stops.]—Where a plaintiff refuses to accept a sum tendered at the commencement of the action, but afterwards takes the sum out of court, when paid in under a plea, he is primâ facie liable to pay the costs incurred from the time the money was tendered; but this is open to explanation; and where, in an action by a landlord against his tenant to recover unliquidated damages for the non-repair of the premises, it was shewn, that at the time the money was tendered the plaintiff was not aware of the amount of damages sustained, nor was acquainted with it until after plea pleaded, when, finding the difference between the sum tendered and the amount at which the injury was valued so trifling as not to be worth proceeding for, he took the money out of court:—Held, that these circumstances were sufficient to rebut the inference that the sum tendered was refused for the purpose of making costs. *Ackroyd* v. *Read*, 5 M. & W. 542; 7 D. P. C. 810; 3 Jur. 797.

Where a summons is taken out to stay proceedings on payment of a certain sum and costs, the refusal to accept that sum will not render the plaintiff liable to the subsequent costs; but if the sum tendered is afterwards paid into court, and accepted by the plaintiff, he will be liable to subsequent costs. *Gower* v. *Elkins*, 3 M. & W. 216; 6 D. P. C. 335; 7 L. J., Ex. 72; 2 Jur. 49.

A plaintiff having contracted with the defendant to serve him at a weekly salary, sued the defendant for wrongfully dismissing him from his service, and also for arrears of salary. After the writ issued, a summons was taken out to stay proceedings on payment of arrears of salary; this was refused, and the arrears were paid into court, and accepted by the plaintiff in satisfaction:—Held, that the fact of the plaintiff having obtained a more profitable employment after action was sufficient to rebut the presumption of a vexatious refusal of the sum tendered, and, therefore, the defendant was not entitled to his costs. *Cumming* v. *Columbine*, 6 D. P. C. 373.

Amendment caused by Plaintiff's Pleadings.]—A defendant paid into court the sum claimed; the plaintiff took out the money and proceeded to trial on another issue, in which he failed, but proved that more was due to him on the issue in respect of which the money was paid in; the judge gave the defendant leave to amend by paying in the balance due:—Held, that the plaintiff was only entitled to such costs as he would have had if the entire claim had been originally paid into court. *Young* v. *Martin*, 4 W. R. 100.

Acceptance in Satisfaction after Four Days.]—The defendant paid money into court in satisfaction of the plaintiff's claim, and gave notice of such payment to the plaintiff. The plaintiff did not give notice to the defendant that he accepted the money so paid in satisfaction of the claim within four days, as required by Ord. XXX. r. 4, but he afterwards accepted that sum in satisfaction:—Held, that an order might be made giving the plaintiff his costs under Ord. LV. r. 1. *Greaves* v. *Fleming*, 48 L. J., Q. B. 335; 4 Q. B. D. 226; 27 W. R. 458.

When Plaintiff proceeds and afterwards repents.]—In an action brought for two distinct demands, one of which was offered, and on refusal paid into court:—Held, that the plaintiff, who had taken out that sum and proceeded in the action for the other demand, but finding that it could not be supported, wished to stay the proceedings on payment of the costs incurred, was too late to do so. *James* v. *Raggett*, 2 B. & Ald. 776; 1 Chit. 471.

When Plaintiff proceeds and recovers Nothing Beyond.]—In an action for damages for breach of covenant, the defendant denied the breach, and also paid money into court, alleging that it was enough to satisfy the claim. The plaintiff replied joining issue, alleging that the money was not enough, and the issues having been referred to an official referee, he reported that the money paid in was enough to satisfy the claim:—Held, that the costs were in the discretion of the court under Ord. LV. r. 1, and that the discretion in such cases ought to be exercised by allowing the plaintiff his costs of the action up to the time of the payment into court, and allowing the defendant his costs of the action after that time. *Buckton* v. *Higgs*, 4 Ex. D. 174; 40 L. T. 755; 27 W. R. 803.

Where Plaintiff proceeds for Nominal Damages.]—Where, after action, the debt is paid and accepted in satisfaction, and costs are offered, but refused, the damage is merely nominal independently of the costs, and the plaintiff therefore cannot proceed for the costs. *Thame* v. *Boast*, 12 Q. B. 808; 17 L. J., Q. B. 339; 12 Jur. 1024.

A defendant pleaded non assumpsit to all but 12*l.*; to 11*l.*, parcel of the 12*l.*, payment and acceptance in satisfaction after action; to the residue payment of 1*l.* into court. The plaintiff traversed the payment of the 11*l.*, and took the 1*l.* out of court. The amount due to the plaintiff, at the commencement of the suit, did not exceed 12*l.*, and the sum of 11*l.* was paid after action, and accepted by the plaintiff in satisfaction of that amount:—Held, that the plaintiff, after the payment of the 1*l.*, was not entitled to proceed for costs in respect of the 11*l.*, but that the defendant was entitled to have the verdict entered for him, and to the general costs of the action. *Horner* v. *Denham*, 12 Q. B. 813; 17 L. J., Q. B. 29; 11 Jur. 1036.

What Costs.]—To a declaration for money had and received, the defendant pleaded as to all except 3*l.* 5*s.* non assumpsit; as to all except 3*l.* 5*s.* a set-off; and as to 3*l.* 5*s.* payment of that sum into court. The plaintiff admitted the set-off, and replied that he would not further prosecute his suit, except as to 3*l.* 5*s.*, and took that sum out of court:—Held, that the defendant was entitled to his costs of the two first issues. *Goodee* v. *Goldsmith*, 2 M. & W. 202; 5 D. P. C. 288; 2 Gale, 194; 6 L. J. Ex. 70.

A plaintiff having obtained leave to amend his declaration, on payment of costs, by increasing the amount of damages, and the defendant having, after the amendment, paid money into court, by which one of his pleas becomes unavailable, is not entitled to the costs of that plea. *Gould* v. *Oliver*, 5 Bing. (N.C.) 115; 6 Scott, 884.

To a declaration consisting of common counts, the defendant pleaded, except as to 15*s.*, parcel, &c., never indebted; and, as to that sum, payment into court in the form. The plaintiff accepted the 15*s.* in satisfaction, and took issue on the other plea. The case was tried, and the jury having found that, except as to the 15*s.*, the defendant was never indebted to the plaintiff:—Held, that the plaintiff ought to have his costs, so far as related to the 15*s.*, down to the time of his taking that sum out of court, and that the defendant was entitled to the costs of all the rest of the proceedings. *Harrison* v. *Watt*, 4 D. & L. 519; 16 M. & W. 316; 17 L. J., Ex. 74; 11 Jur. 91.

Action for work and labour. Pleas: to the declaration, except as to 10*l.*, parcel, &c., never indebted; as to 10*l.*, other parcel, &c., payment before action; as to the 10*l.* excepted, payment into court of 10*l.* 1*s.* Replication, joining issue on the first plea, traversing the second, on which issue was joined, accepting the money paid into court, and praying judgment for the plaintiff's costs in respect of that. A verdict was found for the plaintiff on never indebted to the extent of 10*l.*, and for the defendant on the plea of payment, so that the plaintiff recovered nothing beyond the money paid into court:—Held, that the plaintiff was entitled to the costs as to the causes of action relating to the 10*l.* paid into court up to and including the payment into court. *Rumbelow* v. *Whalley*, 2 L. M. & P. 245; 16 Q. B. 397; 20 L. J., Q. B. 262; 15 Jur. 724.

A declaration, claiming a certain sum, and giving credit for part, with particulars, setting out the items and giving credit in general terms, "cash on account." Plea, never indebted. The case was made a remanet, and afterwards the plaintiff amended, on payment of costs, delivering a declaration and particulars claiming only the balance, without reference to credit. The defendant pleaded de novo, paying the money into court, which the plaintiff took out:—Held, that the plaintiff was not entitled to the costs of the issue, or of preparing for the trial. *Wilton* v. *Snook*, 1 D. & L. 964; 12 M. & W. 805; 13 L. J., Ex. 236.

A plaintiff, having joined too many defendants, obtained an order at the assizes to strike out some of them upon payment of costs, the remaining defendants having leave to plead de novo. The master taxed the remaining defendants the costs of the day. They then pleaded payment into court, which was accepted. The master allowed the plaintiff the costs of the cause, but not the costs incurred subsequently to the former pleas:—Held, right, because it was to be assumed that, if the plaintiff had originally sued only the right defendants, they would have pleaded payment into court at once, and so the costs of the former plea and subsequent proceedings would not have been incurred. *Jackson* v. *Nunn*, 3 G. & D. 543; 4 Q. B. 209; 7 Jur. 846.

The defendants afterwards obtained a rule to shew cause why the master should not allow them the costs of the former pleas, and of the subsequent proceedings, on the ground that they would have succeeded at the trial on account of the misjoinder. The plaintiff contended that they were not entitled to such costs, or, if they were, that the master should have taxed them on the former occasion:—Held, that the defendants were entitled, and that it was no objection that they had not been taxed before, as, before the pleading de novo and acceptance of the money paid into court, it could not be known what costs beyond those of the day had been uselessly incurred. *Ib.*

In an action to recover 130*l.* for work and extras, under a building contract, the defendant pleaded never indebted. The plaintiff prepared his brief, and delivered notice of trial. The defendant afterwards obtained an order to amend, and paid into court 79*l.*, and pleaded never indebted to the residue. The plaintiff took the 79*l.* out of court, and proceeded for the residue of his demand, but was nonsuited on the trial:—Held, that the plaintiff was not entitled, either under Reg. Gen. H. T. 1853, r. 12, or under the order to amend, to such costs of the brief and other matters as would have been incurred if the 79*l.* had been paid into court at the time of pleading the original pleas. *Harold* v. *Smith*, 5 H. & N. 381; 29 L. J., Ex. 141; 6 Jur. (N.S.) 254; 1 L. T. 556; 8 W. R. 447.

In an action of contract in which more than 20*l.* was claimed, the defendant paid 24*l.* into court. The jury gave damages to the plaintiff to the amount of 2*l.* 10*s.* in excess of the sum paid into court:—Held, that the costs should be taxed on the reduced scale. *James* v. *Vane* (*Lord*), 2 El. & El. 883; 29 L. J., Q. B. 169; 6 Jur. (N.S.) 731; 2 L. T. 281; 8 W. R. 446.

2. Order on Accountable Parties.

Power of Court to order.]—Upon an interlocutory application for the payment of money into court made before the trial of an action for the taking of an account, where an account has been rendered, and the court has before it the parties to the account and evidence as to the items in dispute between them, the court will look into the facts of the case, and if, in the fair exercise of its judicial discretion, it can arrive at a conclusion that a sum will be due to the plaintiff on the taking of the account, and what the amount of that sum will be, the court will order the defendant to pay that amount into court. *Wanklyn* v. *Wilson*, 56 L. J., Ch. 209; 35 Ch. D. 180; 56 L. T. 52; 35 W. R. 332.

After decree directing accounts to be taken in chambers, if it is ascertained, before the chief clerk's certificate as to the ultimate balance to be paid, that a certain sum will be probably found to be due from either party, the court has power at the instance of the other party to order such sum to be paid into court. *London Syndicate* v. *Lord*, 8 Ch. D. 84; 38 L. T. 329; 26 W. R. 427—C. A.

An order to bring a fund into court to remain in medio ought not to be made upon a mere allegation in the bill that there is a question to be tried at the hearing. *Gunn* v. *Bolckow, Vaughan & Co.*, 44 L. J., Ch. 732; L. R. 10 Ch. 491; 32 L. T. 781; 23 W. R. 739.

On Person not a Party.]—The court has no jurisdiction to order, upon motion, a person not a party to the cause to pay into court the arrears of an annuity granted by him to a defendant

against whom a sequestration had issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. But he may notwithstanding, and without applying for the leave of the court, obtain from the grantee a release of the annuity. *Johnson* v. *Chippendale*, 2 Sim. 55 ; 29 R. R. 58.

A testator charged his real estate with an annuity to his widow, and subject thereto devised it to S. A. in fee, and appointed her his executrix. The testator had insured a house. Policy expired a few months after his death, and was then renewed by S. A. Soon afterwards the house, which was the whole of his real estate, was burnt down. The insurance money was ordered to be paid into court on a motion by the widow in a suit instituted by her against S. A. for the administration of the testator's estate. *Parry* v. *Ashley*, 3 Sim. 97 ; 30 R. R. 132.

Order made that A. B., who had received moneys on behalf of plaintiff before institution of suit, but who was not a party thereto, might be at liberty to pay money into court in trust for cause. *Francis* v. *Collier*, 5 Madd. 75.

Though the court will stay the payment of a fund out of court, for the purpose of giving a stranger the opportunity of enforcing his right against it, yet it will not, for the same purpose, order into court a sum directed to be paid by one party to another. *Newton* v. *Askew*, 11 Beav. 446 ; 18 L. J., Ch. 42 ; 12 Jur. 330, 551, 766.

Stakeholder.]—An order for payment into court of a fund in the hands of a stakeholder in this country may be made in a suit in which one of two parties (each of whom claims the fund under a person residing abroad) is plaintiff and the other defendant, although the person residing abroad may not be made effectually a party to the suit. *Ward* v. *Booth*, 41 L. J., Ch. 729 ; L. R. 14 Eq. 195 ; 27 L. T. 364 ; 20 W. R. 880.

Auctioneer, being mere stakeholder, ordered to pay deposit money into court, after retaining his own claims out of it, without prejudice. *Yates* v. *Farebrother*, 4 Madd. 239. See *Annesley* v. *Muggeridge*, 1 Madd. 593 ; 16 R. R. 273.

Where two parties claim fund in hands of stakeholders, the former may make motion by consent, to avoid the expense of bill of interpleader, that stakeholders pay the money into court ; but stakeholders cannot make such motion, they not being parties to the suit. *Belbee* v. *Belbee*, 6 Madd. 28.

Gross Fraud.]—Defendant ordered to pay money into court before answer in a case of gross fraud appearing by affidavit of plaintiffs, and by defendant's affidavit in answer. *Jervis* v. *White*, 6 Ves. 738 ; 6 R. R. 26.

Trust Money.]—When a court of equity traces out trust money in the hands of a person who has not primâ facie a right to hold it, that money must be paid into court. *Leigh* v. *Macaulay*, 1 Y. & Coll. 260 ; 4 L. J., Ex. Eq. 37.

Agreement for Mining Lease — Lessee in Possession—Payment of Royalties into Court.]—The plaintiffs commenced an action against the defendant for specific performance of an agreement for a lease of a coal mine by the plaintiffs to the defendant at a royalty, as the plaintiffs alleged, of 10*d.* per ton. The defendant counterclaimed to have specific performance with a royalty of less amount. The defendant was in possession, and raising and selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against the plaintiffs in the queen's bench division to obtain damages for misrepresentation, alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. The plaintiffs moved for an interlocutory order that the defendant might be ordered to pay into court the amount of royalties at 10*d.* per ton on the coal he had raised, but the court refused the motion : —Held, on appeal, that although it would not be right, while the rate of royalty was in dispute, to order the defendant to pay into court the amount of royalties at the rate claimed by the plaintiffs, he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, and that as his carrying away coal diminished the value of the property, he would not have the usual option of giving up possession instead of paying money into court. *Lewis* v. *James*, 56 L. J., Ch. 163 ; 32 Ch. D. 326 ; 54 L. T. 260 ; 34 W. R. 619 ; 50 J. P. 423—C. A.

Admission of Liability—What Sufficient.]—The defendant, one of the trustees of a settlement, in letters written to the plaintiff, his co-trustee, before the commencement of this action for the administration of the trusts, admitted having received 300*l.*, part of the trust funds, and invested it in an unauthorised way. The plaintiff, after the defendant had appeared in the action, took out a summons to have the 300*l.* brought into court, and made an affidavit deposing that he had paid the money to the defendant, and stating the admissions contained in the defendant's letters as to its application. The defendant did not answer this affidavit or adduce any evidence, and the money was ordered into court on the ground that the letters were a sufficient admission within Ord. XXXII. r. 6. The defendant appealed :—Held, that, as the defendant had not met the affidavit, there was a sufficient admission that the money was in his hands, and that the appeal must be dismissed. *Freeman* v. *Cox* (8 Ch. D. 148) approved and followed. Per Fry, L.J., whether the letters were not a sufficient admission within Ord. XXXII. r. 6, quære. *Porrett* v. *White*, 55 L. J., Ch. 79 ; 31 Ch. D. 52 ; 53 L. T. 514 ; 34 W. R. 65 —C. A.

An admission of liability sufficient to support a motion for payment into court of such admitted sum may be made by the party ordered to pay the sum into court, or his agent, or gathered from their course of conduct, without necessarily appearing on the pleadings or affidavits in the action. *London Syndicate* v. *Lord*, 8 Ch. D. 84 ; 38 L. T. 329 ; 26 W. R. 427—C. A.

The non-appearance of a defendant in an administration action, who had been served with notice of a motion to order him to bring money into court, was held a sufficient admission to enable the court to make such order, though before judgment was given in the action, or accounts taken. *Freeman* v. *Cox*, 47 L. J., Ch. 560 ; 8 Ch. D. 148 ; 26 W. R. 689.

Motion by infant cestuis que trustent that their trustee might bring a fund into court allowed where, although he had not by his answer admitted their title, he had not denied

it. *Symonds* v. *Jenkins*, 34 L. T. 277 ; 24 W. R. 512.

A defendant may be ordered to pay into court money which he has verbally admitted to be in his hands or under his control. *Beeny, In re, Effrench* v. *Sproston*, 63 L. J., Ch. 312 ; [1894] 1 Ch. 499 ; 70 L. T. 160 ; 42 W. R. 377.

Upon a motion that a defendant might be ordered to pay into court a sum of money which he had verbally admitted to be in his hands or under his control, an affidavit proving the admission was made by a clerk of the plaintiff's solicitors. A copy of the affidavit was served on the defendant with the notice of motion, which stated that the affidavit would be read on the hearing of the motion. The defendant did not answer the affidavit, and he did not appear on the hearing :—Held, that the defendant must be ordered to pay the money into court. *Ib.*

On an application for an order for payment of money into court, the court will not extend the doctrine of admissions that the defendant has the money in his hands further than it was carried in *Freeman* v. *Cox* (8 Ch. D. 148), where an affidavit of the plaintiff charging that the defendant had the money in his hands, not answered by the defendant, was held sufficient to justify an order. *Neville* v. *Matthewman*, 63 L. J., Ch. 734 ; [1894] 3 Ch. 345 ; 7 R. 511 ; 71 L. T. 282 ; 42 W. R. 675—C. A.

Under a settlement H. was absolutely entitled to a trust fund which had been invested on mortgage, but which was called in by J., the surviving trustee of the settlement, in August, 1883. At that date J. was in partnership with B. in the business of solicitors. The trust fund was, as H. alleged, paid by J. to and was received by J. & B.'s firm, and was paid into their banking account. In December, 1890, the partnership between J. & B. was dissolved by mutual consent, it being arranged that all debts due to and owing by that firm would be received and paid by B. Application having been made by H. to B. to produce a security shewing the proper investment of the trust fund, but without any satisfactory result, an action was brought by H. against J. & B., claiming that the trust fund should be paid into court, and consequential relief. There being an admission in B.'s defence and answer to interrogatories to the effect that the trust fund had been paid by J. into the banking account of the firm, thereby making the firm responsible for it, the usual order was made at chambers upon B. to pay the trust fund into court :—Held, that the discharge of the order made in chambers ought not to be granted, except on the terms of B. paying the money into court. *Hollis* v. *Burton*, [1892] 3 Ch. 226 ; 67 L. T. 146 ; 40 W. R. 610—C. A.

A defendant, whose affidavit filed on an inquiry discloses that he has money in his hands, may be ordered to pay it into court after decree, and before further consideration. *Dunne* v. *English*, L. R. 18 Eq. 524.

Money may be ordered into court, on motion, upon the ground of admission, as by schedules or books, containing an account of receipts and payments, and referred to so as to be part of the answer or examination. *Mills* v. *Hanson*, 8 Ves. 68.

The right of the plaintiff to have money in the defendant's hands paid into court must proceed on admissions in the answer made in reference to an equity raised by the bill, and not in reference to an independent equity stated only in the answer. *Proudfoot* v. *Hume*, 4 Beav. 476.

A railway company having powers over the line of another company, the special act for making the latter's line contains a provision that, in the event of such line not being completed within a specified time, that portion of the line within specified limits should belong to the company having such running powers, and be completed by them, they being repaid for any money advanced. The line is not completed, and the company enter and complete and work the line under the act, and subsequently agree in writing to give 6,000*l.* for the portion so completed, with interest at 5 per cent. A long correspondence takes place, and the money not being paid, a bill is filed for specific performance of the agreement. The answer admits that the 6,000*l.* and interest are owing, but submits a question of title. A motion is then made for payment of the 6,000*l.* and interest into court, admitted on the answer to be due :—Held, that, this not being the simple case of vendor and purchaser, but of a company being in possession under a parliamentary power, no order for payment into court could be made, and motion refused, but the costs reserved until the hearing. *Northern Counties Union Ry.* v. *N. E. Ry.*, 6 W. R. 122.

An order will not be made under r. 6 of Ord. XXXII., in an action for money lent, unless there is a clear admission that the debt is due and recoverable in the action in which the admission is made :—Quære, whether the words "or otherwise" in r. 6 refer only to cases in which notice has been given under r. 1 or r. 4 of Ord. XXXII. *Landergan* v. *Feast*, 55 L. T. 42 ; 34 W. R. 691—C. A. Reversing 55 L. J., Ch. 505.

Trust funds may be ordered to be brought into court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which, as trustee, has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money. *Hampden* v. *Wallis*, 54 L. J., Ch. 1175 ; 27 Ch. D. 251 ; 51 L. T. 357 ; 32 W. R. 977. See also *Porrett* v. *White*, supra.

Money "in the hands" of Executors or Trustees—Money parted with before Application.]—Although trustees or executors are proved to have received trust money, and have not properly discharged themselves thereof, an order for payment of the money into court cannot be made upon them under Rules of Supreme Court, 1883, Ord. LV. r. 3 (*d*) (or Ord. XLVIII. r. 3 (*d*) of the Palatine Rules, which is in the same terms), unless when the application is made the money is actually in their hands. *Chapman, In re, Fardell* v. *Chapman* (54 L. T. 13), disapproved. *Nutter* v. *Holland*, 63 L. J., Ch. 932 ; [1894] 3 Ch. 408 ; 7 R. 491 ; 71 L. T. 508 ; 43 W. R. 18—C. A. See *Anon.*, 1 L. J. (o.s.) Ch. 21.

In an action for an account against trustees, the trustees will not, upon motion, be ordered to pay money into court, unless it is actually in their hands :—Quære, whether the circumstances under which money has been parted with may not render the rule inapplicable. *Neville* v. *Matthewman* ([1894] 3 Ch. 345) and *Nutter* v.

Holland ([1894] 3 Ch. 408), discussed and applied. *Crompton and Evans Union Bank* v. *Burton*, 64 L. J., Ch. 811; [1895] 2 Ch. 711; 13 R. 792; 73 L. T. 181; 44 W. R. 60.

—— **Discretion as to Order.**]—The court has a discretion as to the making of an order requiring a trustee to pay into court trust money, which he admits having received and applied in an unauthorised manner. *Wright, In re, Kirke* v. *North*, 65 L. J., Ch. 37; [1895] 2 Ch. 747; 13 R. 849; 73 L. T. 396; 44 W. R. 125.

Application by whom made—Title of Plaintiff.]—An application under Rules of Supreme Court, 1883, Ord. XXXII. r. 6, for an order in an action upon admissions of fact by a defendant cannot be made by some only of the plaintiffs, but must be made by them all. *Ib.*

General rule as to payment of money into court is that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of those others, to have the fund secured. *Freeman* v. *Farlie*, 3 Mer. 29; 17 R. R. 7.

The court will not order money into court if the title of the party applying is at all doubtful. Neither will it order a fund, standing to the credit of a cause between A. and B., to be transferred to the joint credit of that and another cause, in which it is claimed by C. adversely to both A. and B., unless C. has a perfectly clear title to the fund. *St. Victor* v. *Devereux*, 13 Sim. 641.

In moving upon admissions in an answer for the payment of money into court, the plaintiff may shew that, upon the case stated in the answer, he has an interest in the sum in question, though the defendant in his answer expressly denies that the plaintiff has any such interest. *Domville* v. *Solley*, 2 Russ. 372.

On a motion to pay money into court, the court does not require the plaintiff to produce any absolute admission of title, but merely such a probability of title as it can safely act on. *M'Hardy* v. *Hitchcock*, 11 Beav. 73.

Money will not be ordered to be brought into court upon motion before decree, unless it appears clearly upon the answer to belong to the plaintiff. *Hagell* v. *Currie*, L. R. 2 Ch. 449; 16 L. T. 309; 15 W. R. 605.

Persons not before the Court.]—On an application for payment of money into court, it was objected that persons having an interest were not before the court. The order was made on the undertaking of the plaintiff to make them parties. *Whitmarsh* v. *Robertson*, 4 Beav. 26.

Unless all persons interested in a fund are before the court, an order for payment of it into court will not be made on an undertaking by the plaintiff to make them parties, except perhaps in cases of administration or creditors' suits. *Marriage* v. *Royal Exchange Assurance Co.*, 18 L. J., Ch. 216.

The court, on application by petition to allow a sum, which had been awarded under the 5 & 6 Will. 4, c. 45, by the commissioners, to be paid into court dispensed with the service of the petition on all the parties to the cause. *Lushington* v. *Sewell*, 5 L. J., Ch. 1.

An order may be made for payment of money into court, although some of the persons interested in the money are not before the court. *Wilton* v. *Hill*, 2 De G. M. & G. 807.

Upon an application against trustees by a person interested in the assets, to transfer the trust fund into court, and the bill shewing on the face of it that other individuals have interests in the fund, all the parties beneficially interested in the fund must be served with notice of the motion. *Lewellin* v. *Cobbold*, 17 Jur. 1111.

Amount to be paid in.]—Payment of money into court, after a decree and report, ordered upon admissions in the answer, the defendant being at liberty to discharge himself of any part of the sums so admitted by an affidavit of subsequent receipts and payments. *Anon.*, 1 L. J. (o.s.) Ch. 72.

The court, in ordering a defendant to pay money into court for which he has improperly taken credit, cannot go beyond the sum specified in the plaintiff's notice of motion; and the defendant claiming a balance due to him:—Held, that he was entitled to have it deducted from the amount of those items. *Nokes* v. *Seppings*, 1 Coop. C. C. 194. *And see Cases cited there.*

The court will not make an order upon a defendant to pay money, upon an admission in his answer that he has received a large sum of money (specifying the amount), coupled with a claim of lien on it for travelling expenses, post-chaise hire or otherwise. *Law* v. *Hunter*, 1 L. J. (o.s.) Ch. 222.

Interest.] — After the usual decree for an account, order on motion to pay into court the amount of the principal sums, admitted to be due by examination upon interrogatories, not extended to interest. *Wood* v. *Downes*, 1 Ves. & B. 49.

A party ordered to pay costs and make other payments into court, but to be indemnified out of the fund in court:—Held, entitled to interest on all sums paid for costs or otherwise. *Wainman* v. *Bowker*, 8 Beav. 363.

Prospective Order.]—The court will not make a prospective order for liberty to pay into court moneys which may be awarded by the commissioners; the order ought not to precede the adjudication under the Slave Compensation Act. *Dickinson* v. *Jones*, 5 L. J., Ch. 3.

Prospective order, enabling parties to pay in money from time to time to the credit of the cause, obviating the necessity of a repetition of the order for the same purpose. *Hutchinson* v. *Hutchinson*, 9 Hare (App.) lxxxi.

Where there is no fund in court, no order can be made prospectively to deal with purchase-moneys for estate contracted to be sold but not paid for. *Bowes, In re*, 10 L. T. 90; 12 W. R. 569.

Practice.]—If sum be reported due, and exceptions are taken to report, the money will not, on motion, be ordered to be paid into court. *Creak* v. *Capell*, 6 Madd. 114; 22 R. R. 252.

It is competent to the court, on the hearing of exceptions, at the same time it allows an exception taken by the defendant, and directs the master to review his report generally, to order the defendant to pay a sum of money into court, if it is satisfied that ultimately that sum will be found due from the defendant. *Brown* v. *De Tastet*, 4 Russ. 126; 28 R. R. 25.

Practice settled to move on examination, admitting money due, for payment into court before the cause is set down for further directions. *Hatch* v. ——, 19 Ves. 117.

It is not the practice to order the payment of

money into court upon motion made after the decree in a cause, and before the hearing for further directions, founded merely on admissions in the answer. *Binns* v. *Parr*, 7 Hare, 288; 19 L. J., Ch. 401; 14 Jur. 326.

A plaintiff cannot, after decree, obtain an order for the defendant to pay money into court upon admissions contained in his answer. He must proceed on the examination or report. *Wright* v. *Lukes*, 13 Beav. 107; 20 L. J., Ch. 32.

Effect of Payment into Court.]—Payment to the solicitor for all parties in the suit is equivalent to payment into court. *Price* v. *North*, 2 Y. & Coll. 620; 7 L. J., Ex. Eq. 9.

Money paid into court upon an injunction and laid out, is security, and not payment. *Broughton* v. *Pitchford*, 6 Madd. 295.

Enforcement of Order—Receiver.]—Under the general power to appoint receivers given by the Judicature Act, 1873, s. 25, sub-s. 8, and having regard to Rules of Supreme Court, 1883, Ord. XLII. rr. 4 and 28, the court has jurisdiction to enforce a judgment for payment of money into court by a defaulting trustee, by the appointment of a receiver of his equitable interest in property in this country; and order accordingly where, from the debtor being out of the jurisdiction, service of a writ of attachment could not be effected. *Coney, In re, Coney* v. *Bennett*, 54 L. J., Ch. 1130; 28 Ch. D. 993; 52 L. T. 961; 33 W. R. 701.

An order was made against the defendants in an action, who were defaulting trustees for the payment of money into court. The defendants having failed to comply with such order, an application was made by the plaintiffs that a writ of attachment might issue against them. At the defendants' instance, however, the court made an order allowing payment by weekly instalments. L., one of the defendants, had made an affidavit on that occasion, stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture, but that the plaintiffs, in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the plaintiffs for the appointment of a receiver of the furniture by way of equitable execution. For the defendant L. it was contended that the legal and proper remedy of the plaintiffs was by sequestration, and that the court had no jurisdiction to appoint a receiver: —Held, that although, under r. 4 of Ord. XLII. of the Rules of Court, 1883, sequestration was the appropriate remedy, yet under s. 25, sub-s. 8, of the Judicature Act, 1873, the court had jurisdiction to appoint a receiver if it appeared just or convenient so to do; and that, in the present case, it was just and convenient to appoint a receiver, and that an order must be made accordingly. *Whiteley, In re, Whiteley* v. *Learoyd*, 56 L. T. 846.

—— **Person not Party.**]—An order for payment of money against a person not a party to the cause is to be enforced, not by attachment, but by another order directing the payment within a short definite time, or in default that the party do stand committed. *Vickery* v. *Stocker*, 3 Bro. C. C. 372.

Mode of enforcing payment of a sum of money under an order of the court against one not a party to the cause. *Duffield* v. *Elwes*, 2 Beav. 268.

Writ of execution, only in the case of a party to cause, a stranger must be served first with an order to pay the money by a given day, and, in case of default, with an order to pay on another day, or stand committed. *Anon.*, 14 Ves. 207.

—— **Person a Party.**]—After an order upon a party in the cause for payment of money, the proper course is an attachment, and, upon the return to that, an order for commitment. *Bowes* v. *Strathmore (Lord)*, 12 Ves. 325.

An order for payment of a sum of money by one defendant to another was enforced, pending an abatement of the suit by the death of the plaintiff. *Jones* v. *Williams*, C. P. Coop. 488.

—— **Revived Suit.**]—Where the decree or order in the original suit contains a specific direction, as that the defendant shall pay a certain sum of money, that direction cannot be carried into execution in the revived suit by a mere order to revive, but a decree must be made in the revived suit for that purpose. *Harries* v. *Johnson*, 3 Y. & Coll. 583.

—— **Irish Order.**]—An attachment may issue in this country to enforce an order for payment of money made in Ireland, on petition under the Irish Incumbered Estates Act. *Keogh, In re*, 5 De G. M. & G. 73; 23 L. J., Ch. 547; 18 Jur. 321.

b. Staying and Setting Aside Proceedings.

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1. Generally.

a. *On Payment or Satisfaction.*

Where Writ Indorsed for larger Debt than due.]—If a plaintiff indorses on the writ a larger debt than is due, by which the defendant is misled, and prevented from settling the action,

the court will stay the proceedings, on payment of the real debt, with the costs of the writ only; but the application must be made promptly after the particulars are delivered. *Elliston* v. *Robinson*, 2 D. P. C. 241; 2 C. & M. 343; 4 Tyr. 214.

Within what Time Application made.]—An application to stay proceedings on payment of debt and costs, must be made within four days after service of process. *Bowbridge* or *Bowditch* v. *Slaney*, 2 Scott, 197; 2 Bing. (N.C.) 142; 4 D. P. C. 140; 1 Hodges, 224.

Before Declaration—Payment in Certain Time.]—A judge has no power before declaration to order that proceedings be stayed upon payment of debt and costs within a certain time, otherwise judgment for the plaintiff. *Reynolds* v. *Sherwood*, 8 D. P. C. 183; 9 L. J., Ex. 136; 4 Jur. 27.

Judgment on First Writ arrested for Irregularity.] — Where judgment was arrested, on account of a defect in the declaration, and the plaintiff's attorney, on the evening of the same day, served the defendant's attorney with a copy of a writ of summons for the same claim as that in respect of which the judgment was arrested, the court made a rule absolute for setting aside the writ with costs, on payment of the money due within twenty-four hours. *Hayter* v. *Moat*, 5 D. P. C. 329; 2 M. & W. 56; 6 L. J., Ex. 32.

Submission to Reasonable Terms.]—A defendant who moves to stay proceedings on payment of debt and costs, is not entitled to a rule for that purpose as a matter of right, but must submit to such reasonable terms as the court in its discretion may think proper to grant. *Jones* v. *Shepherd*, 3 D. P. C. 421.

Within what Time Payment to be made.]—A judge, who stays proceedings on payment of debt and costs, cannot, without the plaintiff's consent, allow the defendant longer time for the payment than he would be entitled to by law. *Kirby* v. *Ellier*, 2 C. & M. 315; 4 Tyr. 239; 2 D. P. C. 219; 3 L. J., Ex. 63.

A judge has no authority, without the consent of the plaintiff, to make an order to stay proceedings in an action, upon payment of the debt and costs on a subsequent day. *Norton* v. *Fraser*, 2 Man. & G. 916; 3 Scott (N.R.) 293.

When an order is obtained to stay proceedings on payment of debt and costs, to be taxed, the defendant is not bound to pay the debt and costs immediately on the allocatur being made, but is entitled to a reasonable time to procure the money for that purpose. *Perkins* v. *National Insurance and Investment Association*, 2 H. & N. 71; 26 L. J., Ex. 182; 3 Jur. (N.S.) 371; 5 W. R. 470.

The debt and costs indorsed on a writ were received by a clerk of plaintiff's attorney after the expiration of the four days:—Held, that the attorney, not having offered to return the money, was not entitled to go on with the action for the recovery of further costs. *Hodding* v. *Sturchfield*, 7 Man. & G. 957; 8 Scott (N.R.) 662; 2 D. & L. 596; 14 L. J., C. P. 33; 8 Jur. 988.

On motion of defendant before answer, it was ordered that reference be made to master to ascertain debt, &c., claimed by the bill, the same to be paid by a given day, and the suit to be stayed; and, if not paid, plaintiff's costs given him, and plaintiff at liberty to proceed in the cause. *Boys* v. *Ford*, 4 Madd. 40.

Offer of all Relief entitled to.]—A legatee who had incumbered his legacy, filed his bill, before the legacy was payable, against the trustees and executors of the will, and against his own incumbrancers, alleging that the trustees had committed a breach of trust in not selling certain property; contesting also the claim of one of his incumbrancers, and praying that the property might be secured, that certain accounts might be taken between the plaintiff and the incumbrancer whose claim he contested, and that, according to the result of those accounts, the legacy might be paid; and asking that the trustees might be ordered to pay the costs of the suit. The trustees admitted the breach of trust, but stated that the time for payment of the legacy having now arrived they were ready to pay the said legacy into court. Upon motion now, by the defendants, the trustees, and all the other defendants interested under the will, that upon payment by the trustees into court of the said legacy, with interest at the rate of 5*l.* per cent. per annum, from the day the legacy became payable, and the costs of the suit up to and including the motion, the suit might be dismissed as against the defendants moving:—Held, granting the motion, that this offer of the defendants was, in substance, giving the plaintiff all that he asked, for it gave all that by possibility could be coming to the plaintiff from the trustees of the will. *Sawyer* v. *Mills*, 19 L. J., Ch. 242; 13 Jur. 1061.

Where a defendant out of court has conceded the relief asked by the bill, the court, on motion by the plaintiff, stayed all proceedings in the cause, and ordered the defendant to pay the costs of the suit. *North* v. *G. N. Ry.*, 2 Giff. 64; 29 L. J., Ch. 301; 6 Jur. (N.S.) 244.

Matter otherwise Settled.] — When the matters in dispute have been disposed of by an independent proceeding, the plaintiff may apply to stay proceedings, and the court will then dispose of the costs. But where the suit has been dismissed against some of the defendants for want of prosecution, the court is no longer able to adjudicate as to the costs, in the absence of the dismissed parties; and in default of prosecution, the bill will be dismissed in the usual way, with costs. *Troward* v. *Attwood*, 27 Beav. 85.

Defendant must wholly Satisfy Claim.]—Where a debt is claimed or a demand made in a suit, and the defendant, admitting his liability, offers to pay the debt, or comply with the demand, and to put the plaintiff in the same situation as he would have been in if the liability had been satisfied without suit, the court, on motion, will stay all further proceedings. *Holden* v. *Kynaston*, 2 Beav. 204; 9 L. J., Ch. 198. See *Miller* v. *Drury*, 12 L. T. 464.

After a suit to carry out the trusts of a deed for sale of estates, and payment of debts, was nearly ready for hearing, proceedings were stayed on paying the plaintiff all his claims in it (the other parties to the deed consenting), though the plaintiff alleged the suit would affect other objects in reference to the estate in which he was interested. *Damer* v. *Portarlington (Earl)*, 2 Ph. 30; 1 Coop. C. C. 229; 15 L. J., Ch. 405; 10 Jur. 673.

Where the defendant submits to pay the whole demand of the plaintiff, the court stays the proceedings; but if there be a question in dispute as to the plaintiff's right to recover certain expenses, and the defendant does not

submit thereto, the court will not interfere summarily and stop the suit. *Field* v. *Robinson*, 7 Beav. 66.

Where all questions but one in a suit had been settled, the proceedings in the suit were stayed, subject to the determination of that one point in chambers. *Graham* v. *Uppleby*, 1 W. R. 74.

A suit will not be stayed upon an interlocutory application by a defendant paying into court all that a plaintiff claims by his bill, and leaving a portion of the claim to be adjudicated upon in a cross-suit. The defendant in the first suit must wholly satisfy the claims of the plaintiff. *Orton* v. *Bainbrigge*, 22 L. J., Ch. 979; 1 W. R. 487.

—— **Further Demand.**]—A defendant offering the plaintiff all the relief specifically sought by his bill, moved to dismiss the bill without costs, or that the plaintiff might apply respecting them. The plaintiff then insisted on a further demand, which might be had under the prayer for general relief or by amendment. The court refused the motion with costs, but intimated that this proceeding must be considered at the hearing. *Hennet* v. *Luard*, 12 Beav. 479.

Application by Plaintiff — Costs.] — On a defendant submitting to a plaintiff's demands, the plaintiff ought not to bring the cause to a hearing without first applying for the defendant's consent to have the costs disposed of on motion. But if the defendant objects to that course, a motion that the defendant may pay the costs of the suit will be refused. *Morgan* v. *G. E. Ry.*, 1 Hem. & M. 78; 11 W. R. 662.

A plaintiff, having obtained from the defendant satisfaction of his demand before the cause is in such a state that a decree can be made, cannot without the defendant's consent apply to stay proceedings on the defendant's paying costs. *Wilde* v. *Wilde*, 4 De G. F. & J. 348; 6 L. T. 275; 10 W. R. 503.

The plaintiff's solicitor wrote to the defendants complaining of delay in completing a contract of purchase, and saying, that, unless an early day was appointed, he was instructed to take steps at once to enforce completion of the contract. A few days afterwards the defendants wrote in reply, making an appointment for the following week, which the plaintiff's solicitor, two days after, agreed to, at the same time stating that he had filed a bill for specific performance. The bill was filed on the same day, but was being printed two days previously. The defendants having refused to pay the costs of the bill, the plaintiff moved to stay all further proceedings, and for the defendants to pay the costs of the suit. The court stayed proceedings in the suit, but directed the plaintiff to pay the costs of the suit and of the motion. *Chester* v. *Metropolitan Ry.*, 11 Jur. (N.S.) 214; 11 L. T. 669; 13 W. R. 333.

Motion by plaintiffs to stay proceedings, and that defendants might pay costs of suit, the object of which had been gained, refused without the consent of defendants. *M'Naughton* v. *Hasker*, 12 Jur. 956.

All the purposes of a suit having been answered the plaintiff moved, before answer, that his costs might be taxed and paid by the defendant, and that thereupon all further proceedings might be stayed. Motion refused. *Langham* v. *G. N. Ry.*, 16 Sim. 173; 1 De G. & Sm. 486; 17 L. J., Ch. 436; 12 Jur. 574.

A railway company claimed a lien on certain coal waggons in their possession belonging to B., and threatened to sell them; B. thereupon filed a bill to restrain the sale and detention of such waggons. By arrangement, the company agreed not to sell them until after a specified day. Subsequently to that B. brought trover and detinue against the company, and in that action he recovered possession of the coal waggons from the company. No further proceedings had been taken in the suit instituted in equity. Upon motion by B., the court ordered all proceedings in the suit in equity to be stayed, and the costs of such suit to be paid by the company. *North* v. *G. N. Ry.*, 2 Giff. 64; 29 L. J., Ch. 301; 6 Jur. (N.S.) 244.

Where, since filing a bill the object of a suit has been substantially obtained, the court will, on the application of the plaintiff, stay further proceedings, and, if a proper case is made, order the defendant to pay the costs of the suit. *Thompson* v. *Knight*, 7 Jur. (N.S.) 704; 4 L. T. 863; 9 W. R. 780.

Where Plaintiff declines and proceeds.]—Upon a summons to stay proceedings on payment of a certain sum and costs, if the plaintiff refuses to take the amount offered in discharge of his claim, but afterwards accepts it, there is no absolute rule which entitles the defendant to his costs incurred subsequently to the summons. *Walton* v. *Brown*, 3 H. & N. 879; 28 L. J., Ex. 38.

Where a plaintiff refuses a sum of money tendered through the medium of a judge's summons, in satisfaction of his claim, he is deprived of his costs subsequently to such refusal, in the absence of evidence of oppression; and his afterwards taking out of court, in satisfaction of his claim, a sum very slightly exceeding the amount so tendered is not such primâ facie evidence of oppression as will deprive him of costs. To be such evidence, the sum so taken out of court must not exceed at all the sum tendered. *Shaw* v. *Hughes*, 15 C. B. 660; 24 L. J., C. P. 84; 1 Jur. (N.S.) 186.

Where a defendant takes out a summons to stay proceedings on payment of an admitted debt, which the plaintiff declines to receive, claiming more, in order to disentitle the latter to the costs of the cause, the defendant must bring the money into court. *Hore* v. *Sawl*, 17 C. B. 599; 25 L. J., C. P. 181.

Where, after writ issued, the defendant applies to a judge to stay proceedings on payment of a certain sum and costs, and the plaintiff refuses to accept the sum offered, alleging that more is due, but, at the trial, recovers no more, he is entitled to full costs unless the amount offered has been paid into court. *Clark* v. *Dann*, 3 D. & L. 513.

Payment of Interest and Costs.]—A joint and several bond was conditioned for the payment of interest half-yearly, and of the principal after six months' notice. Default having been made in one payment of interest, through inadvertence, as was said, the obligee gave notice to repay the principal, and the next day brought actions on the bond against each of the obligors:—Held, that the court had no power to stay those actions on payment of the interest and costs. *Wheelhouse* v. *Ladbrooke*, 3 H. & N. 291; 27 L. J., Ex. 307; 4 Jur. (N.S.) 407; 6 W. R. 488.

Unliquidated Damages.]—An order cannot be made for staying proceedings on payment of debt and costs for unliquidated damages. *Fisher* v. *Pyne*, 1 Man. & G. 265.

Nor, in any action to recover a sum due from a third person, with the costs of certain proceedings against that third person, the payment of which the defendant has guaranteed. *Ib.*

A plaintiff in an action against his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations:—Held, that the defendant might have that part of the demand struck out of the declaration on payment of the sum claimed and costs. *Smith* v. *King*, 3 M. & Scott, 799.

After Verdict.]—In an action for breach of contract in not accepting goods, the defendant pleaded several pleas, but the plaintiff obtained a verdict on all the issues, with damages, whereupon the defendant, before judgment signed, obtained a rule nisi to stay proceedings on the payment of the amount of the verdict and costs, to be taxed:—Held, that there was no precedent for the rule, and, therefore, as it was opposed, that it must be discharged; but that the application was a reasonable one, and therefore the rule was discharged without costs. *Peat* v. *Mangnall*, 2 B. C. Rep. 325; 6 D. & L. 261; 18 L. J., Q. B. 5; 13 Jur. 62.

Joint Contractors—Payment by One.]—Where two joint contractors having been sued separately for the same debt, and neither having pleaded in abatement, one of them, after verdict against the other, pays the debt and costs in the action against himself, the other is entitled to have proceedings in the action against him stayed without payment of costs. *Bailey* v. *Haines*, 15 Q. B. 533; 19 L. J., Q. B. 402; 14 Jur. 835.

Where separate actions were brought against several, for the same debt, who (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the court stayed the proceedings in the other's without costs. *Carne* v. *Legh*, 6 B. & C. 124; 9 D. & R. 126.

Two separate actions having been brought against two joint contractors in respect of the same demand, and the debt and costs in one action having been paid, a judge made an order staying the proceedings in the other action, without costs:—The court refused to rescind or vary the order. *Newton* v. *Blunt*, 3 C. B. 675; 4 D. & L. 674; 5 Railw. Cas. 29; 16 L. J., C. P. 121.

In Ejectment.]—*See* EJECTMENT.

b. *On the Ground of Breach of Faith.*

Arrangement between Parties.]—A declaration contained a count for libel, and two for malicious prosecution. The cause was tried in 1852, and a verdict found for the plaintiff, with 5*l.* damages for the libel, and 15*l.* for the malicious prosecution. The defendant obtained a rule nisi for a new trial, upon the ground of misdirection in respect of the malicious prosecution, and the court was ready to make the rule absolute, but suggested an arrangement between the parties. It was accordingly arranged that the rule for a new trial should be discharged, the plaintiff undertaking to enter a nolle prosequi to the count for malicious prosecution. The costs were taxed, and, with the 5*l.* damages, paid to the plaintiff. In 1855 the plaintiff commenced another action for malicious prosecution, upon the same facts:—Held, that the defendant was entitled to stay all further proceedings therein. *Ponting* v. *Watson*, 1 Jur. (N.S.) 1139. See *Piercy* v. *Cox*, 2 L. T. 219.

In an action for a libel the attorney for the defendant agreed with the attorney for the plaintiff that the action should be settled by the defendant writing a letter of retractation, and such letter had been sent just before the spring assizes, with a condition that the letter which formed the libel should be given up, which had not been done, and the plaintiff not having been privy to the agreement afterwards changed his attorney and gave notice of trial for the summer assizes:—Held, that the settlement having been conditional was not binding, and that the lapse of time was not sufficient to preclude the plaintiff from going on. *Webster* v. *Acton*, 11 W. R. 114.

An action having been brought to recover a sum of money, it was agreed that the defendants should withdraw their plea, and all further proceedings be stayed upon the terms that they should insure and keep insured a certain ship. The ship was accordingly insured for a certain voyage, and on the expiration of the policies, slips for other policies were signed, but the policies themselves were not effected until three days after the expiration of the former policy. The plaintiff having signed judgment, and issued execution for his debt on the ground of a breach of the agreement:—Held, that the slips of policies were not a binding legal insurance, and that he was entitled to retain his judgment. *Parry* v. *Great Ship Co.*, 4 B. & S. 556; 33 L. J., Q. B. 41; 10 Jur. (N.S.) 294; 9 L. T. 379; 12 W. R. 78.

On a compromise a plaintiff agreed "not to bring any action":—Held, that this included not only actions for the very wrong in question, but also actions for wrongs incident thereto, and applied not only to actions against the then defendant, but also to actions brought against the defendant's agents in doing the alleged wrong. Proceedings stayed as contrary to good faith. *Kelly* v. *Falls*, 16 W. R. 136.

On a trial in the exchequer, a juror was withdrawn by consent. Afterwards the plaintiff sued the defendant in the court of King's Bench for the same cause of action. That court stayed the proceedings, as being contrary to good faith, although the plaintiff, who had conducted the first cause for himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a second action. *Moscati* v. *Lawson*, 4 A. & E. 331.

Every court has an unlimited power over its own process, and may stay proceedings brought against good faith, though the agreement, in fraud of which the action was brought, was made whilst the parties were not under the authority of the court. *Cocker* v. *Tempest*, 7 M. & W. 502; 9 D. P. C. 306; 10 L. J., Ex. 195.

Till Delivery of Copy of Document surreptitiously obtained.]—A plaintiff, who had delivered to A., as B.'s attorney, a bill in which he made B. his debtor, afterwards obtained the bill surreptitiously from A., and delivering a new bill for the same charges, in which he made A. his debtor, sued A. for the amount. The court stayed proceedings till the plaintiff should deliver to A. a copy of the paper surreptitiously obtained from him: the copy to be evidence in the cause. *Edgington* v. *Nixon*, 2 Scott, 507; 2 Bing. (N.C.) 316.

Money received under Compromise—Subsequent Repudiation.]—The plaintiff, having com-

menced an action to recover the sum of 4,500*l.* under a policy of insurance, entered into an agreement with an agent of the defendants to compromise the action upon certain terms, one of which was that 2,350*l.* should be paid to the plaintiff at once, which sum was paid. The defendants subsequently asserted that the agreement to compromise was made without authority, and did not bind them; the plaintiff accepted this repudiation, and proceeded with his action upon the policy, giving credit for the 2,350*l.* so paid to him. The divisional court, upon the application of the defendants, made an order staying the action until the plaintiff paid into court, or secured, the sum of 2,350*l.*:—Held, that it would be a breach of faith for the plaintiff to retain the sum received by him under the abandoned compromise, and at the same time to proceed with his action, and that the action was properly stayed until he paid into court, or secured, that sum. *Henderson* v. *Underwriting Association*, 65 L. T. 732—C. A.

Under s. 24 of the Judicature Act, 1873, an agreement between the parties to an action to stay further proceedings upon specified terms can be enforced upon a summary application. *Eden* v. *Naish*, 47 L. J., Ch. 325; 7 Ch. D. 781; 26 W. R. 392.

Covenant not to sue for Restitution of Conjugal Rights.]—In a suit for restitution of conjugal rights, the respondent moved for an injunction and stay of proceedings, upon affidavit shewing that the petitioner was bound by deed not to institute such a suit:—Held, that such a defence must be alleged by plea, and afforded no ground for summary dismissal of the suit. *Marshall* v. *Marshall*, 48 L. J., P. 49; 5 P. D. 19; 39 L. T. 640; 27 W. R. 399.

Upon such defence being subsequently alleged by plea:—Held, that it was such an equitable plea as the divorce court since the judicature acts is bound to consider. *Ib.*

Defendant receiving Letter not to pay except to Order of Plaintiff.]—Where a defendant was sued for the price of goods after he had received a letter from the plaintiff, who was abroad, not to pay except to his written order, the court ordered proceedings to be stayed on the money being brought into court, although the defendant had pleaded the facts by way of defence. *Newton* v. *Matthews*, 4 D. P. C. 237.

Application must be made Promptly.]—Where proceedings are taken against good faith, the party must come promptly to set them aside as in the case of an irregularity. *Saunders* v. *Jones*, 3 D. & L. 770; 15 L. J., Q. B. 272.

c. *When Action Frivolous or Vexatious.*

Vexatious Actions Act, 1896.]—In making an order under the act, the court will look at the number, general character, and result of the actions brought; and, if these have been of a vexatious character habitually and persistently instituted without reasonable ground, an order will be made. *Chaffers, In re, Att.-Gen., Ex parte*, 76 L. T. 351; 45 W. R. 365.

Inherent Jurisdiction.]—There is an inherent jurisdiction in the high court to strike out a defence which is frivolous and vexatious, and an abuse of the procedure. *Reichel* v. *Magrath*, 59 L. J., Q. B. 159; 14 App. Cas. 665; 54 J. P. 196—H. L. (E.)

The appellant brought an action against his bishop and the patrons of a benefice, claiming a declaration that he was vicar of the benefice, and that an instrument of resignation which he had executed was void, and an injunction to restrain the bishop from instituting, and the patrons from presenting, any other person to the benefice. The action was tried, and judgment was given against the appellant on the ground that the vicarage was void by reason of his resignation thereof with the consent of the bishop. Afterwards the respondent, having been duly appointed to the benefice as the appellant's successor, brought an action against the appellant, claiming a declaration that the respondent was vicar, and a perpetual injunction to restrain the appellant from depriving the respondent of the use and occupation of the house and lands. In his defence the appellant set up the same case as that on which he had been defeated in the action in which he was plaintiff:—Held, that there was an inherent jurisdiction in the court to strike out the defence as frivolous and vexatious, and an abuse of the procedure, and to enter judgment for the plaintiff with a declaration and injunction as claimed. *Ib.*

The exercise by a court of its inherent jurisdiction to dismiss an action as an abuse of its process is not justified merely by great improbability in the case made by the pleadings. But all the circumstances may be considered. *Laurance* v. *Norreys* (*Lord*) 59 L. J., Ch. 681; 15 App. Cas. 210; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708—H. L. (E.)

Where, in a statement of claim, a charge of concealed fraud, within s. 26 of the Statute of Limitations (3 & 4 Will. 4, c. 27), was stated vaguely and generally, and previous litigation with reference to the same subject-matter led to the conclusion, which was confirmed by an affidavit filed on the plaintiff's behalf, that the allegations were an afterthought and wholly incapable of proof:—Held, that the action was properly dismissed as an abuse of the process of the court. *Ib.*

The Queen's Bench Division has an innate and inherent authority to dismiss or stay a frivolous or a vexatious action. This authority is distinct from the authority conferred on it by Ord. XXV. r. 4, which is limited to pleadings which are frivolous or vexatious or otherwise objectionable. *Blair* v. *Cordner*, 36 W. R. 64.

The Probate Division has, apart from Ord. XXV. r. 4, an inherent jurisdiction, in common with other courts, to stay proceedings which are frivolous and vexatious, and an abuse of the process of the court. *Willis* v. *Beauchamp* (*Earl*), 55 L. J., P. 17; 11 P. D. 59; 54 L. T. 185; 34 W. R. 357—C. A.

An action was brought to obtain revocation of letters of administration granted in 1798, the plaintiff claiming to represent the next of kin of the intestate, and the defendants being the representatives of the deceased administrator:—Held, that, having regard to the lapse of time, the fact that the defendants did not and could not succeed to the administration sought to be revoked, and the other circumstances of the case, the action was frivolous and vexatious, and must be dismissed. *Ib.*

Although it is the right of a plaintiff to have his action decided by a jury, the court will stay all proceedings if it is satisfied that the bringing

of such action is an abuse of the process of the court. *Jacobs* v. *Raven*, 30 L. T. 366.

Actions were brought, charging the defendants with conspiring to make, and making, false statements respecting the plaintiff, an officer in the army, to the commander-in-chief, whereby he was placed on half-pay. Upon an application to stay the actions as frivolous and vexatious, and an abuse of the process of the court, it was stated in the defendants' affidavits that the actions were for acts done by them in the due course of their duty as members of a military court of inquiry, and this was not denied by the plaintiff:—Held, that the actions ought to be stayed, on the ground that *Dawkins* v. *Rokeby (Lord)* (L. R. 7 H. L. 744) was a case directly in point that an action under such circumstances would not lie. *Dawkins* v. *Saxe Weimar (Prince)*, 45 L. J., Q. B. 567; 1 Q. B. D. 499; 35 L. T. 323; 24 W. R. 670.

When an action is shewn to be vexatious, and an abuse of the process of the court, it will be stayed on summons. *Edmunds* v. *Att.-Gen.*, 47 L. J., Ch. 345; 38 L. T. 213; 26 W. R. 550.

A public servant who had formerly held the office of clerk of the patents, but to whom no pension had ever been granted, brought an action against the attorney-general, claiming a pension in respect of such office, and to have an account taken of all moneys due to him in respect thereof. All matters of account between him and the crown had been finally settled by the award of arbitrators in 1869:—Held, that the action must be stayed as being frivolous and vexatious, and an abuse of the process of the court. *Ib.*

Alternative—Terms.]—A judge ought not to make an order dismissing an action as frivolous and vexatious, with the alternative that the plaintiff may proceed on payment of a sum of money into court by way of security for the defendant's costs, if the latter should get a verdict. Per Wills, J. *Mittens* v. *Foreman*, 58 L. J., Q. B. 40.

Malicious Prosecution—Action against Trustee in Bankruptcy.]—An action for malicious prosecution ought not be stayed as frivolous and vexatious on the ground that the defendant is the trustee under the plaintiff's bankruptcy and has prosecuted him by order of the court under s. 16 of the Debtors Act, 1869. *Mittens* v. *Foreman*, 58 L. J., Q. B. 40.

Foreclosure—Second Action for Interest.]—Since the judicature acts, it is the practice in foreclosure actions to make a personal order for payment of the sum found due for principal and interest. A second action, brought to recover arrears of interest on the mortgage while the foreclosure action is still pending, will be stayed as vexatious. *Poulett* v. *Hill*, 62 L. J., Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503—C. A.

Res Judicata.]—In an action brought by the plaintiff against the defendant for libel in respect of the publication of a pamphlet purporting to be the judgment delivered in court in a certain action between the parties, the jury found that the pamphlet was a fair, honest, and accurate report of the judgment, and was published without malice, and judgment was accordingly entered for the defendant. The plaintiff afterwards commenced a second action for libel in respect of the same pamphlet, but relying upon defamatory passages in the pamphlet other than those relied upon in the first action. The different defamatory statements, however, relied upon in both actions were all spoken of the plaintiff in the same character:—Held, that the subject-matter was res judicata, and that an order striking out the statement of claim and dismissing the action was rightly made. Held, also (assuming the matter was not res judicata, the defamatory passages relied upon in the two actions not being the same), that the second action was an abuse of the process of the court, and ought to be dismissed. *Macdougall* v. *Knight*, 59 L. J., Q. B. 517; 25 Q. B. D. 1; 63 L. T. 43; 38 W. R. 553; 54 J. P. 788—C. A.

Where no Relief can be obtained.] — Any action may be stayed as being vexatious when it is clear that no relief can be obtained at the trial. *Barrett* v. *Day*, 59 L. J., Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38 W. R. 362.

The court has an inherent jurisdiction not to allow an action to proceed which must fail. *Chatterton* v. *Secretary of State for India*, 64 L. J., Q. B. 676; [1895] 2 Q. B. 189; 14 R. 504; 72 L. T. 858; 59 J. P. 596—C. A.

Nonpayment of Costs.]—The mere fact of nonpayment by a plaintiff of costs, which he has been ordered to pay upon an interlocutory application, by reason of his inability to pay, is not a ground for staying proceedings in the action; but if the action itself is vexatious, or if the plaintiff in his mode of conducting it acts vexatiously and oppressively towards the defendant, then the court will, for the protection of the defendant against similar treatment in the future stay the proceedings until the plaintiff has paid the costs which he has been ordered to pay. The principle of *Wickham, In re, Marony* v. *Taylor* (56 L. J., Ch. 748; 35 Ch. D. 272), applied. *Graham* v. *Sutton, Carden & Co.*, 66 L. J., Ch. 666; [1897] 2 Ch. 367; 77 L. T. 35—C. A.

Striking out Pleadings — Pleading raising important Question of Law.] — Applications under Ord. XXV. r. 4, to strike out pleadings or stay proceedings on the ground that the pleadings disclose no reasonable cause of action or defence, are not intended to supply the place of demurrers, except in frivolous cases, and the court will not entertain such an application if the pleading raises an important point of law. *Att.-Gen. (Duchy of Lancaster)* v. *L. & N. W. Ry.*, [1892] 3 Ch. 274—C. A.

—— **Application by Defendant before Defence.**]—An application to strike out a statement of claim or stay proceedings may be made by the defendant in a proper case before filing his defence. *Ib.*

—— **Extrinsic Evidence not admitted.**]—An application to strike out a pleading can only be made where it can be shewn that the pleading discloses no cause of action or defence on the face of it without extrinsic evidence. Per A. L. Smith, L.J. *Ib.*

—— **Action by Client against Solicitor — Alleged Improper Advice and Fraudulent Conduct.**]—The plaintiff alleged that, being temporarily in want of money, and desirous of getting his creditors to postpone payment of their claims,

he instructed the defendants, his solicitors, to call a meeting of his creditors and to ask for time; that the defendants advised him that he ought first to file his petition in bankruptcy; that they procured him to sign such petition and forwarded a circular to his creditors which was never, he said, approved of or authorised by him, stating untruly that he was compelled to suspend payment; that they attended the meeting by their clerk, who, purporting to act upon the plaintiff's instructions, told his creditors that his estate would not pay more than 2*s.* in the pound; and that that information was wholly untrue to the knowledge of the defendants, or was made recklessly and negligently, and without any sufficient grounds. The plaintiff also alleged that afterwards he instructed the defendants to submit a scheme to avoid his being made a bankrupt, but that they advised him not to do so, and eventually he was adjudicated a bankrupt; that the defendants also prepared a statement of the plaintiff's affairs, and persuaded and advised him to swear to a statement that he was hopelessly insolvent, and in that statement the defendants intentionally or recklessly and negligently overstated the liabilities and under-estimated the assets, and the defendants were well aware during the whole time that the plaintiff's estate was sufficient to pay 20*s.* in the pound, and did those acts knowing that they were acting contrary to the interests of the plaintiff, and with a view of benefiting themselves, they, or one of them, having a large interest as the plaintiff's mortgagees. There was also a count for slander on the plaintiff as a trader:—Held, that the plaintiff's statement of claim and affidavits disclosed no reasonable cause of action, and that the proceedings ought to be stayed as frivolous and vexatious; that, even if the plaintiff had any cause of action, it was one that passed to his trustee in bankruptcy, and was not sustainable by the plaintiff personally. The principles on which the court ought to act in staying proceedings as frivolous and vexatious discussed and explained. *Kellaway* v. *Bury*, 66 L. T. 599—C. A.

Striking out Summons.]—*See* infra, SUMMONSES.

d. *In Actions under* 40*s.*

Infra Dignitatem Curiæ.]—The court will stay proceedings in an action brought for a sum less than 40*s.*, when recoverable in an inferior court. *Sutton* v. *Bament*, 6 D. & L. 632; 3 Ex. 831; 18 L. J., Ex. 318; 13 Jur. 399.

The court refused to set aside, as an abuse of the process of the court, a writ of summons for 3*l.* 11*s.* due for goods sold:—Semble, an action for any sum not less than 40*s.* is not beneath the dignity of the court. *Hannay* v. *Graham*, 12 L. R., Ir. 413. See *Kernan* v. *Kenney*, Ir. R. 5 Eq. 220.

If it appears to the court that the debt sued for is under 40*s.*, it will stay the proceedings before trial. *Kennard* v. *Jones*, 4 Term Rep. 495; 2 R. R. 447. S. P., *Stean* v. *Holmes*, 2 W. Bl. 754.

The court will stay proceedings, in an action of contract, where it clearly appears to be brought to recover a sum under 40*s.*, although the sum claimed on the writ exceeds that amount; especially if there has been, in addition, an abuse of the process of the court in issuing the writ prematurely. *Stuart* v. *Cawse*, 5 C. B. (N.S.) 737; 28 L. J., C. P. 193; 5 Jur. (N.S.) 650; 7 W. R. 187.

Amount, how Determined.]—In order to determine whether an action is brought for a sum less than 40*s.*, the court will only look to the amount claimed in the first instance. *Nurdin* v. *Fairbanks*, 1 L. M. & P. 617; 5 Ex. 738; 20 L. J., Ex. 20; 14 Jur. 988.

Therefore where an action was brought to recover a debt of 9*l.* 10*s.*, to which the defendant pleaded as to 8*l.* 14*s.* 6*d.* a tender, and subsequent payment into court, and to the residue never indebted; and the jury found for the tender, but that the plaintiff was entitled to 16*s.* more; the court refused to stay the proceedings upon payment of the debt without costs, on the ground that the action was frivolous, as brought to recover a sum less than 40*s.* *Ib.*

Proceedings will not be stayed because the cause of action is infra dignitatem curiæ, upon the mere affidavit of the defendant. *Oulton* v. *Perry*, 3 Burr. 1592.

But proceedings were stayed, where it was sworn by the defendant, and not denied by the plaintiff, that the debt was under 40*s.* *Wellington* v. *Arters*, 5 Term Rep. 64; 2 R. R. 544.

On motion to set aside proceedings as infra dignitatem, on an affidavit that the demand sued for does not amount to 40*s.*, the court will not inquire into the amount, if an affidavit is put in on shewing cause, that the demand exceeded that sum, but will at once discharge the rule with costs. *Branker* v. *Massey*, 2 Price, 8.

The court refused to stay proceedings in an action of trover, on an affidavit that the plaintiff's cause of action did not amount to 40*s.*, where it appeared to be a mere matter of calculation. *Lowe* v. *Lowe*, 8 Moore, 220; 1 Bing. 270; 1 L. J. (O.S.) C. P. 99.

e. *Cross Actions.*

One to be Stayed, Counter-claim delivered in other—Who should be Plaintiff.]—When an order is made under the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7, to stay one of two cross actions between the same parties arising out of the same matter, the action brought against the party on whom the burden of proof lies ought to be stayed, and the action brought by him ought to be allowed to proceed, the other party to the litigation being at liberty to raise by defence, set-off and counter-claim all questions intended to be raised by him in the action which is stayed. In an action commenced on the 28th of November, 1881, the plaintiffs, Messrs. T., claimed 7,000*l.*, the balance of the price of a steamship built by them for the defendants, a railway company, and certain other sums as extras. In a cross action, commenced on the 30th of November, 1881, the railway company, as plaintiffs, claimed a return of all the moneys paid by them to Messrs. T. on account of the steamship and 15,000*l.* damages, and in the alternative 50,000*l.* damages. Upon the facts the burden of proof lay upon the railway company. The Queen's Bench Division ordered that the action brought by the railway company should be stayed, with liberty to raise their claim by way of counter-claim in the action brought by Messrs. T., on the ground that Messrs. T. had been the first to commence legal proceedings:—Held, that as the burden of proof lay upon the railway company, the action brought by the railway company should be allowed to proceed, Messrs. T. being at liberty to raise all

questions by counter-claim, and that the action brought by Messrs. T. should be stayed. *Thomson* v. *S. E. Ry.*, 51 L. J., Q. B. 322 ; 9 Q. B. D. 320 ; 46 L. T. 513 ; 30 W. R. 537—C. A.

In the former of two cross actions the plaintiffs, who were shipowners, claimed against the shippers and consignees for detention at the port of loading and for freight of cattle shipped. In the latter the plaintiffs claimed a far larger sum for loss of the said cattle by the shipowners' negligence. The writs were issued the same day, but the statement of claim in the former action was delivered before the other. A master had stayed proceedings in the second action, the plaintiffs in that action to be at liberty to set up their claim by way of counter-claim in the other ; but a judge had rescinded the master's order :—Held, upon appeal, that although there was jurisdiction to make such an order as the master's in cross actions, yet it should be done only when the points at issue are the same, and it would be unjust in the circumstances of these cases. *Adamson* v. *Tuff*, 44 L. T. 420.

Until Determination of Cross Suit.]—In a suit to enforce a mortgage, in which all the proceedings were regular, a decree pronounced and served, and a receiver appointed :—Held, that the court had no jurisdiction to stay the proceedings until the determination of a cross suit to be instituted by the defendant for the purpose of impeaching the mortgage on the ground of fraud. *Bradshaw* v. *Meagher*, Ir. R. 9 Eq. 101.

f. *Pendency of Actions Abroad.*

Lis alibi pendens.]—It is no ground for staying proceedings in an action here, that proceedings are pending between the parties for the same cause of action in the United States. *Cox* v. *Mitchell*, 7 C. B. (N.S.) 55 ; 29 L. J., C. P. 33 ; 6 Jur. (N.S.) 225 ; 1 L. T. 8 ; 8 W. R. 45.

Whether a court having ample authority to decide the matter in question should await the adjudication of a foreign tribunal having only similar authority, is merely a question for the exercise of judicial discretion. If there be any want of power in the court, proceedings may well be stayed in order that a foreign tribunal, which has the requisite power, may adjudicate. *Phosphate Sewage Co.* v. *Molleson*, 1 App. Cas. 780—H. L. (Sc.)

W., an Englishman domiciled in France, entered into an agreement in France with F., a Frenchman, that if F. assisted him in obtaining certain contracts from the French government, the profits of these contracts should be divided between them in certain proportions. F. negotiated with D. & Co., merchants in this country, for carrying out the contracts, and D. & Co. held, as W. alleged, large sums of money which were due to him under his agreement with F. He filed a bill against F. and D. & Co., for an account and to restrain D. & Co. from handing over the money in their hands to F. Proceedings were also instituted in France for the same accounts as were prayed for in the English suit. Upon a motion by the defendants to stay all proceedings in the English suit until the determination of the French suit :—Held, that inasmuch as there were interrogatories which they were bound to answer, the motion, which was in the nature of a demurrer, could not be sustained, and it was therefore refused with costs. *Wilson* v. *Forrand*, L. R. 13 Eq. 362 ; 26 L. T. 387.

If one of the actions is in a foreign country, where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious, and a special case must be made out to induce the court to interfere. The court has, however, power to interfere in such a case under its general jurisdiction to restrain vexatious and oppressive legislation, and will interfere in a proper case even before decree. And semble, after a decree has been made in one of the actions, the court will be more willing to exercise its jurisdiction. *Cox* v. *Mitchell* (7 C. B. (N.S.) 55) considered. *McHenry* v. *Lewis*, 52 L. J., Ch. 325 ; 22 Ch. D. 397 ; 47 L. T. 549 ; 31 W. R. 305—C. A.

Cross Action by Defendant in Foreign Country.]—In an action of damage in personam by the owners of the ship G. against the owners of the ship P., it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this court, been instituted by the owners of the P. against the G. in a vice-admiralty court abroad, and was then pending. The court, on the application of the owners of the ship P., stayed the proceedings in this court until after the hearing of the cause in the vice-admiralty court abroad. *The Peshawur*, 52 L. J., P. 30 ; 8 P. D. 32 ; 48 L. T. 796 ; 31 W. R. 660 ; 5 Asp. M. C. 89.

B., resident in San Francisco, brought an action against C. in England alleging that C. had been B.'s agent to purchase for him goods in England ; that B. had recently discovered that C. had in the accounts rendered charged more for the goods than he had paid for them, and asking for an account against C. as agent. C. delivered a defence in which he denied agency, alleged that he had as principal sold the goods to B., insisted on the accounts rendered as settled accounts, and alleged that a large balance was due. C. then commenced an action in San Francisco against B. to recover the amount which he so alleged to be due. B. moved to restrain this action :—Held, that the action ought not to be restrained, for that there was no primâ facie inference that the bringing the action abroad, during the pendency of an action in England in which the matters in dispute could be determined, was vexatious, since the course of procedure in San Francisco might be such as to give advantages to C. of which he was entitled to avail himself, and that the burden lay on B. to prove that C.'s action was vexatious, which he had failed to do. *Hyman* v. *Helm*, 24 Ch. D. 531 ; 49 L. T. 376 ; 32 W. R. 258—C. A.

Action in rem—Bail—Election.]—The owners of the British ship R. and the owners of her cargo sued the German steamship R. in the German consular court at Constantinople for damages for injury to the cargo caused by collision between the two vessels. An order was made therein for the arrest of the R., or for bail, subject to the plaintiffs giving security for a certain sum. The action was proceeded with, but the plaintiffs never gave the required security, and consequently the R. was never arrested. The R. left Constantinople during the pendency of the action and came to England, where she was arrested in the present action in rem instituted by the owners of cargo in respect of the same cause of action. Previously to the institution of the present action the defendants had given bail in the action at Constantinople, to which port the

R. was a constant trader, although the plaintiffs in that action had never given the required security. The limit of the defendant's liability in the German consular court was the value of the R., a sum considerably less than the limit of their liability in this country. Upon motion by the defendants to release the R. without giving bail, or to stay the action:—Held, that bail having been given without the plaintiffs having deposited the required security, was given voluntarily and not under compulsion, and that the plaintiffs were not proceeding vexatiously in instituting a second action in this country, and that the ship ought not to be released. *The Reinbeck*, 60 L. T. 209; 6 Asp. M. C. 366—C. A.

Breach of Faith.]—A collision occurred on the high seas between the C. and the J., two foreign vessels. The C. was arrested in Holland in an action brought by the owners of the J. and her cargo, but was released with the consent of the agent of the J. on the guarantee of a firm of underwriters interested in the C. to answer judgment in the action. Cross proceedings were instituted in the Dutch court by the owners of the C. and the J. An action was subsequently commenced in this country against the owners of the C. by the owners of the J. and her cargo, and the C. arrested in respect of the same collision. The plaintiffs expressed their willingness to abandon the action in Holland:—Held (dissentiente Brett, M.R.), that the proceedings in this country must be stayed and the ship released. *The Christiansborg*, 54 L. J., P. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491—C. A.

Action in Colony and in England.]—B., of London, and M. and C., of Honduras, carried on business in partnership at Honduras as G. & Co. B. & N. carried on business in partnership in London under the same name. The Honduras firm employed the London firm as their agents under an agreement by which B.'s share in the profits of the Honduras firm was to be brought into account as between the two firms to the credit of the English firm. The Honduras partnership was dissolved, and B. obtained a decree in Honduras for taking the partnership accounts. Before those accounts had been fully taken, M. and C. brought this action in England against the London firm for an account of the dealings between the two firms, alleging the defendants to have made improper profits in their agency. The defendants denied having made improper profits, and by counter-claim claimed to have the accounts of the Honduras firm taken. The counter-claim was ordered to be struck out:—Held, that though if M. and C. had not brought this action, B. would not, after obtaining a decree in Honduras, have been allowed to carry on another action here for the same purpose, still as the two actions were so closely connected that neither of them could be finally wound up independently of the other, B. ought not to be prevented from proceeding with his counter-claim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action; and that on N.'s undertaking to be bound by the proceedings in the Honduras action, the order must be discharged. *Mutrie* v. *Binney*, 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131—C. A.

The next of kin of an intestate filed their bill in equity, in the supreme court of Newfoundland, against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A. and of the intestate, possessed by A., and an account of the partnership transactions, and the dealings of A. with the estate, since the death of the intestate. The bill was taken pro confesso against A., in the colonial court; and, on a reference, the master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A.; but that no account between A. and the intestate had been laid before him. The supreme court decreed that the sums found by the master to be due to the next of kin, and the costs, should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts and on private transactions, alleging various errors and irregularities in the proceedings in the supreme court, and that A. intended to appeal therefrom to the privy council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeeding in their actions. Demurrer, for want of equity, allowed on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before the supreme court of Newfoundland. That inasmuch as the privy council is the court of appeal from the colonial court, and has jurisdiction to stay the execution of the decree pending the appeal, the court will not interfere by injunction on the ground of error or irregularity in the decree of the colonial court. *Henderson* v. *Henderson*, 3 Hare, 100.

Proceedings in India and in England.]—A husband who had been residing with his wife in India presented a petition in India for a divorce from her on the ground of her adultery with the co-respondent, who also resided in India. Before the presentation of the petition the husband sent his wife home to her relations in England, and whilst the petition was pending he came over for a short time for the purpose of making arrangements for his children. The wife then served him with a petition for the restitution of conjugal rights. The court refused an application made by the husband for a stay of proceedings on his wife's petition until the suit in India had been determined. *Thornton* v. *Thornton*, 55 L. J., P. 40; 11 P. D. 176; 54 L. T. 774; 34 W. R. 509—C. A.

Two suits were instituted—the one in India, the other in England—for the purpose of taking certain accounts of a partnership business, one of the partners being dead. The plaintiff in the Indian suit sued under the authority of power of attorney from the English plaintiff. A final decree having been made in the Indian suit approving of a compromise of the subject-matter in dispute, the defendant in the English suit thereupon moved to stay all further proceedings in that, the English suit, and the court ordered accordingly. *Ostell* v. *Lepage*, 16 Jur. 1134; 1 W. R. 18.

Election.]—An action was brought in this country by an English company against a firm

of French merchants for the delivery of the cargoes of certain ships, or in the alternative for damages, and for an injunction and receiver. At the commencement of the action the ships were in British waters, but they had since been removed by the direction of the defendants to ports in France, and the cargoes had been taken possession of by the defendants. Proceedings had been instituted by the plaintiffs in a French court for recovery of the cargoes. The English action comprised a claim for the cargo of one ship which was not claimed in the French action. A motion on behalf of the defendants, that the plaintiffs might be ordered to elect whether they would proceed with the English action or with the French proceedings was refused. *Peruvian Guano Co.* v. *Bockwoldt*, 52 L. J., Ch. 714 ; 23 Ch. D. 225 ; 48 L. T. 7 ; 31 W. R. 851 ; 5 Asp. M. C. 29—C. A. See *The Reinbeck*, supra.

Plaintiff put to his election where suing in this court, and in a foreign court of law. *Pieters* v. *Thompson*, Coop. 294.

Restraining Action Abroad when Action pending here.]—*See* INTERNATIONAL LAW.

Action between same Parties in Ireland.]—But the court will stay proceedings in an action on the ground that another action is pending for the same cause between the same parties in Ireland. *Alexander* v. *Adams*, 16 L. T. 384 ; 15 W. R. 791.

Trustees for creditors, after decree for execution of trusts, restrained from proceeding in a suit in court of chancery in Ireland, having same objects. *Harrison* v. *Gurney*, 2 Jac. & Walk. 563 ; 22 R. R. 211.

An injunction was granted to restrain the plaintiff from prosecuting a suit not brought to a hearing in Ireland, the subject-matter of the suit being the same as that of a suit instituted in this court, and in which this court had pronounced a decree, refusing the relief sought by the plaintiff. *Booth* v. *Leycester*, 1 Keen, 579 ; 3 Myl. & C. 459. *And see* 2 Jur. 935.

Proceedings between same Parties in Scotland.]—The existence of a suit of multiple poinding and exoneration, brought by tutors in Scotland in respect of their receipts of the real estate of the infant in that kingdom, constitutes no objection to a decree for an account of the same estates against the same parties in this court in a suit by the infant in which the tutors have appeared. *Beattie* v. *Johnstone*, 8 Hare, 169.

Plaintiffs who had obtained in this court a decree for an account against three defendants, two of whom resided in Scotland, and all of whom had real property there, brought actions in Scotland against the same defendants for the same demand ; and they obtained leave from this court to prosecute the Scotch actions so far as should be necessary for the purpose of obtaining such security as it is in the power of the Scotch court to give for the amount which, upon taking the accounts directed by the decree, should ultimately be found due to the plaintiffs. *Wedderburn* v. *Wedderburn*, 4 Myl. & C. 585 ; 9 L. J., Ch. 205 ; 4 Jur. 66.

After decree here, the plaintiff cannot, except by leave of the court, proceed in another court in respect of the same matter, even though such proceedings are merely auxiliary. *S. C.*, 2 Beav. 208.

Power of Court to look at Proceedings in Action Abroad.]—H., a lessee of estates in Ireland, claimed the exclusive right of shooting. S., the lessor, claimed that on the true construction of the lease such right was reserved to him. On the 19th September, 1883, H. commenced an action in the chancery division in England to restrain S. from interfering with his alleged rights, and, in the alternative, for rectification of the lease. On the 22nd September, 1883, S. commenced a common law action in Ireland against H. for trespass. The Irish action was heard first, resulting in a verdict (sustained by a divisional court) for S., with 6*d.* damages. H. had also raised by his defence a plea for rectification of the lease, but it did not appear clearly that this question was ever submitted to the jury. Upon a summons in the English action raising the question of res judicata :—Held, that the pleadings and judgments in the Irish action might be put in evidence, having been only very briefly referred to by S. in his defence, as amended with leave, upon the analogy of the old practice, which permitted a judge in similar cases to refer to a master for a report as to the nature of the questions raised and decided in another action. Upon looking into such proceedings the court was not satisfied that the question of rectification was ever really decided against H., and accordingly refused to stay the present action on that ground. *Houston* v. *Sligo* (*Marquis*), 29 Ch. D. 448 ; 52 L. T. 96.

g. *Two or more Actions in this Country.*

Test Action—Trial of.]—*See* CONSOLIDATION, infra, col. 397, et seq.

Several Actions by same Persons, or by Persons in same Interest.]—When a plaintiff commenced seven actions against a defendant for separate and distinct publications of the same libel, the court made a rule absolute for staying the proceedings in the other six until after the trial of one. *Jones* v. *Pritchard*, 6 D. & L. 529 ; 18 L. J., Q. B. 104 ; 13 Jur. 427.

The court will not stay the proceedings on the ground of the pendency of another action for the same cause against the defendant jointly with another person, except in a case of oppression or vexation. *Sowter* v. *Dunston*, 1 M. & Ry. 508 ; 6 L. J. (O.S.) K. B. 114.

Thirty-eight actions having been brought by different persons against the defendants as directors of an incorporated company, charging misappropriation of moneys advanced by the plaintiffs in different amounts and at different times, but all under similar circumstances :—Held, upon the authority of *Amos* v. *Chadwick* (4 Ch. D. 869 and 9 Ch. D. 459), that it was competent to a judge at chambers, upon the application of the plaintiff, to stay the proceedings in thirty-seven of the actions until after the trial of the thirty-eighth as a test action, proper provision being made in case that action did not satisfactorily dispose of the questions in all. *Bennett* v. *Bury* (*Lord*), 49 L. J., C. P. 411 ; 5 C. P. D. 339 ; 42 L. T. 480.

Where a plaintiff has brought eleven separate actions for the same cause of action, against eleven members of a provisional railway committee, the court refused to stay the proceedings in each of the actions, except such one as the plaintiffs should elect. *Giles* v. *Tooth* or *Forth*, 4 D. & L. 486 ; 3 C. B. 665 ; 4 Railw. Cas. 678 ;

16 L. J., C. P. 3; 10 Jur. 948. S. P., *Newton* v. *Belcher*, 9 Q. B. 612; 16 L. J., Q. B. 37.

The lessor of the plaintiff having brought three actions of ejectment in K. B. for the same property, that court stayed the proceedings in two, and compelled the plaintiff to confine himself to one, upon certain terms, which rendered it probable that in the event he would have to pay the costs; whereupon he brought an ejectment for the same property in C. P. Proceedings therein were stayed. *Doe* d. *Carthew* v. *Brenton*, 6 Bing. 469; 4 M. & P. 186; 8 L. J. (O.S.) C. P. 143. S. P., *Doe* d. *Walker* v. *Stevenson*, 3 Bos. & P. 22.

It is no ground for staying proceedings for a forfeiture, that the plaintiff has previously brought an ejectment for the same premises in a different court, in respect of a former forfeiture, in which action a rule for entering a nonsuit was pending. *Doe* d. *Henry* v. *Gustard*, 4 Man. & G. 987; 5 Scott (N.R.) 818.

A rule for staying proceedings in ejectment, on the ground of an action of trespass relating to the same subject-matter pending in another court, was refused, the two actions being different in form and in their consequences. *Doe* d. *Geldart* v. *Tabram*, 5 Scott, 141; 6 L. J., C. P. 303; 1 Jur. 432.

Where a sole executrix and universal devisee propounded a will, and cited the heir-at-law and next of kin in order to have the will proved in solemn form, and the heir-at-law commenced two actions of ejectment to try the title, and applied to have the proceedings in the court of probate stayed till the result of the actions was known, the court refused to stay the proceedings, inasmuch as the result of the actions of ejectment would not affect the right to the personalty, as to which the validity of the will would have to be determined in any event. *Davies* v. *Devereux*, 35 L. J., P. 77; L. R. 1 P. 77; 14 W. R. 901.

The court refused to stay an action in the chancery division for account, though there was pending in a more advanced stage a common law action in which the same issues were raised by the plaintiff in the chancery division by counterclaim. *Ladd* v. *Puleston*, 52 L. J., Ch. 816; 31 W. R. 539.

The court, upon the hearing of a claim, made an order for taking accounts and executing a trust, and held, that the pendency of a suit by bill, in which the same accounts and directions would be necessary, and which sought additional relief in respect of alleged breaches of trust, was not a ground for staying the order upon the claim. *Scott* v. *Hastings* (*Lord*), 9 Hare, 35; 20 L. J., Ch. 530; 15 Jur. 572.

A judgment creditor of the defendant brought an action in the court of the county palatine of Lancaster to obtain a declaration that he had a charge upon certain lands of the defendant comprised in a certain deed of settlement, and to carry into effect the trusts of the settlement. He obtained judgment for a declaration of his charge, and for administration, inquiries, and a receiver. Afterwards one of the beneficiaries under the settlement brought an action in the high court to carry into effect the trusts of the settlement, and charging the trustees with a breach of trust. Judgment was obtained and inquiries directed, including one as to the breach of trust:—Held, that the plaintiff in the palatine action was not a stranger to the action in the high court, and was entitled to the conduct of that action; and he undertaking to add the inquiry as to the breach of trust to the inquiry in the palatine action, the court stayed all proceedings in the action in the high court. *Townsend* v. *Townsend*, 23 Ch. D. 100; 48 L. T. 694; 31 W. R. 735—C. A.

The court refused to hear a claim on a matter which was the subject of two bills in another branch of the court. *Marsh* v. *Marsh*, 2 W. R. 615.

A defendant put in an answer to a bill to perpetuate testimony. He afterwards moved to stay all further proceedings, upon the ground that in another suit, since instituted, the matters in question had been made the subject of judicial investigation. The motion was refused, with costs. *Ellice* v. *Roupell*, 32 L. J., Ch. 778; 9 Jur. (N.S.) 533; 8 L. T. 486; 11 W. R. 679; 2 N. R. 150.

The court will not suffer two suits to go on where under the decree in the first suit all that is asked for by the second suit can be obtained, and it matters not that the decree made in the second suit is of a more complicated kind than would be pronounced in the suit which it is desired shall proceed, and that there may, on that account, be some delay. *Smith* v. *Guy*, 2 Coop. C. C. 289.

Where the suit in which there has been no decree so far differs from the suit in which the decree has been pronounced, that something may be asked for in that suit which cannot be had under the decree already pronounced in the other suit, there can be no stay of proceedings. *Ib.*

The real question is, whether the party desirous of bringing the second cause to a hearing can get all that he wants in the suit in which there has been a decree. *Ib.*

If the party, desirous of bringing the second cause to a hearing, can get all that he wants in the suit in which there has been a decree, any person interested has a right to come to the court, and stay the proceedings of such party. *Ib.*

An order was made for winding up an abortive company. Afterwards a bill was filed by a shareholder, on behalf, &c., against the directors, complaining of their acts, and seeking to have the accounts taken, to make them responsible, and to have the deposits returned. The court, on motion, stayed the proceedings in the suit. *Parbury* v. *Chadwick*, 12 Beav. 614; 19 L. J., Ch. 562; 14 Jur. 636.

Although different suits may involve the same subject-matter and the same parties, the court will not decline to make a separate decree in each suit, unless the frame of the two suits, and the relative position of the parties to each, be the same. *Godfrey* v. *Maw*, 1 Y. & Coll. C. C. 485.

W. P. deposited with a bank as security for a loan, two leases, alleged to be the property of H. P., his wife. W. P. having died, an action for the administration of his personal estate was brought against his personal representative by the bank. H. P. was not a party to this action. H. P. having brought an action against the bank to recover the leases:—Held, that this latter action should not be stayed pending the administration action, as the full relief claimed by the plaintiff could not be given in the administration action. *Parke* v. *Ulster Bank*, [1894] 2 Ir. R. 652.

Res judicata.]—After judgment in an action the plaintiff commenced another action substantially for the same cause:—Held, that the court would consider and decide whether any real

difference distinguished the two actions, and that proceedings should be stayed where the distinction was merely colourable. *Breen* v. *Cooper*, 18 W. R. 630. See also *Reichel* v. *Magrath* and following cases, ante, col. 284.

Election.]—When a plaintiff sues a defendant for the same matter in two courts in this country, such a proceeding is primâ facie vexatious, and the court will generally, as of course, put the plaintiff to his election, and stay one of the suits. And the same principle applies where one of the actions is in the queen's courts in Scotland or Ireland, or any other part of the queen's dominions. Under the present practice *Dillon (Lord)* v. *Alvares* (4 Ves. 357) cannot be relied on as an authority. *McHenry* v. *Lewis*, 52 L. J., Ch. 325; 22 Ch. D. 397; 47 L. T. 549; 31 W. R. 305—C. A.

Two actions were brought, one by A., a merchant at Naples, against B., the other by B. against A., for alleged breaches of two several contracts for cargoes of timber to be shipped at Moulmein, and to be delivered at Genoa. In the first action A. recovered judgment for 3,801*l.* 13s. 4d., and on the 14th November, 1866, the amount was paid to his attorney, who carried on business in the city of London, and on the same day an attachment from the mayor's court was served upon A.'s attorney in an action brought in that court at the suit of B. for the same cause as that for which the action of B. against A. had been brought. The court ordered that the proceedings in the action be stayed, unless B. elected within a week to abandon the proceedings in the mayor's court, deeming the proceedings in the mayor's court to be unfounded and vexatious. *Frith* v. *Guppy*, 36 L. J., C. P. 45; L. R. 2 C. P. 32; 12 Jur. (N.S.) 1011; 15 L. T. 616; 15 W. R. 280.

When Relief claimed already claimed in another Action.]—An action in which relief is claimed, which has been already claimed in another action, will be stayed except so far as it claims relief not included in the former action. *Morton* v. *Quick, Aird, In re*, 26 W. R. 441—C. A.

An action having been brought by an assignee under a bill of sale, his title being founded on a notice given under it, which, being objected to as invalid, a rule to enter a nonsuit was pending—afterwards he brought another action for the same goods, but founded on a title which had subsequently arisen (by reason of the bill of sale having become absolute), and, the defendant not agreeing to a stet processus in the former action without costs, the court allowed both actions to proceed. *Marshall* v. *Goadby*, 11 W. R. 365.

The court will not stay proceedings in an action of libel, on the ground that the libel complained of has been previously made the subject of an unsuccessful application to the queen's bench for a criminal information. *Wakley* v. *Cook*, 4 D. & L. 702; 16 L. J., Ex. 225; 11 Jur. 377.

On the trial of an action for libel in the common pleas, to which a justification was pleaded, the plaintiff's counsel, after his reply, elected to be nonsuited. The plaintiff then brought an action in the queen's bench for the same libel, and on the 13th of January delivered a declaration, which was the same as in the first action. On the 14th of January the defendant's costs in the first action were taxed; on the 21st he obtained time to plead; on the 22nd he took out a summons to stay proceedings in the action until the plaintiff had paid the costs of the first action and given security for the costs of the second; on the 24th the judge indorsed the summons "No order, without prejudice to any application to the court"; on the 30th a rule in similar terms was served upon the plaintiff's attorney. In the meantime the defendant had pleaded, his plea being the same justification, and issue being joined, the plaintiff, on the 28th, gave notice of trial, and delivered briefs to counsel before the service of the rule. When the plaintiff commenced the first action he was bankrupt, and his discharge had been suspended for one year from the 13th of May, 1862, with protection for one month. The court, in the exercise of its discretion, made the rule absolute for staying proceedings, but discharged so much of it as related to security for costs. *Prowse* v. *Lowdale*, 3 B. & S. 896; 32 L. J., Q. B. 227; 9 Jur. (N.S.) 1236; 8 L. T. 314; 11 W. R. 643.

The tenant for life under a settlement having been served with the decree made in a suit instituted to administer the trusts of the settlement, and to which he had not been made a party, then filed a bill for the same purpose, which contained general allegations of breaches of trust. Afterwards he came in under the decree and attended all the proceedings in the first suit, and, at the same time, continued to prosecute his own suit. On the application of the trustees of the settlement, who were the defendants in both suits, the court stayed all proceedings in the second suit on the ground that the tenant for life by his conduct had adopted the decree made in the first suit, and had not sufficiently charged the trustees with wilful default. *Askew* v. *Woodhead*, 28 L. T. 465; 21 W. R. 573.

Where, in an action for work and labour, the plaintiff obtained a verdict, but the court granted a new trial, on the ground that he ought to have declared specially, and he thereupon, without discontinuing that action, brought another for the same cause, declaring specially; the court stayed the proceedings in the latter action until the former was disposed of. *Haigh* v. *Paris*, 16 M. & W. 144; 4 D. & L. 325; 16 L. J., Ex. 37.

A plaintiff agreed with the defendant to withdraw the record in an action on two cheques, which stood ready for trial in the exchequer, upon the terms that defendant should pay the debt, interest and costs, on or before a certain day, or in default of payment, that plaintiff should be at liberty to sign judgment, and that a judge's order should be given to secure payment. The exchequer having afterwards set aside the order, which had been made in pursuance of the above agreement, plaintiff brought an action on the agreement in the common pleas:—Held, that these facts formed no ground for staying the proceedings in the action in the common pleas. *Wade* v. *Simeon*, 3 D. & L. 27; 1 C. B. 610; 14 L. J., C. P. 188; 9 Jur. 472.

A rule nisi had been obtained for setting aside a fi. fa., because after the trial, and before judgment, the action was settled. It was sworn, in opposition to this rule, that the party had acted under a mistake, and had been imposed upon. The rule, however, was made absolute; and, an action having been brought upon the judgment, the court made a rule absolute for staying the proceedings in the action commenced on similar affidavits; but, as the setting aside of the

judgment was not included in the first rule, the rule was made absolute without costs. *Philpot* v. *Thompson*, 2 D. & L. 18; 13 L. J., Q. B. 231; 8 Jur. 647.

The court will not stay proceedings in an action by the assignee of an insolvent debtor, on the ground that an action brought by the insolvent for the identical cause, has been referred by order of nisi prius to an arbitrator, and the reference is still pending. *Sturgis* v. *Curzon* (*Lord*), 7 Ex. 17; 21 L. J., Ex. 38.

A defendant, after a decree to account, though called an actor in the suit, yet is not prevented becoming plaintiff in another suit for the same matter. *Bayley* v. *Edwards*, 3 Swanst. 703; 19 R. R. 289.

Motion in a suit, in which no decree had been obtained, to stay further proceedings in a suit in which a decree had been obtained, refused, there being no misconduct or other special circumstances to induce the court to interfere. *M'Hardy* v. *Hitchcock*, 12 Jur. 781.

Stay of Action pending Administration Action.]—C., being executor of L., mortgaged certain hereditaments, which had formed part of the estate of the deceased. The plaintiff, who became mortgagee, afterwards sued to recover possession of them from her lessees on the ground of a forfeiture for nonpayment of rent. C. obtained leave to defend the action as landlord. A suit had been instituted by C. in the chancery division to administer the estate of L., and an inquiry had been directed as to the mortgage. An order was obtained by C. staying the proceedings in the action for the recovery of the hereditaments until the proceedings in the chancery division should have concluded:—Held, that the order was bad, and must be set aside. *Crowle* v. *Russell*, 48 L. J., C. P. 76; 4 C. P. D. 186; 39 L. T. 320; 27 W. R. 84—C. A.

A creditor issued a writ for the administration of the personal estate of S., and subsequently obtained leave to amend his writ so as to include the real estate. Before any further steps were taken the executors of S. filed a writ and obtained a full administration decree, and then applied for the stay of proceedings in the creditor's action:—Held, that the creditor's action must be stayed, and that the plaintiff in the executors' action was entitled to the conduct of the administration. *Smith, In re, McMurray* v. *Mathew*, 33 L. T. 804.

An action having been brought in the common pleas division against the defendant as executor de son tort of B., deceased, the defendant obtained letters of administration to B., and then issued a writ in the chancery division for administration of the real and personal estate of the deceased, and before obtaining a decree the defendant moved the common pleas division for an order to restrain the plaintiff's action, and obtained an order staying the proceedings pending the administration suit:—Held, that the court had no jurisdiction to restrain the plaintiff's action, as no decree for administration had been obtained. *Higgins* v. *Browne*, 16 L. R. Ir. 173—C. A.

Action in Formâ Pauperis.]—A plaintiff brought an action for work, but failed to prove that any work was actually done; he nevertheless obtained a verdict, which the court afterwards set aside, directing a nonsuit to be entered. He then commenced a fresh action for the same cause, suing in formâ pauperis, and declaring upon a special contract. The court stayed the proceedings in the latter action until the former should be disposed of. *Haigh* v. *Paris*, 16 M. & W. 144; 4 D. & L. 325; 16 L. J., Ex. 37.

Proceedings stayed until payment of costs of former suit by same party suing in formâ pauperis in cases only of great vexation. *Wild* v. *Hobson*, 2 Ves. & B. 112.

Application by Party Working Mine under Licence—Ejectment.]—An individual working a mine under a licence giving no interest in land, moved to stay proceedings in an ejectment which had been commenced against him, but the court refused the rule. *Doe* d. *Johns* v. *Roe*, W. W. & D. 66; 1 Jur. 151.

Mode of Application for.]—A plaintiff had sued the defendant for negligence, per quod the plaintiff became liable for certain sums, and lost the custom of A. The cause was referred under an order of nisi prius, by which the plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of the plaintiff, who nevertheless sued the defendant again, the new declaration differing from the old one in stating that the plaintiff had paid the money he before alleged himself liable to pay, and had lost the custom of D., E., and F.:—Held, that the court could not stay proceedings on a summary application. *Dicas* v. *Jay*, 6 Bing. 519; 4 M. & P. 285; 8 L. J. (o.s.) C. P. 210.

Motion by a defendant, before decree, to restrain a co-defendant from prosecuting an action, or to stay all proceedings in the suit on an affidavit that the relief sought by the bill and by the action was identical. Refused, with costs. *Russell* v. *L. C. & D. Ry.*, 4 Giff. 403; 2 N. R. 507.

A creditor who has obtained an administration decree in the Lancaster palatine court, has no locus standi to move to stay proceedings under another decree subsequently obtained in a suit in the high court of chancery, to which he is not a party, and in which he has not proved his debt. *Bradley* v. *Stelfox*, *Yates, In re*, 1 N. R. 221—L.C.

Infants.]—Court will not, on motion, stay proceedings on one of the two bills for the same purpose, unless both are brought by the same person, or on behalf of an infant. *Gage* v. *Bulkeley*, Ambl. 103; 1 Ves. 544.

Two suits had been instituted on behalf of infants for the same purpose, and a decree had been obtained in the second. Upon motion to stay the first suit, the court ordered it to be stayed, giving liberty to the next friend in the second to apply for the conduct of the first. *Kenyon* v. *Kenyon*, 35 Beav. 300.

Two suits were instituted in behalf of infants, against trustees for administration, the first by a stranger to the infants, and the second by their father, as next friend. The second bill stated that the object of the first was to stave off inquiries from a defaulting trustee, and prayed relief against him in respect of the breaches of trust, and it was charged in affidavits, and not denied, that the next friend in the first suit was falsely described, and was a friend of the defaulting trustee. The court ordered the first suit to be stayed. *Virtue* v. *Miller*, 19 W. R. 406.

h. *Actions Commenced or Prosecuted without Authority.*

Action brought by Solicitor without Authority.]—Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant, as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party. In cases where no rule of practice is laid down by the new orders, and there is a variance in the old practice of the chancery and common law courts, that practice is to prevail which is considered by the court most convenient. *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 49 L. J., Ch. 231; 13 Ch. D. 310; 41 L. T. 637; 28 W. R. 217—C. A.

The name of a plaintiff having been inserted on the record without his knowledge, consent or authority, on motion by the defendants to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record:—Held, that the solicitors to the record who had purported to act for the said plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the defendants of the action and all the motions therein. *Nurse* v. *Durnford*, 49 L. J., Ch. 229; 13 Ch. D. 764; 41 L. T. 611; 28 W. R. 145.

The form of order in *Dundas* v. *Dutens* (1 Ves. 196) not followed. The practice of common law as laid down in *Reynolds* v. *Howell* (L. R. 8 Q. B. 398) followed. *Ib.*

When an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed without payment of costs. *Reynolds* v. *Howell*, 42 L. J., Q. B. 181; L. R. 8 Q. B. 398; 29 L. T. 208; 22 W. R. 18.

Where a person is made a plaintiff in an action without proper authority, and orders have been, without his knowledge, made against him, under which he is liable to pay costs to the defendant, the proper order to make is to stay all proceedings in the name of the person in question, and all proceedings against him in the action since he was added as a plaintiff, and to direct his name to be struck out for the purpose of future proceedings; the solicitor who wrongly made him a party must pay all his costs, and all the costs which he has been ordered to pay, and also all the defendant's costs, the costs of the person wrongly made plaintiff as between solicitor and client, and the costs of the defendant as between party and party, and in such costs must be included the costs of the application to be relieved from the consequences of the misjoinder. The rule laid down in *Reynolds* v. *Howell* (42 L. J., Q. B. 181; L. R. 8 Q. B. 398), and adopted in *Nurse* v. *Durnford* (49 L. J., Ch. 229; 13 Ch. D. 764), and *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (49 L. J., Ch. 231; 13 Ch. D. 310), applied. *Fricker* v. *Van Grutten*, 65 L. J., Ch. 823; [1896] 2 Ch. 649; 75 L. T. 117; 45 W. R. 53—C. A.

The rule that proceedings taken by a solicitor without proper authority will be annulled with costs, to be paid by him, does not apply unless he was aware of the circumstances which invalidated his authority; and notice from the other side is not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were not true. *Thomas* v. *Finlayson*, 19 W. R. 255. *See also* SOLICITOR.

Jurisdiction.]—The ground on which the court in a proceeding before itself will stay proceedings in an action instituted without authority in the name of a third party is that it has jurisdiction to prevent an abuse of its own process. *London and Blackwall Ry.* v. *Cross*, 55 L. J., Ch. 313; 31 Ch. D. 354; 54 L. T. 309; 34 W. R. 201—C. A.

Who made Party to Application.]—On an application by a defendant to stay proceedings, on the ground that the plaintiff's attorney is going on with the suit contrary to the express direction of his client, the plaintiff should be made a party to the rule. *Thatcher* v. *Aguilar*, 11 Ex. 436; 4 W. R. 149. See also *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, supra.

At what Period made.]—In an action for calls, after the cause had been set down for trial and made a remanet, the defendant applied to set aside the proceedings, upon the ground that the company was virtually extinct, and that the parties who had instituted the action had no authority to do so:—Held, that the application was too late, it appearing that the defendant had known all the facts for a long time. *Thames Haven Dock and Ry.* v. *Hall*, 5 Man. & G. 274; 6 Scott (N.R.) 342; 3 Railw. Cas. 441; 7 Jur. 238.

Action commenced under Void Power of Attorney.]—An application by a defendant to stay the proceedings in an action, was supported by an affidavit of some of the plaintiffs, disavowing the action and stating that it had been brought in their names under a power of attorney contained in a deed which was void for usury:—The court refused to stay the proceedings. *Tubb* v. *Dodd*, 2 L. M. & P. 97.

By Wife on Settlement without Trustee.]—An action was brought by a wife against her husband, on a settlement deed, in the name of the trustee. The court refused on the application of the husband to set aside the proceedings on the ground that the action was brought without the authority of the trustee, it appearing that an application had been made to the trustee, to consent to her name being used, and an indemnity against costs offered to her, which she had refused without assigning any reason. *Auster* v. *Holland*, 3 D. & L. 740; 1 B. C. Rep. 104; 15 L. J., Q. B. 229; 10 Jur. 786.

Action by Assignor of Debt.]—A. assigned to B., by way of security for a loan of 10,000*l.*, two sums of 5,000*l.* each, due from C. to A. under several deeds, and afterwards brought an action against C. upon those deeds:—The court refused to stay proceedings in the action at the instance of B. and C., and suggested that the proper course was to apply after judgment to stay execution. *Seppings* v. *Nokes*, 2 C. B. 292.

Plaintiff a Trustee for Another.] — Though after the recovery of a verdict the effect will be only to make the plaintiff a trustee for another person for half the amount recovered, the court will not stay the proceedings in an action against him on the payment of the half of the sum

sought to be recovered, but will leave the defendant to his remedy in equity. *Barlow* v. *Leeds*, 5 N. & M. 426 ; 1 H. & W. 479.

i. *For Irregularity.*

i. When Application should be made.

Within Reasonable Time.]—An application to set aside proceedings for irregularity must be made within a reasonable time after the irregularity occurs ; and therefore, where a defendant suffered two terms to elapse before applying for a rule on the master to review his taxation of costs, the court refused to grant him the rule. *Claridge* v. *M'Kenzie*, 2 D. (N.S.) 898 ; 6 Scott (N.R.) 171 ; 5 Man. & G. 251 ; 12 L. J., C. P. 131 ; 7 Jur. 329. S. P., *Chaffers* v. *Hunter*, 1 W. R. 165.

This rule applies as well to prisoners as to other persons. *Ib.* S. P., *Primrose* v. *Baddely*, 2 D. P. C. 350 ; 2 C. & M. 468 ; 4 Tyr. 370.

If a defendant conducts his cause in person it is no reason for delay in moving to set aside proceedings for irregularity. *Currey* v *Bowcher*, 9 D. P. C. 523.

Assignees of a bankrupt seeking to set aside a judgment against him for irregularity, must come within the same time after their appointment as the bankrupt must have done after he has had notice of the irregularity. *Alcock* v. *Sutcliffe*, 2 B. C. Rep. 313 ; 16 L. J., Q. B. 129 ; 11 Jur. 126.

If an application is made to a judge to set aside proceedings on the ground of irregularity, the question, whether or not the application is made in time, is entirely in his discretion, and the court will not review his decision in this respect. *Lane* v. *Newman*, 1 B. C. Rep. 93 ; 10 Jur. 925.

The law is the same, whether the judge refused or granted the application. *Ib.*

Where a judgment was irregularly signed, and execution levied on the 9th March :—Held, too late to apply to set aside the judgment on the 28th April following, either at the instance of the defendant himself or of his assignees, he having subsequently become bankrupt, although the latter were not aware until the 7th April of the irregularity existing in the judgment. *Weedon* v. *Garcia*, 2 D. (N.S.) 64 ; 7 Jur. 130.

Application may be made to set aside a judgment for irregularity the day after serving notice of executing a writ of inquiry. *Amos* v. *Smith*, 7 D. P. C. 866.

Where there is an irregularity in any proceeding had in vacation, and there is time in the course of that vacation to apply to a judge, it is imperative upon the party complaining to do so ; and he cannot move to set aside the proceedings till the first four days of the next term, though there has been no intermediate step taken. *Cox* v. *Tulloch*, 2 D. P. C. 47 ; 3 Tyr. 578 ; 1 C. & M. 531 ; 2 L. J., Ex. 233.

But an application to set aside an interlocutory judgment for irregularity, after notice to execute a writ of inquiry on the 4th of November, will be too late on the 12th. *Scott* v. *Cogger*, 3 D. P. C. 212.

Judgment for want of a plea was signed on the 17th April, and a summons was taken out for setting it aside, which was discharged on the 23rd, execution issued on the 27th, and on the 28th defendant moved the court to set aside the judgment for irregularity : —Held, that the application was too late. *Shield* v. *Quick*, 8 M. & W. 289 ; 9 D. P. C. 751 ; 10 L. J., Ex. 270.

When a defendant was wrongfully arrested under a ca. sa. on the 14th of August, and the application for his discharge was not made until the 11th of December :—Held, not too late. *Hodges* v. *Callaghan*, 2 C. B. (N.S.) 306 ; 26 L. J., C. P. 171 ; 3 Jur. (N.S.) 369.

Before further Step taken.]—A party may apply to set aside proceedings for irregularity at any time before the irregular party has taken a further step, if the latter has not by the delay of the former been induced to place himself in a worse situation than he would have been in if the other had come earlier. *Dand* v. *Barnes*, 6 Taunt. 5 ; 1 Marsh. 403.

ii. Grounds of Application should be Stated.

It is not necessary, in a rule nisi to set aside proceedings for irregularity, to specify the grounds of irregularity on which the party relies. *Rennie* v. *Bruce*, 3 D. & L. 946 ; 9 Jur. 597.

Where a party moves to set aside proceedings on the ground of irregularity, he should point out the first irregularity. *Hardwicke* v. *Wardle*, 2 B. C. Rep. 17 ; 4 D. & L. 739.

But it is not necessary to use the term "irregularity." *Harvey* v. *Bennett*, 2 Chit. 238.

A party must state at once all the grounds of his application. *Anon.*, 1 Chit. 126.

When a rule is drawn up for setting aside a judgment for irregularity, an objection that it was signed against good faith cannot be entertained (though the rule was moved on that ground), that not being an irregularity. *Smith* v. *Clark*, 2 D. P. C. 218.

iii. Imposition of Terms.

Of bringing no Action.]—The application for setting aside a judgment as against good faith is ex debito justitiæ, and the court will not impose on the defendant, as a condition for setting it aside, that he should bring no action. *Cash* v. *Wells*, 1 B. & Ad. 375.

On an application to set aside judgment and execution for irregularity, on the alleged ground that the judgment had been signed pending a summons for time to plead, which summons the plaintiff's attorney denied having received, the judge made an order setting aside the judgment and execution, without costs, but not embodying any decision as to the irregularity ; and he added a direction, that the defendant should bring no action. The defendant protested against this addition, but served the order upon the sheriff, who thereupon gave up the goods ;—Held, that defendant, having thus far availed himself of the order, could not apply to rescind that part which forbade bringing an action. *Pearce* v. *Chaplin*, 9 Q. B. 802 ; 16 L. J., Q. B. 49.

When, execution having been issued prematurely, the defendant has applied to a judge to set the same aside, with costs, the judge may, on granting such application, impose the terms that no action be brought, and the court will not afterwards review the exercise of such discretionary power by rescinding that portion of the judge's order, which imposes those terms, although the order has not been drawn up or acted on by the defendant. *Bartlett* v. *Stinton*, 35 L. J., C. P.

238 ; L. R. 1 C. P. 483 ; 12 Jur. (N.S.) 342 ; 14 L. T. 287 ; 14 W. R. 614.

Where a judgment and execution are set aside for irregularity, the court has no power to impose the term on the defendant, that he should bring no action. *Adlam* v. *Noble*, 9 D. P. C. 322.

If the term of bringing no action is not imposed by the court at the time of disposing of the rule for setting aside the irregular proceedings, the successful party cannot be restrained from bringing an action in respect of the irregularity. *Attwood* v. *Greenwood*, 7 D. P. C. 534.

If a judge discharges a person, who has been arrested, out of custody, under an order, on his undertaking to bring no action, and he afterwards commences one in disobedience of such order, the court will not interfere to set aside the proceedings until the order is made a rule of court. *Jameson* v. *Raper*, 3 Moore, 65, n.

Performance of Terms a Condition Precedent.]—If the court directs any proceedings to be set aside on terms, the terms are a condition precedent, and till performance of the terms the proceedings stand, and the plaintiff may pursue them without application to the court. *Dodsley* v. *Hamilton*, 5 Taunt. 1 ; 14 R. R. 695.

iv. Waiver.

If a party lies by after an irregularity in the proceedings, and knowingly permits the other party to take a further step in the cause before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity as taking a step himself. *Gaire* v. *Goodman*, 2 Smith, 391.

There can be no waiver unless with a knowledge of the irregularity. *Cox* v. *Tullock*, 2 D. P. C. 47 ; 3 Tyr. 578 ; 1 C. & M. 531 ; 2 L. J., Ex. 233.

An irregularity is not waived by agreeing to terms where the party is under a misapprehension occasioned by the mistake of a judge in point of law. *Whalley* v. *Barnet*, 1 D. P. C. 607.

v. Other Matters.

Excuse for Irregularity.]—Irregularities in practice are not excused from liability to costs on the ground that the party has been misled by Impay's Practice or other unauthorised publications. *Crew* v. *Attwood*, 7 Taunt. 70 ; 2 Marsh. 337. And see *Lear* v. *Heath*, 1 Marsh. 19 ; 5 Taunt. 201 ; 14 R. R. 739.

Order that Plaintiff sign Judgment.] — The court will not grant a rule authorising a plaintiff to sign judgment for irregularity, but will leave him to take that step at his own peril. *Tynne* v. *Woodman*, 2 Tyr. 492.

Similar Application at Chambers.]—Where a defendant applied to a judge in vacation to set aside the plaintiff's execution for irregularity on a ground which the judge overruled, the defendant having brought a writ of error before final judgment signed, but not having communicated that fact to the judge, afterwards applied to the court to set aside the execution, on the ground that he had before brought a writ of error :—Held, that, this fact not having been communicated to the judge on the former application to him the defendant was now too late to take advantage of the irregularity. *Thorpe* v. *Beer*, 1 Chit. 124 ; 2 B. & Ald. 373.

When an application to set aside proceedings for irregularity primâ facie is too late, but the defendant means to rely upon the fact of a similar application having been made at chambers within the proper time, the rule should be drawn up on reading the order of the judge, or upon an affidavit of the fact. *Shugars* v. *Concannon*, 7 D. P. C. 391 ; 5 M. & W. 30 ; 8 L. J., Ex. 159.

Affidavit — Judgment signed.]—In order to set aside judgment for irregularity, it must distinctly appear by affidavit that judgment has been signed. *Classer* v. *Drayton*, 8 D. P. C. 184.

—— **Misdescription.**]—The plaintiff in the bill was described as S. P., of ——, spinster. After the defendant had filed his answer he discovered that the plaintiff was married. On a motion by the defendant to have the bill taken off the file for irregularity, the court ordered the proceedings in the cause to be stayed until further order, the defendant producing an affidavit that the fact of the plaintiff's marriage was not known to him at the time he filed his answer. *Pyke* v. *Halcombe*, 9 Jur. 368.

j. *Until Payment of Costs.*

Of Former Action.]—It is only in ejectment that the court ordinarily interferes to stop a second action till the costs due from the plaintiff in a former action for the same matter have been paid ; but the court might interfere in a second action of trespass, if it appeared to have been brought vexatiously and oppressively. *Danvers* v. *Morgan*, 17 C. B. 530 ; 25 L. J., C. P. 144.

When a plaintiff has failed in one action and brings another action against the same party or some one identified in interest with him for the same or what is substantially the same cause of action, the court will stay proceedings in the second till the costs of the first are paid, unless it is shewn that the plaintiff has a real probable cause of action. *Cobbett* v. *Warner*, 8 B. & S. 21 ; 36 L. J., Q. B. 94 ; L. R. 2 Q. B. 108 ; 16 L. T. 150 ; 15 W. R. 403. S. P., *Denis* v. *Gorman*, 4 L. R. Ir. 356.

If A. brings an action for money had and received against B. and others, and is nonsuited, and brings another action, being in form an action on the case, but proceeding on the same alleged causes of action against B., and previously to commencing the second action A.'s attorney has told B.'s attorney that unless B. will forego his costs arising on the nonsuit in the former action A. will commence the second action, this is such evidence of oppression and vexatious conduct as will induce the court to grant a stay of proceedings in the second action until the payment of B.'s costs of the first. *Clark* v. *Dixon*, 4 Jur. (N.S.) 715.

The court refused to stay proceedings in a qui tam action till the costs of a non pros. in a former action by a different plaintiff were paid. *English* v. *Cox*, Cowp. 322.

A bill for an account of the personal estate of W. J., an intestate, was filed by the legal personal representative of E. B. against the personal representatives of the deceased administrators of W. J., alleging that the administrators of W. J. had got in the greater part of the estate, and that E. B. was the sole next of kin The suit

was revived in 1877 by M., a subsequent personal representative of E. B., against X. and Y., as representatives of one of the administrators, and Z., as representative of the others, and was ultimately dismissed in 1880 with costs as against all three defendants on the ground that the title of E. B. as next of kin was not proved. After this M. took out administration de bonis non to W. J., and brought his action as such administrator against Z. for an account of the personal estate of W. J., received by the administrators whom Z. represented:—Held, that, although M. formerly sued as personal representative of E. B., and now sued as personal representative of W. J., the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid. *Martin* v. *Beauchamp (Earl)* 53 L. J., Ch. 1150; 25 Ch. D. 12; 49 L. T. 334; 32 W. R. 17—C. A.

Where a plaintiff, having failed in one action, brings a second action for the same cause of action, the second action must be stayed until the costs in the first have been paid. And this is the rule in Ireland, as in England. *Martin* v. *Beauchamp (Earl)* (25 Ch. D. 12) approved. *M'Cabe* v. *Bank of Ireland*, 59 L. J., P. C. 18; 14 App. Cas. 413; 61 L. T. 416; 38 W. R. 257—H. L. (Ir.).

A., in 1891, took possession of the house of C. A. gave up the house, and C. brought an action against him in the queen's bench division for trespass, and claimed damages. C. in his claim alleged possession. A. put in a defence that he (A.) in 1891 was in possession, and if the plaintiff C. was in possession, that he (C.) was wrongfully in possession. A. then withdrew his defence, and was ordered to pay the costs of the action. A. then brought an action against C. in the chancery division asking for a declaration that he was entitled to the property, and for possession:—Held, that the cause of action was substantially the same as that in the action in the queen's bench division, and that the court had jurisdiction to stay proceedings in the second action until payment of the costs of the first action. *Hall* v. *Paulet*, 66 L. T. 645.

Second action not stayed, as it did not appear that the effect of the second could be produced by a fair amendment of the first. *Budge* v. *Budge*, 12 Beav. 385.

It is an established rule that a plaintiff will not be allowed to institute a second suit for a like matter against parties to a former suit by him, in which a decree with costs was made against him, until those costs have been paid. *Ernest* v. *Partridge*, 8 L. T. 762.

The next of kin of a testator instituted a suit for administration with a will annexed bearing date 1868, of which the sole executor and universal legatee was the testator's wife, who predeceased him. In opposition, parties claiming to be legatees set up the contents of a later will alleged to have been executed in 1877 or 1878, but which could not be found. The court of appeal decided that there was not sufficient evidence of the contents of the second will, and their decision was affirmed in the house of lords. A fresh suit for probate of the second will was then commenced by the executor of the testator and residuary legatee of the will of 1877-8, who had been the confidential solicitor of the deceased, and who had acted as solicitor for the legatees all through the litigation. This suit was founded upon fresh evidence of the contents and execution of the second will:—Held, that although the plaintiff had been privy to the prior action, an application to stay the proceedings generally could not be granted, but that the proceedings ought to be stayed until the costs of the plaintiffs in the prior action had been paid. *Peters* v. *Tilly*, 55 L. J., P. 75; 11 P. D. 145; 35 W. R. 183.

The plaintiff filed his bill in chancery, and dismissed it after answer; he then filed another bill in exchequer for same matter. Proceedings stopped till costs in chancery paid. *Baldwyn* v. *Malo*, 3 Anstr. 835.

Practice of staying proceedings till costs of former proceedings paid is not applied to the case of a suit, as ejectment at law, and a suit in the spiritual court by some of the next of kin disputing, as paupers, a will, on the ground of incapacity, the plaintiff in equity being another next of kin. *Wild* v. *Hobson*, 2 Ves. & B. 105.

An action was brought by a married woman by her next friend, and an order was made that the next friend should give security for costs on the ground of poverty. That order not having been complied with, the action was dismissed with costs. Afterwards the plaintiff by a different next friend brought another action for the same purpose:—Held, that the second action ought to be stayed till the costs of the first action were paid. *Hind* v. *Whitmore* (2 K. & J. 458) not followed. *Payne, In re, Randle* v. *Payne*, 52 L. J., Ch. 544; 23 Ch. D. 288; 48 L. T. 194; 31 W. R. 509—C. A.

A plaintiff having been nonsuited in an action of slander in which the defendant had pleaded a justification, commenced, without having paid the defendant's costs, a second action in formâ pauperis for substantially the same slander as that declared upon in the first action and also for other slanderous words spoken on the same occasion as that slander. The court stayed the proceedings in the second action until payment of the costs of the first. *Hoare* v. *Dickson*, 6 D. & L. 577; 7 C. B. 164; 18 L. J., C. P. 158.

The plaintiff's counsel at the trial of an action for libel, after the evidence on both sides was before the jury, elected in the course of his reply to be nonsuited. The plaintiff then commenced a second action, and delivered the declaration on the 13th January, shewing that the cause of action was the same in both cases. After obtaining time to plead, the defendant took out a summons on the 24th January to stay the second action till the costs of the first were paid. No order was made on the summons, but the defendant got further time to plead, and then applied to the court and obtained a rule nisi on the 30th January to stay the second action till the costs of the first were paid. The plaintiff was an uncertified bankrupt and keeping out of the way:—Held, that this was a proper case for staying the second action till the costs of the first were paid, and that the application was in time. *Prowse* v. *Loxdale*, 3 B. & S. 896; 32 L. J., Q. B. 227; 9 Jur. (N.S.) 1236; 8 L. T. 314; 11 W. R. 643.

Previous Ejectment.]—The court will stay the proceedings in a second ejectment until the costs are paid of a prior one, even though brought by a third person, or for different premises, if the title is the same. *Keene* d. *Angel* v. *Angel*, 6 Term Rep. 740. S. P., *Doe* d. *Carrell* v. *Roe*, 1 Chit. 195; *Doe* d. *Mudd* v. *Roe*, 8 D. P. C. 444; 4 Jur. 607.

To entitle a defendant to apply for a stay of proceedings until the costs of a former unsuccessful action of ejectment are paid, it is not necessary that the parties should be precisely the same, or the premises sought to be recovered identical; it is enough that the plaintiff is the same in both actions, and that the same title in substance is in issue. *Tichborne* v. *Mostyn*, 41 L. J., C. P. 113; L. R. 8 C. P. 29; 26 L. T. 554; 20 W. R. 661.

To induce the court to abstain from acting upon this rule, it must be clearly made out that the plaintiff's want of success on the former occasion was the result of perjury or fraud, or some miscarriage for which he was not responsible. *Ib.*

Before moving for a stay of the proceedings, the defendant had given the plaintiff the twenty days' notice to proceed under the Common Law Procedure Act, 1852, s. 202:—Held, that this was no waiver of his right to move for a stay of the proceedings until the former costs should be paid. But, the probable amount of the costs being large, the court made it a condition that the time for proceeding to trial should be extended by six months. *Ib.*

Proceedings stayed till the costs of a former ejectment, brought by the father of the lessor of the plaintiff against the defendant's father on the same title, were paid. *Doe* d. *Feldon* v. *Roe*, 8 Term Rep. 645.

But refused where the ejectment was by the heir-at-law for part of the devised premises after he had failed in a previous action for other parts. *Doe* d. *Taylor* v. *Harris*, 4 M. & Ry. 569.

Where the lessor of the plaintiff was son and heir of the lessor in a former ejectment, and claimed under the same title, and against the same defendant, but brought his action for different premises, the court stayed proceedings until the costs of the first action were paid. *Doe* d. *Heighley* v. *Harland*, 10 A. & E. 761; 3 Jur. 1189.

Proceedings stayed in a second ejectment on the several demises of an insolvent debtor, and of his assignee, until payment of the costs of a former ejectment brought by the debtor. *Doe* d. *Standish* v. *Roe*, 2 N. & M. 468; 5 B. & Ad. 378.

Where a defendant improperly obtained a tenant right to the property sought to be recovered, and on the objection taken he was held to be estopped from impugning the lessor's title, and he afterwards brought another ejectment in respect of other property, part of the same estate, held under the same title, he was compelled to pay the costs of the former action in which he was defendant before he proceeded with his own. *Doe* d. *Thomas* v. *Shadwell*, 7 D. P. C. 527; 1 W. W. & H. 574.

If the defendant, in a former ejectment, who was then evicted, brings another ejectment for the same premises, the court will stay the proceedings until he pays the costs of the former cause. *Thrustout* d. *Williams* v. *Holdfast*, 6 Term Rep. 223.

Where several ejectments have been unsuccessfully brought, contesting a title to premises, if possession is obtained of those premises in a subsequent ejectment, founded on the same title as upon a vacant possession, the court will compel the plaintiff to stay his proceedings until the costs of the former ejectments are paid. *Harvey* d. *Beal* v. *Baker*, 2 D. (N.S.) 75; 6 Jur. 605.

In an ejectment by A. and his wife, claiming as devisees under a subsequent will of S. against B., who claimed as devisee under a prior will of S., the court stayed proceedings until the costs were paid in a former ejectment, brought by C. (brother of B., and claiming under the same prior will) against A. and a third party, who claimed under the same subsequent will, and in which judgment had been entered for the plaintiffs, the validity of the same wills being the question in both actions. *Doe* d. *Brayne* v. *Bather*, 12 Q. B. 941; 18 L. J., Q. B. 2; 12 Jur. 1087.

An ejectment having been brought by a son claiming as heir through his father, who was alleged to be dead, and a verdict having passed for the defendant, the father, who was shewn to have kept out of the way, to prevent his son from being nonsuited, brought a second action to recover the same premises. The court stayed the proceedings till the costs of the former action were paid. *Morgan* v. *Nicholl*, 3 H. & N. 215; 27 L. J., Ex. 335; 6 W. R. 542.

A. and B. jointly brought two ejectments on the same title, one against C., and the other against D., and recovered in both. In a third, brought by A. and B., on the same title, against C. and D., they had a verdict, and taxed their costs, but never made any express demand of them. The costs were never paid. Four years after the trial of the third cause, B. released to C. and D. his claim to the premises in dispute, in consideration of money, and of a covenant by C. and D. to suspend their claim against B. for costs. Afterwards A. died, and his son brought ejectment against C. and D. on the title relied upon in the former actions. Upon motion to stay proceedings till payment to C. and D. of the costs recovered by them:—Held, that the facts of this case did not take it out of the ordinary rule, and that the defendants were entitled to the stay of proceedings. *Doe* d. *Rees* v. *Thomas*, 4 A. & E. 348.

So, although growing crops were seized under a writ of possession in the first action, of sufficient value to cover the costs. *Doe* d. *Chapman* v. *Black*, 1 Arn. 537; 3 Jur. 246.

—— **In Action for Mesne Profits.**]—Proceedings were stayed until the costs of a former ejectment, and also of an action for mesne profits, were paid. *Doe* d. *Pinchard* v. *Roe*, 4 East, 585.

Yet the court will not extend the rule to include the damages in an action for mesne profits, however vexatious the proceedings of the present plaintiff may have been. *Doe* d. *Church* v. *Barclay*, 14 East, 233.

—— **Action against Sheriff.**]—A. and others recovered in ejectment against B. B. afterwards brought trespass against the sheriff for taking the goods of the tenant of the land in execution at the suit of A. The court will not stay proceedings in the action against the sheriff until the costs of the ejectment are paid. *Carnaby* v. *Welby*, 1 W. W. & H. 411; 7 D. P. C. 315; 2 Jur. 966.

Costs of Prior Action in other Division unpaid.]—The fact that a previous action, of which the costs are unpaid, has been commenced and discontinued in one of the common law courts, may be a good ground for staying proceedings until such costs are paid. *Cannot* v.

Morgan, 45 L. J., Ch. 50 ; 1 Ch. D. 1 ; 33 L. T. 402 ; 24 W. R. 91—C. A.

Proceedings in an ejectment would not have been stayed until the costs of a bill in equity, filed by the same party for the recovery of the same premises, were paid. *Doe* d. *Williams* v. *Winch*, 3 B. & Ald. 602.

First Action not tried.] — Where several successive ejectments had been brought to recover property, but not any one of them had been tried, the court refused to stay proceedings in a subsequent ejectment until the costs of the former had been paid. *Doe* d. *Blackburn* v. *Standish*, 2 D. (N.S.) 26 ; 6 Jur. 716.

Costs of Interlocutory Proceeding Unpaid.]—The plaintiff obtained a verdict in an action, and the queen's bench division having refused to grant a rule nisi for a new trial, the defendant obtained a rule absolute in the court of appeal. By the rule the plaintiff was ordered to pay the costs of the applications, which he failed to do : —Held, that the defendant was not entitled to an order to stay the proceedings until the costs were paid. *Morton* v. *Palmer*, 51 L. J., Q. B. 307 ; 9 Q. B. D. 89 ; 46 L. T. 285 ; 30 W. R. 951 ; 46 J. P. 358.

The plaintiff being resident out of the jurisdiction, and his bill having been reported prolix, the court restrained him from proceeding in the cause until he paid the costs of the reference and report of prolixity, though the defendant had neglected to compel him to give security for costs. *La Touche* v. *Lawlor*, 2 Jones, 629.

Proceedings on a bill which was amended after the allowance of a demurrer will not be stayed till the costs of the demurrer are paid. *Dick* v. *Dick*, 1 Hog. 390.

The plaintiff being in contempt for non-payment of costs due under an interlocutory order in the cause, all proceedings in the suit were stayed, on motion by the defendants, till the plaintiff should have cleared his contempt. *Bradbury* v. *Shawe*, 14 Jur. 1042.

Although mere non-payment of the costs of an interlocutory motion, which a plaintiff has been ordered to pay, is not per se sufficient ground for ordering further proceedings in his action to be stayed in cases where the party is acting vexatiously in withholding payment of costs, there is jurisdiction, upon application by summons, to stay proceedings until he has complied with the order for payment. *Neal, In re* (31 Ch. D. 437), and *Youngs, In re* (31 Ch. D. 239), questioned. *Wickham, In re, Marony* v. *Taylor*, 56 L. J., Ch. 748 ; 35 Ch. D. 272 ; 57 L. T. 468 ; 35 W. R. 525 —C. A.

Where a plaintiff is in contempt through breach of an order for payment of the costs of an application in the action, the court will, at the instance of the defendant, upon the action being called on for trial, stay all further proceedings until the plaintiff has cleared his contempt. *Neal, In re, Weston* v. *Neal*, 55 L. J., Ch. 376 ; 31 Ch. D. 437 ; 54 L. T. 68 ; 34 W. R. 319.

Where a party prosecuting proceedings is in contempt for not paying costs, the proceedings will be stayed. *Youngs, In re, Doggett* v. *Rerett*, 55 L. J., Ch. 371 ; 31 Ch. D. 239 ; 54 L. T. 50 ; 34 W. R. 290.

Some Causes of Action the same as in Former Action, and some different.] — Plaintiff had brought an action for slander and libel. The libel was contained in a letter written by the defendant, the words of which, as set forth in the statement of claim, the plaintiff failed to prove, and he was nonsuited. The costs of this action were not paid by the plaintiff. He then brought a second action for slander and libel against the same defendant. The statement of claim in the second action relied upon the same causes of action in slander, and three of the same causes of action in libel, as were contained in the statement of claim in the first action, but the plaintiff further relied upon other statements contained in the letter which had not been sued upon in the former action. The plaintiff having entered a nolle prosequi on the causes of action, as far as they were identical with those in the former action, the court refused to stay proceedings upon the additional causes of action relied on in the second action. *Bywater* v. *Dunne*, 10 L. R. Ir. 380.

Pauper.]—Proceedings in a suit by a pauper stayed till the costs of a previous suit in the court of chancery were paid. *Calvert* v. *Rooth*, 4 Y. & Coll. 514.

Bankruptcy.]—When a plaintiff, who has been ordered to pay the costs of a proceeding in a suit, becomes bankrupt, and the suit is revived by his assignee, the court will stay proceedings until payment of the costs which the plaintiff has been ordered to pay. *Cook* v. *Hathway*, L. R. 8 Eq. 612 ; 17 W. R. 1057.

Death of Parties.]—Where the costs of a former suit for the same purpose, which had been ordered to be dismissed for want of prosecution, were unpaid, the next friend in that suit having died insolvent :—Held, that the court could not stay proceedings in the new suit until those costs were paid. *Hind* v. *Whitmore*, 2 Kay & J. 458 ; 25 L. J., Ch. 394 ; 4 W. R. 379.

After answer, and after liberty to amend had been refused, a suit abated by the death of the plaintiff. The executors filed an original bill of a similar nature. The court stayed the proceedings in the second suit until the costs in the first had been paid. *Altree* v. *Hordern*, 5 Beav. 623 ; 12 L. J., Ch. 76 ; 7 Jur. 247.

A suit having become abated by the death of the sole plaintiff, his representatives filed a fresh bill against the former defendants and others, nearly to the same effect as the former bill. Proceedings in the second suit stayed till the plaintiffs had paid the costs of the former suit. *Long* v. *Storie*, 19 L. J., Ch. 148 ; 13 Jur. 1091.

A bill had been dismissed for want of prosecution. Before the costs were paid the defendant died, and the plaintiff filed another bill for the same object against the defendant's executor. The proceedings in the latter suit were stayed until the costs of the former were paid. *Spires* v. *Sewell*, 5 Sim. 193.

The Application.]—Bill dismissed with costs without prejudice to a new bill ; order will be made to stop plaintiff proceeding by a new bill, until he pays the costs, if the application is made early ; but if defendant had taken any step before applying for it, such order to stop will be refused. *Ouge* v. *Truelock*, 2 Moll. 41 ; Beat. 339.

The merits of the case cannot be discussed on the motion. *Montgomery* v. *Johnson*, 9 Ir. Eq. R. 221.

Dismissal on Non-payment.]—A bill was filed against A. and B. A. obtained an order to stay proceedings until the plaintiff had paid the costs of a former suit for the same object, and which had been dismissed with costs. The plaintiff, not paying the costs, was prevented from proceeding against A.; and, after considerable delay, B. procured the bill to be dismissed for want of prosecution. *Lautour* v. *Holcombe*, 10 Beav. 256.

Proceedings in a second suit were stayed until the costs of a former suit for the same purpose had been paid. After great delay, the court ordered that, unless the costs were paid within a limited time, the bill should stand dismissed. *Lautour* v. *Holcombe*, 11 Beav. 624.

A defendant submitted to the claim of the plaintiff except the costs of a distringas. The court would not stay the proceedings till the question was agreed upon or determined. *Field* v. *Robinson*, 7 Beav. 66.

When a plaintiff is in contempt for nonpayment of costs of an interlocutory application, and the defendant has obtained an order staying further proceedings on the plaintiff's part until such costs are paid, a motion by the defendant asking the court to fix a time for payment of the costs, and, in default, to dismiss the bill, is irregular. *Gould* v. *Twine*, 43 L. J., Ch. 381; 30 L. T. 243; 22 W. R. 398.

Acquiescence.]—The plaintiff, in a cross-suit, in which, as well as in the original suit, a decree had been made against him, with costs, moved for a further production of documents (which had been, as he alleged, withheld from him by reason of untrue statements in the answer), and for leave to file a supplemental bill in the nature of a bill of review. The motion, as regarded the documents, was refused, with costs; but, by consent, leave was given to file a supplemental bill on the plaintiff depositing 50*l.* The supplemental bill was filed; and pending the hearing of the appeal in the original suit, the defendants moved that all proceedings against them for want of answer in it might be stayed till after the plaintiff had paid the costs of the motion (for non-payment of which he was in contempt), or otherwise that the time for answering might be enlarged. The time was enlarged for four weeks, without prejudice to an application to stay proceedings. After the original decree had been affirmed, with costs, the defendant moved that all proceedings in the supplemental suit might be stayed until after the plaintiff should have paid the costs of the first-mentioned motion, and also of the original and cross-suits (for payment of which last-mentioned costs he was also in contempt):—Held, that the motion was properly refused as to the latter costs on the ground of acquiescence, but that, as regarded the former, the order ought to have been made. *Reynell* v. *Sprye*, 1 De G. M. & G. 712; 21 L. J., Ch. 664.

Costs should be taxed.]—A summons to stay proceedings in one suit, on the ground of nonpayment of costs in another, was taken out before the amount of costs had been ascertained by the master's certificate:—Held, that this proceeding was irregular. *Ernest* v. *Partridge*, 8 L. T. 762.

k. *Until after Discovery.*

Given by Foreign Government.]—Proceedings in a suit by a foreign government were stayed until the means of discovery were secured in a cross-suit. *Peru Republic* v. *Weguelin*, 44 L. J., Ch. 583; L. R. 20 Eq. 140; 32 L. T. 426; 23 W. R. 776.

Until Officer named to give Discovery.]—An original bill was filed by a foreign republic, and a cross-bill was filed by one of the defendants against the republic, and one of its officers was made a defendant for the purpose of discovery:—Held, that the court would not order proceedings in the original suit to be stayed until the officer of the republic had appeared. *Costa Rica Republic* v. *Erlanger*, 45 L. J., Ch. 145; 1 Ch. D. 171; 24 W. R. 151—C. A. Reversing 33 L. T. 632.

The United States of America having filed a bill, a cross-suit was instituted against them and the president, by the defendants, for discovery, and a motion being made to stay proceedings in the original suit until an answer had been put in in the second suit:—Held, that the United States of America, though a quasi-corporation, were to be treated, for the purpose of the suit, as any other foreign sovereign, and that they were bound to answer on oath by an agent, but that the president was not properly selected for that purpose, as not being necessarily under their control with reference to giving discovery. *United States of America* v. *Prioleau*, 36 L. J., Ch. 36; L. R. 2 Eq. 659; 12 Jur. (N.S.) 724; 14 L. T. 700; 14 W. R. 1012.

Jurisdiction.]—The court of chancery has not only full power to stay all proceedings in a suit till the plaintiff has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself: and where money has been paid into court, may direct the payment of that money out of court to the party entitled to it. *Liberia Republic* v. *Roye*, 1 App. Cas. 139; 34 L. T. 145.

Nominal Plaintiff—Discovery by Real Plaintiff.]—Where an action is brought by an agent on behalf of a principal who is resident abroad, and such agent is only a nominal plaintiff, the real plaintiff will be compelled to make discovery to the same extent as if he had been the plaintiff upon the record, and the action will be stayed until such discovery is made through the nominal plaintiff. *Willis* v. *Baddeley*, 61 L. J., Q. B. 769; [1892] 2 Q. B. 324; 67 L. T. 206; 40 W. R. 577—C. A.

l. *Other Grounds.*

No Debt due proved by Affidavit.]—The court will not stay proceedings in an action for a debt, though it clearly appears by affidavit that there is no debt due. *Smith* v. *Curtis* 2 D. P. C. 223.

The court will not stay proceedings in an action, although it is distinctly sworn that it is brought for a sum of money already recovered in a former action between the same parties;

that the plaintiff is in insolvent circumstances; and that, in the event of the action failing, the defendant will have to pay his own costs. *Jacques* v. *Ross*, 8 M. & W. 135; 9 D. P. C. 737; 5 Jur. 345.

Security for Costs.]—A plaintiff having gone abroad subsequently to his cause being set down in the special paper for argument, upon a motion for security for costs, the court directed that the demurrer should be argued, when, if judgment should be given for the plaintiff, proceedings should be stayed until security for costs was given. *Kemble* v. *Mills*, 1 Man. & G. 565; 8 D. P. C. 836; 1 Scott (N.R.) 402. *And see* COSTS.

Want of Interest.]—A testatrix, having indorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the will was granted, sued the bankers for a return of the bill or its value. The defendants were always willing to pay over the proceeds of the bill to the plaintiffs upon production of probate:—Held, that all proceedings in the action ought to be stayed until the plaintiffs obtained probate. *Webb* v. *Adkins* (14 C. B. 401) followed. *Tarn* v. *Commercial Banking Company of Sydney*, 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.

A sole plaintiff, whose interest failed pending a reference to take the accounts, was restrained from proceeding further in the suit. *Hay* v. *Bowen*, 5 Beav. 610; 12 L. J., Ch. 78; 6 Jur. 1119.

When the plaintiff is, after decree, found to have no title, the suit may be stayed on the application of a person who has been served with notice of the decree. *Houseman* v. *Houseman*, 1 Ch. D. 535; 34 L. T. 633; 24 W. R. 592—C. A.

When Defendant absconds.]—After a decree for specific performance of a contract to take a lease of a house, and an order on further consideration for payment of the sums certified to be due from him (for costs and damages), the defendant having absconded without paying the amount, the court, on motion by the plaintiff, ordered the contract to be rescinded and all further proceedings in the suit stayed, except as to the recovery of the sums already ordered to be paid. *Watson* v. *Cox*, 42 L. J., Ch. 279; L. R. 15 Eq. 219; 27 L. T. 814; 21 W. R. 310.

Equitable Defence.]—A defendant in an action having an equitable defence should obtain from the judge of the common law division leave to plead that defence, and cannot obtain from a judge of the chancery division a direction to stay proceedings in the common law division; and this prevails whether the action was commenced before or after the Judicature Acts came into operation. *Garbutt* v. *Fawcus*, 45 L. J., Ch. 133; 1 Ch. D. 155; 33 L. T. 617; 24 W. R. 91—C. A.

Unprosecuted Felony disclosed.]—Where a civil action claiming damages for acts which, on the face of the pleadings, amount to a felony, was instituted and came before the court upon an interlocutory matter:—Held, that the court should not of its own motion, where no application is made by the defendant, and where no prosecution was pending, stay the action on the ground of the felony not having been prosecuted. *A.* v. *B.* or *S.* v. *S.*, 16 Cox, C. C. 566; 24 L. R. Ir. 235.

Compliance with Plaintiff's Demand—Without Costs.]—When a defendant offers to comply with the plaintiff's demand, and would have done so, if asked, before bill filed, the court will stay all further proceedings without costs. *Rudd* v. *Rowe*, 39 L. J., Ch. 846; L. R. 10 Eq. 610; 22 L. T. 785; 18 W. R. 977.

Agreement or Compromise.]—The court, on motion, has sometimes stayed proceedings in a suit where the parties have entered into an agreement for that purpose. *Rowe* v. *Wood*, 1 Jac. & Walk. 337.

Under s. 24 of the Judicature Act, 1873, an agreement between the parties to an action to stay further proceedings upon specified terms can be enforced upon a summary application. *Eden* v. *Naish*, 47 L. J., Ch. 325; 7 Ch. D. 781; 26 W. R. 392.

Where a suit has been compromised, and proceedings in it stayed by an order of the court, the court, on setting aside the compromise as against a co-plaintiff, will allow him to proceed with the suit, though the proceedings remain stayed as against the other co-plaintiffs. *Brooke* v. *Mostyn* (*Lord*), 13 W. R. 248.

Plaintiff becoming Insane.]—After decree, a commission of lunacy issued against the plaintiff, who, being a married woman, was suing by her next friend. The court, on the application of her husband, a defendant, stayed the proceedings in the suit until the result of the proceedings under the commission was known. *Hartley* v. *Gilbert*, 13 Sim. 596.

A suit being properly instituted, the proceedings not to be stayed on the ground of the plaintiff's subsequently becoming imbecile. *Wartnaby* v. *Wartnaby*, Jac. 377.

Infant Plaintiff.]—Motion to stay a suit commenced in the name of infants for account of their property, upon affidavits representing that the suit was for their benefit, refused. *Lyons* v. *Blenkin*, Jac. 259; 23 R. R. 38.

Petition before Parliament.]—A suggestion that there is a petition before parliament is no cause for staying proceedings, but rather otherwise. *Gray's Inn case*, Lofft. 436.

Act of Parliament likely to be passed.]—In a qui tam action for penalties, the court refused to stay the proceedings upon a suggestion by affidavit that an act of parliament was likely to be passed the effect of which would be to relieve the defendant from the penalties. *Grant* v. *Ridley*, 5 Man. & G. 201; 6 Scott (N.R.) 176; 12 L. J., C. P. 151.

Where an action had been commenced to recover penalties for omissions mentioned in a statute, and an act had afterwards passed which, as respected some only of those omissions, enacted that no action already commenced to recover penalties in respect of them should be prosecuted without the consent of a judge:—Held, that the proceedings in the action subsequent to the passing of the latter statute must be set aside, the consent of a judge not having been obtained.

Grant v. *Browne*, 1 D. & L. 799; 7 Scott (N.R.) 508; 13 L. J., C. P. 23; 8 Jur. 177.

Discontinuance.]—A rule to discontinue is not a stay of proceedings. *Beeton* or *Baker* v. *Jupp* or *Gupp*, 15 M. & W. 149; 3 D. & L. 474; 15 L. J., Ex. 120; 10 Jur. 646.

Of Issue of Fact pending Appeal on Question of Law.]—Where a question of law has been decided on demurrer, or on a preliminary objection, and an appeal has been brought, the court will not in general stay the trial of the issues of fact pending the appeal. *Palmer's Application, In re*, 52 L. J., Ch. 224; 22 Ch. D. 88; 48 L. T. 52; 31 W. R. 33—C. A.

2. Practice.

To what Court Application must be made.]—An application to stay proceedings in an action must be made in the court in which the action is pending. No other judge or court has jurisdiction to stay proceedings. *Garbutt* v. *Fawcus*, 45 L. J., Ch. 133; 1 Ch. D. 155; 33 L. T. 617; 24 W. R. 91—C. A. *South of France Pottery Works Syndicate, In re*, 37 L. T. 260; 25 W. R. 870—C. A. *People's Garden Co., In re*, 45 L. J., Ch. 129; 1 Ch. D. 44; 24 W. R. 40. *Walker* v. *Banagher Distillery Co.*, 45 L. J., Q. B. 134; 1 Q. B. D. 129; 33 L. T. 502. *Rose* v. *Gardden Lodge, &c., Co.*, 47 L. J., Q. B. 338; 3 Q. B. D. 235; 38 L. T. 101; 26 W. R. 353. The decisions contra, viz., *Kingchurch* v. *People's Garden Co.*, 45 L. J., C. P. 131; 1 C. P. D. 45; 33 L. T. 381; 24 W. R. 41; *Needham* v. *Rivers Protection Co.*, 45 L. J., Ch. 132; 1 Ch. D. 253; 33 L. T. 403; 24 W. R. 317, cannot be supported.

Power of County Court Judge to restrain Action in High Court.]—The County Courts Act, 1865, s. 2, confers upon the judge of a county court all the powers and authorities, for the purposes of that act, possessed by a judge of the court of chancery, which at that time included the power of restraining by injunction an action in a superior court of common law. Such a power has been taken away from the court of chancery by s. 24, sub-s. 5, of the Judicature Act, 1873, and is therefore impliedly taken away also from a county court judge, who has moreover expressly conferred upon him by the same act (s. 89) the same powers as are possessed by the high court of justice. *Cobbold* v. *Pryke*, 49 L. J., Ex. 8; 4 Ex. D. 315; 28 W. R. 259.

Application without Delay.]—When an application is to be made for relief or indulgence it ought to be made without delay. *Fisher* v. *Begrez*, 1 D. P. C. 588. *And see preceding subheads.*

Clear Case for Relief.]—On an interlocutory application to stay an action, the plaintiff's equity must be clearly established, or he must pay the money into court; therefore where the equity rested on an alleged parol agreement, which was denied by the defendant, and the plaintiff declined to pay the money into court, a motion to stay the action was refused. *Grech* v. *Oram*, 39 L. J., Ch. 126.

Affidavits in support of a rule to set aside proceedings must shew a clear case for relief. *Preedy* v. *Lovell*, 4 D. P. C. 671.

Costs on Stay.]—When a defendant obtains the ordinary order to stay proceedings upon payment of costs, it is the duty of the master when taxing such costs to consider and determine questions raised by the defendant as to the necessity or propriety of proceedings for which charges are made in the bills of costs. *Wormsley, In re, Baines* v. *Wormsley*, 47 L. J., Ch. 844; 39 L. T. 85; 27 W. R. 36.

Although the general rule is, on setting aside proceedings for irregularity, that the successful party is entitled to his costs, still the court will not give them if they consider the matter one on which doubts might have fairly existed. *Jones* v. *Smith*, 3 M. & W. 526; 6 D. P. C. 557; 7 L. J., Ex. 143.

If, on moving to set aside proceedings for irregularity, the rule does not pray for costs, the court cannot give them. *Rex* v. *Middlesex Corporation*, 2 D. P. C. 5.

Where an inquisition of damages before the sheriff was excessive, and the court granted a rule for setting it aside, leaving it to an arbitrator to say for what sum the verdict should stand (nothing being said at the time as to costs), and the arbitrator reduced the damages considerably:—Held, that the plaintiff was not entitled to the costs of setting aside the inquisition. *Lewis* v. *Harris*, 4 D. & R. 129; 2 B. & C. 620.

Where a creditor brings an action against a company which to his knowledge is in voluntary liquidation, and the claim is admitted by the liquidator, the court will order the creditor to pay the costs of an application to stay the action. *Freeman* v. *General Publishing Co.*, 63 L. J., Q. B. 678; [1894] 2 Q. B. 380; 10 R. 366; 70 L. T. 845; 42 W. R. 539; 1 Manson, 366.

Proceedings stayed in a tithe suit as to one of several defendants on payment of costs. *Ould* v. *Griffin*, 8 Ir. Eq. R. 512.

Where a decree had been obtained in chancery for the general administration of a testator's assets, a bill previously filed in this court by an annuitant under the will against the executor was dismissed; and as the annuitant's bill had been filed with undue haste, she was not allowed the costs of the application to stay proceedings, although she was allowed her costs up to the time of notice of the decree. *Hayward* v. *Constable*, 2 Y. & Coll. 43.

A party prosecuting a suit after notice of decree in another suit under which he may obtain all the relief which he seeks in his own, may be refused his costs of an application to stay proceedings; but it is contrary to the practice to order him to pay such costs. Such application may be made by the plaintiff in the suit in which the decree has been made, if he have an interest in staying proceedings, as well as by the defendant, although such plaintiff be not a party to the other suit. *Portarlington (Earl)* v. *Damer*, 2 Ph. 262; 16 L. J., Ch. 370; 11 Jur. 443.

Where after answer a plaintiff moved to stay all proceedings on certain terms, and a defendant by a cross-motion moved to dismiss the bill with costs, the court, by one order on both motions, made the costs of the motion costs in the cause. *Ventilation and Sanitary Improvement Co.* v. *Edelsten*, 11 W. R. 613; 2 N. R. 53.

When dealing with the costs of an informal motion to stay proceedings, the court will not wholly disregard the merits of the suit. *Ib.*

When a suit is properly instituted, but after its institution circumstances occur which render its further prosecution impossible, it is in the discretion of the court to stay proceedings with or without costs; and the court will look at the

circumstances under which the suit was instituted to determine this question. *Elsey* v. *Adams*, 10 L. T. 212 ; 12 W. R. 586 ; 3 N. R. 696.

When the matters in dispute have been disposed of by an independent proceeding, the plaintiff may apply to stay proceedings, and the court will then dispose of the costs. But where the suit has been dismissed against some of the defendants for want of prosecution, the court is no longer able to adjudicate as to the costs, in the absence of the dismissed parties : and in default of prosecution the bill will be dismissed in the usual way, with costs. *Troward* v. *Attwood*, 27 Beav. 85.

c. PARTICULARS.

See R. S. C., 1883, Ord. XIX. rr. 6–8.

1. When Ordered, 319.
2. Practice, 328.
3. Sufficiency of, 335.
4. Amendment of, 337.
5. Binding Character of Particulars, 338.
6. In Ejectment.—*See* EJECTMENT.
7. On Infringement of Patent.—*See* PATENT.

1. When Ordered.

Account—Sum claimed.]—Where a plaintiff claims to recover a definite sum made up of a number of items he will be ordered to give particulars of demand, though he will not be ordered to do so if he only claims an account. *Blackie* v. *Osmaston*, 54 L. J., Ch. 473 ; 28 Ch. D. 119 ; 52 L. T. 6 ; 33 W. R. 158—C. A.

The administratrix of A., by statement of claim in an action against the administratrix of G., alleged that an arrangement had been made between A. and G. that sums contributed by them for the purpose of being lent to or applied for the benefit of C., to enable him to carry on a litigation, should be treated as a joint transaction, and that as soon as C. had established his title to the property for which he was suing and could repay the advances made him the advances made by A. and G. should be repaid out of the moneys recovered from him ; that during the litigation A. advanced, in pursuance of this arrangement, sums amounting to about 27,000*l.* ; that the advances made to C. were made through G. and in his name ; that the defendant had recovered a judgment against C. for the advances to him, and that a sum had been set apart in a suit in chancery in satisfaction of this judgment. The plaintiff claimed that it might be declared that the loans by G., in respect of which the judgment was recovered, were transactions for the joint benefit of A. and G. as partners, and to have the sums contributed by them respectively ascertained, and asked that the plaintiff might be declared entitled to a share in the benefit of the judgment and in the fund set aside to satisfy it. The defendant, before putting in a defence, applied for an account, with dates and items of the particulars of the 27,000*l.* mentioned in the statement of claim :—Held, that, the action not being a mere legal demand for an ascertained sum, but an equitable claim for an amount to be ascertained by an account, the particulars asked for were not required to enable the defendant to frame her defence, and that the plaintiff ought not to be ordered to furnish them. *Augustinus* v. *Nerincks*, 16 Ch. D. 13 ; 43 L. T. 458 ; 29 W. R. 225—C. A.

It was alleged by counter-claim to a redemption action that the mortgage comprised : (1) certain commission ; (2) a sum also secured by bills of exchange ; (3) a sum due on an open account, and that the mortgagee had received divers sums in respect of the bills of exchange and on the open account. The mortgagee counter-claimed for an account and foreclosure or sale. Particulars of the sums received by him on the bills of exchange and the open account were ordered to be given. *Kemp* v. *Goldberg*, 36 Ch. D. 505 ; 56 L. T. 736 ; 36 W. R. 278.

Particulars by Plaintiff of Credits.]—A plaintiff may be ordered to give particulars of items which are, in his claim, placed to the credit of the defendant. *Godden* v. *Corsten*, 49 L. J., C. P. 112 ; 5 C. P. D. 17 ; 41 L. T. 527 ; 28 W. R. 305.

The rule which formerly existed not to compel a plaintiff to state the items of sums for which he has voluntarily given credit to the defendant in his particulars of demand is, since the Judicature Act, no longer applicable, and the defendant can require the plaintiff to state such items, unless they are such as would be more within the knowledge of the defendant than of the plaintiff. Therefore where, in an action on a builder's contract, the plaintiff in his particulars, on a specially-indorsed writ, gave credit to the defendant for a lump sum "for work not performed," and for another lump sum for "bricks, goods, and works," the court held, that the defendant was entitled to have an account, with dates and items, as to these two lump sums. *Ib.*

In ordering further and better particulars, the court will not compel the plaintiff to give particulars of payments made by the defendant. *Fussell* v. *Gordon*, 13 C. B. 847.

The court will not compel a plaintiff suing for the balance of an account to furnish a statement of moneys received by him from the defendant. *Penprase* v. *Crease*, 1 M. & W. 36 ; 4 D. P. C. 711 ; 1 Tyr. & G. 468 ; 5 L. J., Ex. 105.

Where there is a debtor-and-creditor account, the particulars should specify the matters for which credit is meant to be given. *Mitchell* v. *Wright*, 1 Esp. 280.

And stating the debtor side only is not sufficient. *Adlington* v. *Appleton*, 2 Camp. 410.

The rule which requires the sum or balance claimed to be stated does not require the plaintiff to state the items in reduction of his demand ; it is sufficient if he states the credit which he gives generally, so as to shew the balance he claims. *Smith* v. *Eldridge*, 5 N. & M. 408 ; 1 H. & W. 527 ; 4 A. & E. 64.

A plaintiff is not bound to give the defendant a statement of the items of the sums for which he has given the defendant credit in his particulars. *Myatt* v. *Green*, 13 M. & W. 377 ; 14 L. J., Ex. 34.

Under Pleas of Payment, &c.]—A defendant who pleads payment of a sum of money may be compelled to furnish the particulars of the payment. *Ireland* v. *Thompson*, 4 Bing. (N.C.) 716 ; 6 Scott, 601 ; 1 Arn. 271 ; 7 L. J., C. P. 296 ; 2 Jur. 518.

But the court of exchequer refused to compel a defendant to deliver particulars of a plea of payment. *Phipps* v. *Sothern*, 8 D. P. C. 208 ; 9 L. J., Ex. 88 ; 4 Jur. 204.

The court ordered particulars of a plea of exoneration and discharge. *Coombe* v. *Stephenson*, 31 L. T. 585 ; 23 W. R. 137.

On Payment into Court.]—In an action against a carrier for the loss of, and injury to, goods sent to different places at different times, comprising a variety of claims specified in the particulars delivered under a judge's order, he paid a sum of money into court, in satisfaction of the plaintiff's claim:—Held, that the plaintiff was entitled to an account of the particular items of the demand in respect of which the sum was paid into court. *Baxendale* v. *G. W. Ry.*, 6 H. & N. 95; 30 L. J., Ex. 63.

But particulars of the parts of a plaintiff's claim in respect of which money is paid into court, will not be ordered, except under very special circumstances. *Thames Ironworks and Shipbuilding Co.* v. *Royal Mail Steam Packet Co.*, 10 C. B. (N.S.) 375; 30 L. J., C. P. 265; 7 Jur. (N.S.) 972; 4 L. T. 250; 9 W. R. 577.

The court refused to order such particulars in an action for extras and alterations upon a shipbuilding contract. *Ib.*

The court has a discretion to order a defendant to give particulars of the items of claim in respect of which he pays money into court, but it can only make such an order when the trial of the action will be facilitated and neither party embarrassed by it. *Orient Steam Navigation Co.* v. *Ocean Marine Insurance Co.*, 34 W. R. 442.

An action was brought by the plaintiff as lessor, against the defendants, as lessees, of certain premises for—(1) possession; (2) mesne profits; (3) damages for dilapidations and non-repair. The defence was a general denial of all liability, and a payment of 30*l.* into court, as sufficient to satisfy the plaintiff's claim in the action. A judge at chambers having made an order that the defendants should give to the plaintiff particulars in writing, stating in respect of which of the two heads of claim (mesne profits and damages for dilapidations) the payment into court was made, and if in respect of both, how much for each head:—Held, that the order was right, as the defendants ought to give the particulars asked for, apportioning the sum paid into the different heads of claim. *Rowe* v. *Kelly*, 59 L. T. 139.

Reasonable and probable Cause.]—In an action for malicious prosecution, where a defendant pleads reasonable and probable cause, the court will refuse to order particulars of the facts upon which he relies unless special circumstances are shewn why particulars should be ordered. *Roberts* v. *Owen*, 54 J. P. 295.

The plaintiff sued the defendant for having wrongfully made and signed an order, stating that the plaintiff was a person of unsound mind, in consequence of which the plaintiff had been assaulted and removed to a lunatic asylum and kept there against his will; and he also claimed damages for the libel contained in such order. The defendant, in his defence, pleaded (inter alia) reasonable and probable cause for believing the plaintiff to have been a person of unsound mind, and fit to be detained under care and treatment:—Held, that the allegation of reasonable and probable cause was an immaterial allegation, and that the defendant could not be ordered to give particulars thereof. *Cave* v. *Torre*, 54 L. T. 515—C. A.

Libel—Publication.]—In an action for libel brought by the plaintiff as director of a company against the defendants, a committee of the shareholders in the company, for statements contained in a report drawn up, and alleged to be maliciously published by them, the defendants had obtained, after the pleadings had been closed, an order for particulars of the occasion of any publication by them to persons other than shareholders:—Held, that the defendants were not entitled to such particulars, since the publication complained of clearly included publication to others than shareholders, though not expressly so stated, and sufficiently complied with the requirements of pleading as laid down under Ord. XIX. r. 4. *Roselle* v. *Buchanan* (16 Q. B. D. 656) distinguished, as applicable only to actions for slander. *Gouraud* v. *Fitzgerald*, 37 W. R. 265—C. A.

—— **Plea of Justification.**]—Defendant published articles alleging that the plaintiff, who was governor of Mauritius, had been charged by members of the council with sending to the colonial office garbled reports of their speeches. The articles were also alleged by the plaintiff to impute that he had in fact transmitted such garbled accounts. An action for libel having been brought, the defendant pleaded that the alleged libels were true in substance and in fact:—Held, that the plaintiff was entitled to further and better particulars, it not being clear whether the defence meant that what was charged against the plaintiff had been truly reported, or that what was reported to have been charged was in fact true. *Hennessy* v. *Wright*, 57 L. J., Q. B. 594; 59 L. T. 795; 36 W. R. 878—C. A.

A plea of justification in an action on a libel may be allowed, in a general form, when the charge is not matter indictable, the defendant rendering particulars of the charges intended to be justified. *Behrens* v. *Allen*, 8 Jur. (N.S.) 118.

A general plea of justification in an action of libel, where the libel complained of consists of a general charge against the plaintiff, is bad, unless the defendant, in his particulars, states specifically the facts upon which he relies in support of the charge. *Zierenberg* v. *Labouchere*, 63 L. J., Q. B. 89; [1893] 2 Q. B. 183; 4 R. 464; 69 L. T. 172; 41 W. R. 675; 57 J. P. 711—C. A.

The plaintiff applied for an order for particulars of a defence of justification pleaded to an action for libel contained in a review of a book written by him. The review stated that the plaintiff was, by his own confession, a most barefaced liar:—Held, that the plaintiff was entitled to particulars of the passages in his book on which the defendants relied in support of the defence of justification, and that such particulars must specify the pages in the book at which the several passages relied on occurred, and the first and last words of such passages. *Devereux* v. *Clarke*, 60 L. J., Q. B. 773; [1891] 2 Q. B. 582.

Slander of Title.]—A statement of claim alleged that the defendant had slandered the plaintiff's title to certain lands by publishing certain words "just before the exposure to sale by auction of said lands, whereby the persons desirous of purchasing were prevented from bidding," to the plaintiff's loss, &c.:—Held, that the defendant was entitled to an order for particulars of the occasions when and where such words were spoken, and also of the persons present on such occasions, and the best particulars the plaintiff could furnish of the persons who were desirous of purchasing, and were prevented by reason of the words complained of. *Roche* v. *Meyler*, [1896] 2 Ir. R. 35.

Slander—Names of Persons to whom Slander uttered.]—In an action for slander the court ordered the plaintiff, upon a summons taken out by the defendant before delivery of the defence, to give particulars of the names of the persons to whom the alleged slander was uttered. *Roselle* v. *Buchanan*, 55 L. J., Q. B. 376; 16 Q. B. D. 656; 34 W. R. 488.

A statement of claim alleged that T., "at the request and by the direction of the defendant, falsely and maliciously spoke and published of and concerning the plaintiff" certain slanderous words, which were set out:—Held, that the defendant was entitled to particulars of the persons to whom the words were uttered. *Bradbury* v. *Cooper*, 53 L. J., Q. B. 558; 12 Q. B. D. 94; 32 W. R. 32.

When particulars are required to be given of the names of persons who may have heard the defendant utter certain slanders in a public room, an order that the plaintiff is to deliver "the best particulars he can give of the persons present" when the slanders were uttered is correct, and will not be varied by the court. *Williams* v. *Ramsdale*, 36 W. R. 125.

Ejectment.]—*See* EJECTMENT.

—— **Claim as Heir-at-law—Pedigree.**]—In an action for recovery of land, where the plaintiff sets up a claim to possession as heir-at-law without further detail, a defendant in possession is entitled to particulars of the pedigree on which such heirship is based. *Palmer* v. *Palmer*, 61 L. J., Q. B. 236; [1892] 1 Q. B. 319.

Trespass to Land.]—In an action of trespass, where the locus in quo was of considerable extent, and related to a right to moor ships, the plaintiff was required to give particulars of the trespass. *Kirwin* v. *Jones*, 3 Hodges, 230.

Acts of Negligence.]—When a declaration in an action against the defendant for negligent navigation of his ship, causing injury, contains only general allegations of negligence on the part of the defendant in respect of navigation, and of keeping the machinery and the ship in good repair, the court will not require the plaintiff to give particulars of matters which he may suppose to constitute the negligence of the defendant, such being within the knowledge of the defendant and his servants, and not necessarily within the personal knowledge of the plaintiff. *George* v. *Watts*, 30 L. T. 60.

Negligent Driving.]—In an action for an injury by the careless driving of a servant of the defendant, the court refused to make an order for particulars of the injury sustained by the plaintiff. *Wicks* v. *Macnamara*, 3 H. & N. 568; 27 L. J., Ex. 419.

Action for Escape.]—In an action against the marshal of the King's Bench prison for an escape, the plaintiff was bound to give a particular of the escape relied upon, and the judge's order for a particular should require the precise day of the escape to be stated, which the plaintiff must state in his particular, if within his knowledge. *Davis* v. *Chapman*, 1 N. & P. 699; 6 A. & E. 767; W. W. & D. 273; 6 L. J., K. B. 142.

Fraud and Repudiation.]—To an action commenced by a company, and continued by the official manager under the winding-up acts, for calls on shares held by the defendant in the company, he pleaded that he was induced to become the holder of the shares by fraud, and within a reasonable time after he had notice of the fraud, and before he had received any benefit from the contract, he repudiated it:—Held, that the plaintiff was entitled to particulars of the acts of fraud and repudiation. *M'Creight* v. *Stevens*, 1 H. & C. 454; 31 L. J., Ex. 455; 6 L. T. 503; 10 W. R. 798.

Particulars granted on a general plea (by way of equitable defence) of fraud on the part of a cestui que trust. *Pitts* v. *Chambers*, 1 F. & F. 684.

Where, in an action of contract, the defendant in one paragraph of the defence pleaded fraud generally, an order was made, on the application of the plaintiff, for particulars of the acts of fraud relied upon in that paragraph, although the defence in subsequent paragraphs specifically set out certain alleged fraudulent representations. *Bastow* v. *Bradshaw*, 8 L. R., Ir. 30.

It is not enough in a statement of claim to refer to particulars of fraud, misrepresentation, breach of trust, wilful default, or undue influence previously furnished to the defendant. Such particulars must, under Ord. XIX. r. 6, be stated on the face of the pleadings. *Kingston* v. *Corker*, 29 L. R., Ir. 364.

In an action by a colliery company against coal merchants for fraudulent misrepresentation on the part of the defendants in selling coal falsely purporting to be the plaintiffs' coal, the plaintiffs by their statement of claim pleaded two particular instances of fraud, and also alleged generally divers other instances. The defendants admitted the two particular instances as occurring through the fraud of a clerk, but offered to make an affidavit that they knew of no other instances:—Held, that as the plaintiffs had made a substantial case, and the defendants had the means of ascertaining from their books whether further frauds had been committed, the plaintiffs were entitled to discovery before delivering particulars. *Waynes Merthyr Co.* v. *Radford*, 65 L. J., Ch. 140; [1896] 1 Ch. 29; 73 L. T. 624; 44 W. R. 103.

Fraudulent Sales—Names and Addresses of Purchasers.]—In an action to restrain the defendants from fraudulently selling inferior qualities of goods manufactured by the plaintiffs as their best quality, and from falsely and maliciously representing that the goods of the plaintiffs' manufacture were inferior to those of the defendants' manufacture, the plaintiffs were ordered to give particulars of the names and addresses of the persons to whom the goods had been sold, as well as the times and places of such sales:—Held, that the plaintiffs, by giving particulars of the times and places of the alleged sales, were giving to the defendants all the information that they required to enable them to meet the case made by the plaintiffs; and that it was not necessary to give particulars of the names and addresses of the purchasers. *Duke* v. *Wisden*, 77 L. T. 67—C. A.

Instigation to improper Act and improper Motives alleged.]—An action was brought by the plaintiff association against the defendant association, and the liquidator in the winding-up thereof, claiming that, notwithstanding a certain order made in the winding-up, the defendant association was liable to pay a certain sum of

money to the plaintiff association. The order had been made on the application of the liquidator postponing payment of that debt. The statement of claim alleged that the directors of the plaintiff association were shareholders of the defendant association, and had instigated and concurred in the liquidator's application for the purpose of escaping from their liability to calls which, as members of the defendant association, they would be under if the claim of the plaintiff association were enforced; and that the liquidator and the directors of the defendant association and their solicitors knew that the directors of the plaintiff association were also shareholders of the defendant association, and also the improper motives which actuated the said directors:—Held, that a line must be drawn between requiring the plaintiff association to make a sufficient statement to prevent the defendant association being taken by surprise at the trial, and requiring it to disclose the evidence on which it intended to rely; and therefore, that the plaintiff association must state whether the alleged instigation was verbal or in writing, and, if verbal, by whom it was made, and, if in writing, the date of such writing, and also give particulars of the improper motives which were alleged to have actuated the directors. *Briton Medical and General Life Association* v. *Britannia Fire Association*, 59 L. T. 888.

Defective Condition of Ship.]—In an action by the owners of cargo against the shipowners, for damage to the cargo caused by the alleged defective condition of the ship:—Held, that the defendants were entitled to particulars of the alleged defective condition of their ship. *The Rory*, 51 L. J., P. 73; 7 P. D. 117; 46 L. T. 757; 4 Asp. M. C. 535—C. A.

Breach of Covenants in Lease.]—In an action on a bond for breach of covenants in a lease, where breaches are not assigned in the declaration, copies of the covenant alleged to be broken are sufficient particulars of demand, if there is no plea of performance. *Souter* v. *Hitchcock*, 5 D. P. C. 724; W. W. & D. 361; 1 Jur. 658.

Plaintiffs not claiming to Recover.]—A plaintiff will not be compelled to give particulars of matters in respect of which he does not claim to recover. *Luck* v. *Handley*, 4 Ex. 486; 19 L. J., Ex. 29; 13 Jur. 962.

Special Damage.]—The court will not compel a plaintiff, suing for the breach of an agreement, and assigning by way of special damage, that he has incurred certain expenses, to furnish particulars of such special damage. *Retallick* v. *Hawkes*, 1 M. & W. 573; 1 Tyr. & G. 1134.

Breach of Warranty.]—Or, in an action for the breach of warranty of a horse, the court will not order the plaintiff to give particulars of the unsoundness complained of. *Pylie* v. *Stephen*, 6 M. & W. 813; 8 D. P. C. 871; 4 Jur. 852.

No Ambiguity.]—In an action on the case, the court will not require the plaintiff to deliver a particular of his claim, where, from the mode of alleging it in the declaration, there is no ambiguity as to the transaction in respect of which the action is brought. *Stannard* v. *Ullithorne*, 5 D. P. C. 370; 3 Scott, 771; 3 Bing. (N.C.) 326; 2 Hodges, 247.

Bill of Exchange.]—Where a plaintiff declares only on a bill of exchange, the defendant is not, except under very special circumstances, entitled to particulars of demand. *Brooks* v. *Farlar*, 3 Scott, 654; 3 Bing. (N.C.) 291; 5 D. P. C. 36; 2 Hodges, 264; 6 L. J., C. P. 26.

Life Policy—Particulars of Symptoms.]—In an action on a policy of insurance, one of the questions put as the basis of the proposal was, whether the deceased had ever been afflicted with or had any symptoms of any complaint. The defendant having pleaded that the answer to this was untrue, as the deceased had had disease of the stomach, the court compelled him to deliver to the plaintiff particulars of those symptoms. *Marshall* v. *Emperor Life Assurance Society*, 6 B & S. 886; 35 L. J., Q. B. 89; L. R. 1 Q. B. 35; 12 Jur. (N.S.) 293; 13 L. T. 281.

Seduction and Loss of Service.]—The plaintiff, in an action for the seduction of his daughter by the defendant and consequent loss of her services, alleged that the defendant, when engaging his daughter as servant, had entered into a contract to treat his daughter in a proper and becoming manner; but that the defendant had committed a breach of that contract by behaving to his daughter in an improper manner, namely, by seducing her whilst in his service, whereby she had become pregnant, and that in consequence of her pregnancy the plaintiff had lost her services. The defendant did not deny the seduction on oath, but sought to obtain particulars of the times and places at which the alleged connection between himself and the plaintiff's daughter had taken place:—Held, that under the circumstances the defendant, without denying the seduction on oath, was not entitled to an order for such particulars. *Thompson* v. *Birkley*, 47 L. T. 700; 31 W. R. 230. See *Knight* v. *Engle*, 61 L. T. 780.

In an action for seduction, to entitle the defendant to an order for particulars, he must shew special circumstances other than those which would tend to a mere restriction of the proof necessarily incident to such an action. *Lagan* v. *Gibson*, Ir. R. 9 C. L. 507.

A defendant in an action for seduction is not entitled to call for particulars without making an affidavit of merits. *Hanna* v. *Keers*, [1896] 2 Ir. R. 226.

Objections to Title on Sale of Property.]—In an action by a vendee against a vendor, to recover back the deposit, the conditions not being complied with, the defendant may obtain particulars of the grounds on which the plaintiff seeks to recover, to which the latter will be confined at the trial. *Squire* v. *Tod*, 1 Camp. 293.

So, in an action for the non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having alleged that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable," the court obliged the plaintiff to give particulars of all objections to the abstract arising upon matters of fact. *Collett* v. *Thompson*, 3 Bos. & P. 246.

In an action to recover back the deposit paid to the auctioneer upon the sale of an estate, on the ground of objections to the title, the defendant is entitled to particulars of the objections arising upon matters of fact, but not

of objections in point of law. *Roberts* v. *Rowlands*, 3 M. & W. 543; 7 L. J., Ex. 182.

Particulars stated the action to be brought to recover the deposit paid upon the sale of an estate, to which the defendant was unable to make a good title. A summons was taken out for better particulars, which was dismissed upon the plaintiff's attorney stating that the objections were matters of law only. Subsequently, a notice was delivered to the defendant's attorney, that the objections were set forth in the plaintiff's answer to the defendant's bill in chancery. At the trial it appeared that the only objection was matter of fact. The court refused a new trial, the defendant's attorney declining to make an affidavit that he had been misled. *Correll* v. *Cattle*, 5 D. P. C. 598; M. & H. 89.

Returning Officer—Action for Charges.]—In an action against a county council by a returning officer for his charges at an election the county council disputed the claim beyond a certain amount as not being "reasonable charges" under s. 2 of the Parliamentary Elections (Returning Officers) Act, 1875, particulars of the items objected to were refused. *James* v. *Radnor County Council*, 54 J. P. 614.

Highway—Acts of Dedication.]—In an action to restrain trespass on a road, the defendants pleaded that it was a highway, and were ordered to amend their defence so as to shew the mode or title in or under which they claimed that the road had become a highway. The defendants amended by alleging that the road had for many years been used by the public as of right and was a highway, having been dedicated to the public by the plaintiff and her predecessors in title or some of them. An order was then made that the defendants should deliver to the plaintiff full particulars of the nature of all acts of dedication relied on by the defendants, and if the defendants claimed by acts of dedication other than permissive user, particulars of such acts of dedication, with dates, and by whom made. The defendants appealed:—Held, that under the present system the court will oblige a party to give such information as to the nature of his case as is requisite to prevent his opponent from being taken by surprise at the trial, but that the order made went too far, and that the proper order was that if the defendants relied on any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made. *Spedding* v. *Fitzpatrick*, 58 L. J., Ch. 139; 38 Ch. D. 410; 59 L. T. 492; 37 W. R. 20—C. A.

Infringement of Trade Mark—Names of Persons deceived.]—In an action to restrain infringement of trade mark, the plaintiff alleged, by his statement of claim, that "divers persons" had been thereby induced to purchase the defendant's goods as the plaintiff's. After defence, the defendant took out a summons that plaintiff might give the names of the persons so induced to purchase:—Held, that defendant was entitled to the order. *Humphries* v. *Taylor Drug Co.*, 39 Ch. D. 693; 59 L. T. 177; 37 W. R. 192.

Infringement of Patent.]—*See* PATENT.

Breaches of Trust—General Allegations.]—Where in an administration action, the plaintiff alleged that the defendant, one of the executors, in various ways had misapplied parts of the rents and profits of the leaseholds, and thereby injured the plaintiff and committed breaches of trust, and the plaintiff specified one misapplication of a sum of 25*l.*:—On summons by the defendant, the court made an order striking out the general allegations unless the plaintiff furnished particulars within seven days. *Anstice, In re, Anstice* v. *Hibell*, 54 L. J., Ch. 1104; 52 L. T. 572; 33 W. R. 557.

Alleged False Entries in Books.]—A company which had bought the business of the defendants, and employed them to manage it, brought an action against them for an account of what was due from them under a guarantee that the profits should amount to a certain yearly sum. The statement of claim alleged that the defendants had made false entries in the books for the purpose of making their working expenses appear less than they had been, and so relieving themselves of liability under the guarantee. The defendants obtained an order for the plaintiffs to furnish particulars of the false entries alleged. The plaintiffs set out a list of the items complained of transcribed from the books with references to the parts of the books where they were found. The defendants applied for further and better particulars:—Held, that as an entry might be wrong in different ways, the mere specification of the entries complained of did not give the defendants sufficient information of the nature of the case they had to meet, and that the plaintiffs must state shortly as to each item the general nature of the objection they made to it. *Newport Slipway Dry Dock Co.* v. *Paynter*, 56 L. J., Ch. 1021; 34 Ch. D. 88; 55 L. T. 711—C. A.

Particulars in Probate Actions.]—*See* WILL.

2. Practice.

In Admiralty Division.]—The rule as to ordering particulars is the same in the Admiralty Division as in the Queen's Bench Division of the High Court. *The Rory*, 51 L. J., P. 73; 7 P. 117; 46 L. T. 757; 4 Asp. M. C. 535—C. A.

In Chancery Division.]—The Chancery Division has power to order a party to give particulars of pleading. If the action is a so-called common law action, as for money lent, particulars will be ordered almost as a matter of course, as in motions at common law before the judicature acts; but in so-called equity actions, as for money due under a partnership or charge, particulars will be ordered only where a strong case for their being allowed is shewn by affidavit, the ordinary practice being, in the absence of such case being made out, to direct a defence to be put in, if that can be done, after which the defendant may administer interrogatories. *Augustinus* v. *Nerinckx*, 16 Ch. D. 13; 43 L. T. 458; 29 W. R. 225—C. A.

Object of.]—The object of particulars is to inform the defendant of the nature of the plaintiff's claim, and to limit the proof of the latter to the amount therein mentioned: but it forms no part of the record itself. It cannot, therefore, be used in aid of the declaration. *Dempster*

v. *Purnell*, 3 Man. & G. 375 ; 4 Scott (N.R.) 30 ; 1 D. (N.S.) 168 ; 11 L. J., C. P. 33.

The object of particulars is to control the generality of the declaration, and a defendant is entitled to such particulars of the plaintiff's demand as will give him that information which a reasonable man would require respecting the matters against which he is called upon to defend himself. *Rennie* v. *Beresford*, 4 Railw. Cas. 129 ; 3 D. & L. 464 ; 15 M. & W. 78 ; 15 L. J., Ex. 78 ; 10 Jur. 76.

At what Time Application made.]—A British subject residing in France was there served with a writ of summons in the form prescribed by 15 & 16 Vict. c. 76, s. 18. The defendant appeared, and after declaration found that the cause of action did not arise within the jurisdiction of the court, whereupon he applied to set aside the writ, and proceedings under it :—Held, that the defendant, by appearing, had given the court jurisdiction ; in such case, the defendant should apply for particulars before appearance. *Forbes* v. *Smith*, 10 Ex. 717 ; 3 C. L. R. 505 ; 24 L. J., Ex. 167 ; 1 Jur. (N.S.) 383 ; 3 W. R. 214.

In an action for seduction particulars of the time and place of the alleged seduction will not be ordered on the application of the defendant before delivering his defence, unless the application is accompanied by an affidavit stating his intention to deny the seduction. *Knight* v. *Engle*, 61 L. T. 780. See *Roselle* v. *Buchanan*, ante, col. 323.

There is no rule as to the class of cases in which the delivery of particulars should be ordered before discovery, or discovery be ordered before the delivery of particulars. The order of the judge or court will depend upon the circumstances of each case. *Waynes Merthyr Co.* v. *Radford*, 65 L. J., Ch. 140 ; [1896] 1 Ch. 29 ; 73 L. T. 624 ; 44 W. R. 103.

—— **After Discovery.**]—Where the defendant has the means of knowing the facts in dispute, and the plaintiff has not, the defendant is not entitled to particulars until after he has given discovery. *Millar* v. *Harper*, 57 L. J., Ch. 1091 ; 38 Ch. D. 110 ; 58 L. T. 698 ; 36 W. R. 454—C. A.

The plaintiffs, who were the executors of a married woman, sued her husband to establish that a quantity of the furniture and other chattels comprised in an inventory which had been taken of the goods in the defendant's house, belonged to the separate estate of the wife. The husband applied for particulars of demand shewing which chattels they claimed :—Held, that the application ought to stand over till the husband had made an affidavit as to which of the articles belonged to the wife. *Ib.*

The statement of claim, in an action by a principal against his stockbrokers to open settled accounts, alleged fraud, and that the plaintiff was unable to give particulars before discovery. An application by the defendants for particulars was ordered to stand over till after a defence had been delivered. A defendant by delivering a defence does not waive his right to particulars. *Sachs* v. *Spielman*, 57 L. J., Ch. 658 ; 37 Ch. D. 295 ; 58 L. T. 102 ; 36 W. R. 498.

An inquiry as to damages was directed in an action to restrain the defendant from carrying on a certain trade in breach of his covenant. The defendant was ordered to make an affidavit of documents. This discovery was postponed until after the delivery by the plaintiffs of "a statement in writing shewing the various heads of claims for damages" :—Held, that such a "statement" would not prevent an abuse of discovery ; that it would be useless, for unless the plaintiffs obtained discovery first it could only be drawn in the most general way so as to include every conceivable head of claim, and that, therefore, the order postponing discovery must be discharged. *Maxim-Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, 62 L. J., Ch. 749 ; [1893] 3 Ch. 122 ; 2 R. 538 ; 69 L. T. 471 ; 42 W. R. 38—C. A.

Opening Settled Accounts—Allegations of Fraud—Particulars.]—The plaintiffs employed the defendants to purchase goods, as their agents, at the lowest possible prices. The plaintiffs sued for an account, and in their statement of claim alleged that the defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the defendants were stated in general terms, no particulars being mentioned. The defendants denied the charges, and pleaded a settled account :—Held, on an application for production of documents, that the plaintiffs were entitled thereto without giving particulars of fraud. *Whyte* v. *Ahrens*, 54 L. J., Ch. 145 ; 26 Ch. D. 723 ; 50 L. T. 344 ; 32 W. R. 649—C. A.

Effect of Particulars on Discovery.]—Ord. XIX. r. 6, which requires that where the party pleading relies upon any misrepresentation or fraud, he shall give particulars of it in his pleading, is a rule of pleading only ; and the generality of an allegation of fraud does not prevent discovery so as to enable the plaintiff to plead the fraud in detail — Per Bowen, L.J. *Leitch* v. *Abbott*, 55 L. J., Ch. 460 ; 31 Ch. D. 374 ; 54 L. T. 258 ; 34 W. R. 506 ; 50 J. P. 441.

Jurisdiction to Order after Matter Referred.]—By a judge's order, the defendant was required, within a limited time, to deliver particulars of set-off, and, in default thereof, the defendant was to be precluded from giving evidence in support of his set-off at the trial. The defendant neglected to comply with the terms of the order, and the cause was afterwards referred by an order of nisi prius ; and after the arbitrators had proceeded with the reference, a judge, during the assizes, made an order for the delivery of particulars of the set-off :—Held, that he had no authority so to do under 1 Geo. 4, c. 55, s. 5, as, after the order of reference the cause was out of court. *Ashworth* v. *Heathcote*, 4 M. & P. 396 ; 6 Bing. 596 ; 8 L. J. (O.S.) C. P. 206.

Condition Precedent to Delivery.]—A carrier, suing a railway company for the amount of overcharges on hundreds of items for the carriage of parcels, is not obliged to furnish particulars of the overcharges until they have furnished him with a copy of their tariff and charges. *Sutton* v. *G. W. Ry.*, 10 W. R. 563.

On what Materials Application made.]—In an action to recover damages for injuries sustained by the plaintiff through the negligence of the defendant, the defendant is not entitled to particulars of the injuries on an affidavit merely stating that his defence is embarrassed by the want of such particulars. *Brown* v. *G. W. Ry.*, 26 L. T. 398 ; 20 W. R. 585.

Semble, that the defendant would have been entitled to such particulars on an affidavit shewing that he had no knowledge of the case the plaintiff intended to set up at the trial, and that the defendant had no means of acquiring such knowledge without the aid of the court. *Ib.*

The court will not grant particulars in an action of trespass on the mere affidavit of the defendant that he had read the declaration, and that, from its general and vague form he was unable to ascertain the grievance on which the plaintiff intended to rely; but some special ground must be shewn as a reason for granting the rule. *Horlock* v. *Lediard*, 10 M. & W. 677; 2 D. (N.S.) 277; 12 L. J., Ex. 33.

Terms of Order.]—An order made on a plaintiff to deliver particulars of his claim under Ord. XIX. r. 7, may include the term that the action shall be dismissed, unless the particulars are delivered within a certain time. *Davey* v. *Bentinck*, 62 L. J., Q. B. 114; [1893] 1 Q. B. 185; 4 R. 144; 67 L. T. 742; 41 W. R. 181—C. A.

Payment into Court—Verdict.]—Particulars applying a payment to and satisfying the claim on one count:—Held, that the defendant must have a verdict on that count. *Swindel* v. *Jeffery*, 2 F. & F. 451.

Waiver of Irregularity.]—Where a plaintiff delivered with his declaration other particulars without leave, and the defendant, instead of objecting, pleaded and went to trial:—Held, to have waived the irregularity, and he was allowed to avail himself of the second particulars. *Fromant* v. *Ashley*, 1 El. & Bl. 723; 22 L. J., Q. B. 237; 17 Jur. 1050.

An order was obtained for delivery of particulars of set-off within a fortnight; they were not delivered for five weeks, but after the delivery an order was made by consent for the amendment of the declaration. This is a waiver of the irregularity in the delivery of the particulars. *Wallis* v. *Anderson*, M. & M. 291.

But a demand of particulars of set-off delivered after a plea, which is a nullity, is no waiver of the plaintiff's right to sign judgment. *Ford* v. *Bernard*, 4 M. & P. 303; 6 Bing. 534; 8 L. J. (O.S.) C. P. 219.

A plaintiff, in his particulars, made charges subsequent to action brought but gave credit also to the defendant for payments made after the commencement of the action. The defendant not having objected to the mode in which the plaintiff stated his claim in his particulars, until the under-sheriff was summing up:—Held, no misdirection on the part of the under-sheriff, that the jury should find for the balance claimed by the plaintiff. *Alexander* v. *Porter*, 1 D. (N.S.) 832; 6 Jur. 1124.

A declaration, indorsed to plead in four days, being delivered with particulars annexed, the plaintiff two days afterwards, finding that the particulars were wrongfully entitled, delivered fresh particulars entitled; and for want of a plea within the four days signed judgment:—Held, that the judgment was regular, the accepting the amended particulars being a waiver of the objection to the first. *Jones* v. *Fowler*, 4 D. P. C. 232; 1 Gale, 256.

Delivery of Account before Action.]—If a plaintiff obtain an order for particulars of the defendant's set-off, and upon an application to the defendant's attorney to deliver particulars under the order, the latter refers to an account before action brought, delivered by his client to the plaintiff, he is not obliged to deliver a fresh particular. *Hatchet* v. *Marshal*, Peake, 172.

A plaintiff may recover a demand in his particular, though he may have omitted to include such demand in a bill previously sent to the defendant. *Short* v. *Edwards*, 1 Esp. 374. And see *Blake* v. *Lawrence*, 4 Esp. 147.

Where the particulars exceed three folios, the court will order the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant has had full particulars of the account before action. *James* v. *Child*, 2 C. & J. 252; 2 Tyr. 302; 1 D. P. C. 310.

Annexing to Record.]—If particulars are not annexed to the record, the cause may be struck out as irregularly entered. *Coulson* v. *Hanson*, 2 F. & F. 312.

Where the particulars are appended to the record, it is not necessary to prove their delivery. *Macarthy* v. *Smith*, 8 Bing. 145; 1 M. & Scott, 227; 1 D. P. C. 253: 1 L. J., C. P. 73.

But they are not to be considered as incorporated with the declaration. *Booth* v. *Howard*, 5 D. P. C. 438.

A plaintiff, in his further and better particulars delivered under a judge's order, omitted all mention of a sum, for which he had given the defendant credit in the particulars delivered with the declaration. At the trial, it appeared that the further particulars were alone annexed to the record, but the defendant offered in evidence the particulars in which the credit was given him. The under-sheriff having refused to receive these particulars, the jury, notwithstanding, found a verdict for the defendant. On motion for a new trial, on the ground of the verdict being against the evidence:—Held, that the court would not grant a new trial, as the particulars tendered ought to have been received, and if that had been done the verdict would have been warranted. *Boulton* v. *Pritchard*, 4 D. & L. 117; 15 L. J., Q. B. 356; 11 Jur. 64.

Where a plaintiff annexed to the record particulars varying from those delivered to the defendant, and, there being no evidence of the particulars delivered, got a verdict upon an item not included in the particulars delivered, the court granted a new trial, without costs; but refused to nonsuit the plaintiff, because the defendant was not in a condition to raise the question at the trial, and the point was not reserved. *Morgan* v. *Harris*, 2 C. & J. 461; 2 Tyr. 385; 1 D. P. C. 570; 1 L. J., Ex. 143.

Costs of Application.]—A judge may engraft upon an order requiring a plaintiff to deliver particulars, a direction to the defendant to pay the costs of the application. *Clement* v. *Weaver*, 3 Man. & G. 551; 4 Scott (N.R.) 229; 1 D. (N.S.) 193; 6 Jur. 62.

Whether Court can compel Plaintiff to Proceed.]—A defendant being served with a writ of summons, obtained an order for particulars before declaration; after waiting three months, the plaintiff refused to go on with the action, or to enter a stet processus; the court refused an application to compel him to do so. *Kirby* v. *Snowden*, 4 D. P. C. 191.

Order, whether operating as a Stay of Proceedings.]—An order for the delivery of particulars does not operate as a stay of proceedings, unless it is so expressed. *Doe* d. *Roberts* v. *Roe*, 13 M. & W. 691; 2 D. & L. 673; 14 L. J., Ex. 101.

Or unless drawn up and served on the plaintiff's attorney. *Wilson* v. *Hunt*, 1 Chit. 647.

An order for particulars does not suspend the time for pleading, and therefore the plaintiff may sign judgment immediately after delivering the particulars, if the time for pleading is then out. *Hifferman* v. *Langelle*, 2 Bos. & P. 363.

By Ord. XIX. r. 8, of the Rules of the Supreme Court, 1883, "the party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons":—Held, that where upon an application for extension of the time for delivering a pleading, an order "peremptory" is made for delivery of the pleading within a time limited by the order, the time continues to run, notwithstanding that the applicant subsequently obtains an order for particulars. *Falck* v. *Arthelm*, 59 L. J., Q. B. 161; 24 Q. B. D. 174; 38 W. R. 196—C. A.

Where a defendant obtains an order for particulars with a stay of proceedings he may give notice of abandoning the order and demur or plead to the declaration without getting the order rescinded. *Maunder* v. *Collett*, 4 D. & L. 456; 3 C. B. 554; 16 L. J., C. P. 17.

Pleading after Application dismissed.]—Where a defendant, having obtained an order for time to plead, takes out a summons for particulars, which is dismissed after the expiration of the time given for pleading, he is entitled only to the remainder of the same day for pleading. *Mengens* v. *Perry*, 15 M. & W. 537; 15 L. J., Ex. 307; 10 Jur. 742.

A defendant having obtained an order for further time to plead upon terms, did not draw up the order; but, on the same day, took out a summons for better particulars, with a stay of proceedings, and also a summons for further time to plead after the delivery of such particulars. On the following day, the plaintiff's attorney delivered the particulars, and signed judgment as for want of a plea, the original time for pleading having then expired:—Held, that the judgment was irregular. *Daley* v. *Arnold*, 1 D. (N.S.) 938.

A defendant obtained an order for particulars before declaration, with a stay of proceedings until delivery. After two terms had elapsed without such delivery, he obtained an order to rescind his former order, and served it with a demand of declaration within four days. No declaration having been delivered within the four days, he signed judgment of non pros.:—Held, that the judgment was regular. *Johns* v. *Saunders*, 5 D. & L. 49; 2 B. C. Rep. 79.

Where a defendant is under terms of pleading issuably, and one of the pleas is a set-off, obtaining an order for particulars of the set-off is a waiver of the objection that the pleas are not issuable. *Scott* v. *Watson*, 3 D. & L. 208; 1 C. B. 826.

Giving Credit, whether an Admission.]—Giving credit to the opposite party in a particular is not an admission that the money is due. *Miller* v. *Johnson*, 2 Esp. 602.

An item of the plaintiff's demand appearing on the face of the particulars of the defendant's set-off given under a judge's order, is not such an admission as to supersede the necessity of proving it. *Ib.*

Particulars stated a claim for wages at 15*s.* per week, amounting altogether to 148*l.*, and gave credit for payments on account to the amount of 70*l.* At the trial, the defendant put the particulars in evidence, as shewing a payment of 70*l.*; and the jury having found that the plaintiff was only entitled to wages at the rate of 7*s.* per week (which destroyed the balance of 78*l.*, claimed by the plaintiff), gave a verdict for the defendant:—Held, that the particulars were properly received, as an admission of the payment; and it not having been objected, that they could only be used in reduction of damages, and not in bar of the action, that the verdict ought not to be disturbed. *Kenyon* v. *Wakes*, 2 M. & W. 764; 6 D. P. C. 105; 6 L. J., Ex. 180. See *Nicholl* v. *Williams*, 2 M. & W. 758; 6 L. J., Ex. 226.

Particulars of set-off are merely explanatory of the plea of set-off, and the plaintiff, by putting them in evidence to prove his case, ex gratiâ, to rebut the defence of the statute of limitations, does not thereby admit the correctness of their contents. *Burkitt* v. *Blanshard*, 3 Ex. 89; 18 L. J., Ex. 34.

In an action which contained several demands, the defendant pleaded, except as to one, a set-off, and the statute of limitations. The plaintiff, in order to take the case out of the statute, put in evidence the particulars of set-off, containing an item, "Paid to the plaintiff, 15*l.*":—Held, that the particulars were no evidence in support of the plea of set-off. *Ib.*

Where a plaintiff admits a payment generally,—as thus, "Cr. by bills, 1,500*l.*"—this is to be taken as a payment admitted to have been made to the plaintiff by the defendant. *Smethurst* v. *Taylor*, 12 M. & W. 545; 14 L. J., Ex. 86.

A plaintiff is not precluded from explaining admissions in his particulars of payments made to him by the defendant, and of shewing on what account such payments were made. *Mercy* v. *Gabat* or *Galot*, 6 D. & L. 656; 3 Ex. 851; 18 L. J., Ex. 347; 13 Jur. 412.

A declaration claimed 44*l.* 8*s.* The particulars, after giving credit, stated the balance due from the defendant to be 12*l.* 4*s.* The defendant pleaded payment of 15*l.* in satisfaction, and obtained a verdict:—Held, that the plaintiff was not entitled to judgment non obstante veredicto, inasmuch as credits given in the particulars need not be pleaded, a less sum than the debt in the declaration might, with credits so given, be equal to such debt. *Turner* v. *Collins*, 2 L. M. & P. 99; 20 L. J., Q. B. 259; 15 Jur. 177.

In an action by the payee against the maker of a note, dated the 28th day of June, 1837, the plaintiff, in his particulars, gave credit for payment of three years' interest on account. The note was actually made in 1839:—Held, that the interest for which credit was given was to be computed from 1837, and not from 1839. *Cheetham* v. *Sturtevant*, 12 M. & W. 515; 1 D. & L. 631; 13 L. J., Ex. 108.

Where a plaintiff gives credit in his particulars for a sum paid by the defendant, such payment is put on the same footing as if there had been a plea of payment; but it cannot be taken as an admission as against the defendant with respect to any of the items in the entire account. *Goatley* v. *Herring*, 12 L. J. C. P. 32.

Explaining Pleadings.]—To the common counts, the defendant pleaded a set-off, and delivered particulars of his set-off with the plea. He afterwards withdrew his plea, and pleaded puis darrein continuance, that there had been a controversy between the plaintiff and himself about other matters in addition to those in the cause, that a balance of accounts had been struck between the parties, that the plaintiff admitted the set-off pleaded to be due, and that it was agreed that the balance struck should be paid by instalments; and that the defendant should release the plaintiff from all liability on a certain contract, and that this agreement was accepted by the plaintiff in satisfaction of his action. The plaintiff replied that he had been induced to enter into this agreement by fraud:—Held, that the particulars of set-off delivered with the original plea of set-off, and in which particulars the statement of account differed from the statement upon which the agreement was founded, were admissible for the purpose of explaining the plea. *Buckmaster* v. *Meiklejohn*, 8 Ex. 634; 22 L. J., Ex. 242.

Particulars cannot be resorted to for the purpose of explaining the pleadings. *Kilner* v. *Bailey*, 5 M. & W. 382; 7 D. P. C. 803; 9 L. J., Ex. 37.

Particulars form no part of the record, and cannot therefore be used in aid of the declaration. *Dempster* v. *Purnell*, 3 Man. & G. 375; 4 Scott (N.R.) 30; 1 D. (N.S.) 168; 11 L. J., C. P. 33.

Delivery of Second Particulars without Order.]—If a plaintiff delivers one particular under an order, and afterwards a second without an order, he cannot give evidence of any demand in the second which was not included in the first. *Brown* v. *Watts*, 1 Taunt. 353; 9 R. R. 793.

Where a writ of summons is specially indorsed under 15 & 16 Vict. c. 76, s. 25, semble, that it is irregular to deliver any other particulars than those indorsed on the writ without leave. *Fromant* v. *Ashley*, 1 El. & Bl. 723; 22 L. J., Q. B. 237; 17 Jur. 1050.

3. Sufficiency of.

Work and Labour done.]—In an action for work and labour as a surveyor, the particulars stated, that the action was brought to recover a specified sum for surveying a number of miles between two places, which were named, at a certain rate per mile, in 1845. The defendant having pleaded only the general issue, and notice of trial having been given, a rule for further and better particulars was refused. *Irving* v. *Baker*, 15 L. J., Q. B. 322.

In an action by an engineer against a railway company, for surveying their line, and for money paid, a general particular for surveying the country between certain places, including travelling charges and assistance, is sufficient, without specifying the number of fields surveyed, or how much of the charge is for the engineer's skill, time and labour, and how much for travelling expenses and assistance. *Rennie* v. *Beresford*, 4 Railw. Cas. 129; 3 D. & L. 464; 15 M. & W. 78; 15 L. J., Ex. 78; 10 Jur. 76.

In actions by engineers and other persons employed in constructing railways, the particulars must be as specific as it is possible for the plaintiffs to make them, and a mere statement of aggregate sums claimed in respect of tavern bills, assistant-surveyors, &c., finding surveyors, meeting and arranging with solicitors, &c., will not be sufficient. *Prichard* v. *Nelson*, 6 M. & W. 773; 5 Railw. Cas. 20; 4 D. & L. 693; 16 L. J., Ex. 207; 11 Jur. 375.

In an action by a sworn broker for the price of scrip bought for the account for the defendant, the particulars should state the names of the persons from whom, and the price at which the scrip was bought, and the date of the purchase within a few days. *Berkley* v. *De Vere*, 4 D. & L. 97; 15 L. J., Q. B. 323.

As to Dates.]—Particulars of set-off delivered, in which the only dates were "from January, 1828, to January, 1834," are not a compliance with an order. *Swain* v. *Roberts*, 1 M. & Rob. 452.

An order for particulars of set-off with dates is not sufficiently complied with by a delivery of particulars without dates, although not objected to by the plaintiff; and the defendant will, in such case, be precluded at the trial from giving evidence of his claim. *Ibbett* v. *Leaver*, 16 M. & W. 771; 4 D. & L. 716; 16 L. J., Ex. 208; 11 Jur. 415.

Goods sold—Money had and received.]—In an action for not accounting for goods, and also for goods sold and money had, a bill of particulars stating the demand to be for the goods (which it specifies) and for money had and received, is sufficient. *Hunter* v. *Welch*, 1 Stark. 224.

Particulars as follows: "This action is brought to recover 3,900*l.*, being a sum claimed by the plaintiff for the amount of sums in cash paid, and the value of bills given by the plaintiff to the defendant at various times between the 1st November, 1842, and the 12th May, 1843, as and for the purchase-money of the paintings hereunder-mentioned, the making of which payments and giving of which bills the defendant procured from the plaintiff by false and fraudulent representations; and in respect of the plaintiff having discounted and paid the bills" (being followed by a list of paintings with the price marked against each), give sufficient information of the nature of the action, and for what it is brought. *Archbutt* v. *Pennell*, 1 D. & L. 318; 7 Jur. 519.

Of Account with Dates and Items.]—The indorsement on a writ of summons was as follows: "The following are the particulars of the plaintiff's claim: 500*l.* for principal money due upon a warrant of attorney, executed by the defendant's wife (before her marriage with him), bearing date the 20th February, 1855. Interest thereon at the rate of 5*l.* per cent. per annum, from the 20th of February to the day of obtaining judgment in this cause. The plaintiff will also seek to recover the 500*l.* upon an account stated between the plaintiff and the defendant's wife before her marriage." Upon an order for a further or better account, with dates and items of the particulars of the demand, the following was delivered: "1855, February 25th. Amount due to the plaintiff upon an account stated on this date, between the plaintiff and the defendant's wife, before her marriage, 500*l.*":—Held, no compliance with the order. *Bayntun* v. *Satchell*, 17 C. B. 383.

Bills of Exchange.]—The acceptor of two bills for 250*l.* each was arrested upon a capias,

indorsed thus, "Bail for 240*l.* and upwards. The plaintiff claims 266*l.* with interest thereon, from the 30th December to the day of payment, for debt, and 3*l.* 10*s.* for costs," &c. The declaration was upon the two bills, and the particulars stated that the action was brought to recover 500*l.*:—Held, that the defendant was entitled to better particulars. *Dawes* v. *Anstruther*, 5 D. P. C. 736; 2 M. & W. 817; M. & H. 268; 6 L. J., Ex. 194; 1 Jur. 949.

Action by Customer against Banker.]—In an action against his banker by a customer for a balance, the question being as to certain overcharges by way of discount, interest and commission, the plaintiff having before action applied for, but failed to obtain, any other information than was afforded by his pass-book, and having delivered particulars, claiming the whole amount of the gross balance, the defendant was not entitled to any further or better particulars, but the plaintiff was afterwards held entitled to particulars of gross charges for interest and commission. *Adams* v. *Aston*, 1 F. & F. 603.

4. Amendment of.

Two Actions against same Defendants.]—In 1835, the plaintiff sued defendants, as executors, for work done in a house of their testator, and delivered his particulars in July, 1837, after he had commenced a second action against them in their own capacity for work done to the same house after the testator's death; both actions were referred, and an award made was set aside in Hilary Term, 1839; the plaintiff having abandoned his second action, was allowed, in Trinity Vacation, 1839, to amend his particulars in the first, by adding to them certain items which had been contained in the particulars of the second. *Jones* v. *Corry*, 6 Bing. (N.C.) 247; 8 Scott, 515; 7 D. P. C. 299; 9 L. J., C. P. 177: 4 Jur. 248.

After Payment into Court.]—Particulars were allowed to be amended after the defendant had paid money into court, and the plaintiff had taken the same out in satisfaction, and the costs had been taxed, where it appeared that the plaintiff had done so under a mistake as to his right to bring a fresh action. *Emery* v. *Webster*, 10 Ex. 901; 3 C. L. R. 713; 24 L. J., Ex. 186; 1 Jur. (N.S.) 381; 3 W. R. 250—Ex. Ch.

Mistake.]—Where a plaintiff's attorney accidentally gives credit in his particulars for a sum of money, which the defendant sets up as a cross demand, the court will allow the particulars to be amended on terms. *Preston* v. *Whiteheart*, 5 D. P. C. 720; W. W. & D. 363.

Defendant not Misled.]—An amendment of particulars is rightly allowed at the trial in cases where the defendant is not misled. *Evans* v. *Talbot*, 10 W. R. 625.

Pending a Reference.]—The court allowed a plaintiff to amend his particulars pending a reference of the cause, by adding thereto items alleged to have accrued due during the space of time covered by the particulars already delivered, there being no suggestion on the part of the defendant that he would not have consented to the reference had the items been originally inserted. *Blunt* v. *Cooke*, 5 Scott (N.R.) 232; 2 D. (N.S.) 89; 4 Man. & G. 458; 11 L. J., C. P. 324.

After a cause has been referred compulsorily, the court has power to amend the particulars, even though objected to. *Gibbs* v. *Knightly*, 2 H. & N. 34; 26 L. J., Ex. 294; 3 Jur. (N.S.) 472; 5 W. R. 562.

Where a cause is referred without power of amendment, a judge has no power, except by consent of the parties, to order the particulars specially indorsed on the writ of summons to be altered by increasing the amount of any one of the items. *Morgan* v. *Tarte*, 11 Ex. 82; 3 C. L. R. 970.

Time for Application.]—An amendment in the particulars was allowed, an order having been made on a summons taken out in town, returnable on the commission-day, attended by the plaintiff in the assize town, the defendant having notice on the same day of the order having been made, and having received and retained the particulars. *Hodson* v. *Steers*, 1 F. & F. 484.

In an action for money received, the plaintiff, having framed his particulars from an account rendered by the defendant, was allowed after a suspension of proceedings for ten years, occasioned by the absence of the plaintiff beyond seas, to amend his particulars, by insertions of fresh items, discovered after the defendant's account had been rendered. *Staples* v. *Holdsworth*, 4 Bing. (N.C.) 717; 6 D. P. C. 715; 6 Scott, 605; 1 Arn. 275.

Terms.]—In an action on a policy of marine assurance, the defence was that the loss was not caused by perils of the sea, and that the subject-matter of the policy, viz. two lighters in tow of a tug, was unseaworthy. Particulars of the unseaworthiness were delivered, stating that the lighters were of improper construction for the purpose of being towed. Evidence as to the lighters was taken abroad on commission, and questions were asked as to the tug. Subsequently, at a time when the evidence of the captain of the tug could no longer be obtained, the defendant applied for leave to amend the particulars, so as to state that the tug was of insufficient power, whereby the subject-matter of the policy was rendered unseaworthy:—Held, that the amendment should be allowed on terms, as no injury would be caused to the plaintiffs for which they could not be compensated by costs. *Clarapede* v. *Commercial Union Association*, 32 W. R. 261—C. A.

5 Binding Character of Particulars.

Extent of.]—Particulars of set-off are merely explanatory of the plea, and the plaintiff, by putting them in evidence to prove his case, does not thereby admit the correctness of their contents. *Burkett* v. *Blanshard*, 3 Ex. 89; 18 L. J., Ex. 34. S. P., *Buckmaster* v. *Meiklejohn*, 1 C. L. R. 839; 8 Ex. 634.

Increase of Demand.]—Although a plaintiff cannot give evidence beyond his particulars, he may take advantage of any evidence produced by the defendant to increase his demand. *Hurst* v. *Watkis*, 1 Camp. 68; 10 R. R. 634.

When a plaintiff recovers a greater sum than he claims by his particulars, and upon discussion the court sanctions the principle on which he recovers, and judgment is entered up accordingly, no objection having been made to the excess above the particulars, either at the trial or on

the argument, the court will not reduce the judgment to the sum claimed by the particulars. *Bell* v. *Puller*, 2 Taunt. 285 ; 12 East, 496, n. ; 11 R. R. 574.

In an undefended action upon a note for payment of principal and interest by instalments, a verdict was not allowed to be taken for a larger amount than claimed in the particulars. *Walker* v. *Wadsworth*, 1 F. & F. 397.

Error in Date, &c.]—A particular is not to be construed so rigidly as to nonsuit a plaintiff for inaccuracies which could not mislead. *Harrison* v. *Wood*, 8 Bing. 371 ; 1 M. & Scott, 536 ; 1 L. J., C. P. 116.

An error in a date, or other inaccuracy, will not warrant a non suit, unless the particular is so framed as to be reasonably calculated to mislead. *Ib.*

A plaintiff's particulars were for goods sold on the 6th January ; the evidence given at the trial was of goods sold on the 28th May. A verdict having been found for the plaintiff, the court refused to set it aside, all other accounts between the parties having been settled. *Flemming* v. *Crisp*, 5 D. P. C. 454 ; M. & H. 28.

In his particulars of set-off a defendant claimed, "Cash, being the amount of the plaintiff's dishonoured acceptance and charges, 21*l.* 16*s.*," dated August, 1840. He gave evidence of a bill of exchange for 19*l.*, on which an action had been commenced, dated June 23rd, 1840, and payable two months after date, indorsed to him by the plaintiff : — Held, that there was no variance by which the plaintiff could have been misled. *Parsons* v. *Wilson*, 4 Scott (N.R.) 1 ; 1 D. (N.S.) 181 ; 3 Man. & G. 445 ; 11 L. J., C. P. 10 ; 5 Jur. 991.

A defendant cannot make at the trial of the cause any such objection to the particulars as, if made earlier, the plaintiff or the court might have rectified. *Lovelock* v. *Cheveley*, Holt, 552.

Variance.]—In an action by assignees of a bankrupt, the declaration stated the cause of action to be money had and received to the use of the bankrupt ; the particulars described it as had and received to the use of the plaintiffs :—Held, that it was not such a variance as would prevent the plaintiffs from recovering, it not appearing that the defendant could be misled by it. *Tucker* v. *Barrow*, M. & M. 137 ; 3 Car. & P. 85 ; 7 B. & C. 622 ; 1 M. & Ry. 518 ; 6 L. J. (O.S.) K. B. 121.

In ejectment to recover premises for nonpayment of rent, a variance between the amount of rent stated in the particulars and the amount proved at the trial to be due, is immaterial. *Tenny* d. *Gunning* v. *Moody*, 10 Moore, 252 ; 3 Bing. 3 ; 3 L. J. (O.S.) C. P. 122 ; 28 R. R. 552.

Particulars stated that the action was brought to recover "cash received by the defendant, being 10*s.* in the pound on a debt of 52*l.* 5*s.*, at one time due from the plaintiff to the defendant, and which had been previously paid by the plaintiff to the defendant" :—Held, that he was not bound by his particulars to prove an actual cash payment of 52*l.* 5*s.* to the defendant, and that he was entitled to succeed on proof of payment of 39*l.* 10*s.*, being the amount of the bill, less a large percentage by way of discount, which the defendant had agreed to deduct. *Gaskill* v. *Skene*, 14 Q. B. 664 ; 19 L. J., Q. B. 275 ; 14 Jur. 597.

Where particulars stated that the action was brought to recover a bet lost by R. :—Held, that the plaintiff was bound by his particulars, and could not shew that he had rescinded the bet before the event. *Davenport* v. *Davies*, 2 Gale, 119 ; 1 M. & W. 570 ; 1 Tyr. & G. 931 ; 5 L. J., Ex. 214.

The plaintiff and others having each deposited 2*l.* with the defendant in a lottery upon the Derby, the plaintiff brought an action for the whole amount, claiming to be the drawer of the winning horse. The particulars stated that the action was brought to recover 13*l.* 16*s.*, being money received by the defendant to the use of the plaintiff :—Held, that the plaintiff was not entitled to recover his stake of 2*l.* *Mearing* v. *Hellings*, 14 M. & W. 711 ; 15 L. J., Ex. 168.

If a bill of particulars states the demand to be for goods sold and delivered to the defendant, no evidence can be received of goods sold by the defendant as agent for the plaintiff. *Holland* v. *Hopkins*, 2 Bos. & P. 243 ; 2 Esp. 168.

The plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to the defendants in their trade of brewers. A verdict having been given for the plaintiffs on proof of delivery of spirits, the defendant obtained a rule nisi for a nonsuit, on the ground that he had been surprised by the variance between that particular and the proof ; it appearing, however, that he had been neither surprised nor misled, the court discharged the rule. *Lambirth* v. *Roff*, 8 Bing. 411 ; 1 M. & Scott, 597 ; 1 L. J., C. P. 120.

Action for work and labour as an architect, and for commission. The particulars claimed 5*l.* per cent. for commission :—Held, that the plaintiff might recover for work and labour, although the jury negatived the right to commission. *Mayor* v. *Ward*, 10 Jur. 796.

Where a particular stated that the plaintiff claimed for work and labour under an agreement :—Held, that he might recover for extras. *Lines* v. *Rees*, 1 Jur. 593.

A plaintiff, in his declaration and particulars, claimed damages for certain articles deposited with the defendant, which had not been returned, and of which due care had not been taken. Under the former description, in his particulars, he set out certain articles of glass, which however, turned out to have been destroyed :—Held, that, under such particulars, he was not entitled to recover damages in respect of those articles. *Moss* v. *Smith*, 8 D. P. C. 537.

Admissibility of Evidence.] — A defendant, who has not complied with a judge's order to deliver particulars of set-offs, with dates will not be allowed to give any evidence of his set-off. *Swain* v. *Roberts*, 1 M. & Rob. 452.

An order for the delivery of particulars of set-off, and in default precluding the defendant from giving evidence of his set-off, makes such evidence inadmissible at the trial. *Young* v. *Geiger*, 6 C. B. 552 ; 6 D. & L. 337 ; 18 L. J., C. P. 43.

An order was made for delivery of particulars of set-off, with dates, and, in default, that the defendant should be precluded from giving evidence of set-off. Particulars were delivered, but without dates, subsequently to which the plaintiff replied, and the cause came on for trial, when the judge refused to receive the evidence of set-off : —Held, that the evidence was properly rejected, the order not having been complied with, and that the plaintiff had not waived the objection by replying to the plea. *Ibbett* v. *Leaver*, 4

D. & L. 716; 16 M. & W. 771; 16 L. J., Ex. 208; 11 Jur. 415.

Action by assignees of a bankrupt. The first four counts were for goods sold, money paid, and had and received, and on an account stated, laying the promises to the bankrupt; the fifth, sixth and seventh counts were for goods sold, money had and received, and on an account stated, laying the promises to the assignees. Pleas, first, except as to 320*l.*, parcel, &c., and except as to 140*l.*, parcel of the sums in the first, second, third and fourth counts, non assumpsit; secondly, as to 140*l.*, parcel of the moneys in the first, second, third and fourth counts, a plea of mutual credit, which had been demurred to, and on argument judgment given for the defendant; thirdly, as to the 320*l.*, payment of that sum into court, which the plaintiffs took out, and joined issue on the plea of non assumpsit. The following were the particulars delivered prior to the pleas:—"This action is brought to recover 140*l.*, the value of certain yarn; also 316*l.*, the proceeds of a bill of exchange drawn by J. M., and indorsed by the bankrupt to the defendant; also 4*l.*, the proceeds of a cheque; and 80*l.* in cash; the yarn, bill of exchange, cheque and cash having been received by the defendant, from or by the authority of the bankrupt, about the months of September or October, 1839. The particular date is known to the defendant." At the trial the cause proceeded for the recovery of 140*l.* only, and no evidence was adduced as to the 80*l.* cash. It was objected that the plaintiffs were not entitled to go into evidence as to the 140*l.*, as that sum was already satisfied by the judgment upon the demurrer, and that that sum must be struck out of the particulars:—Held, that the plaintiffs were entitled to give evidence of goods sold to the amount of 140*l.*, upon the other counts, to which the plea was not pleaded, and might apply the particulars to those counts. *Russell* v. *Bell*, 10 M. & W. 340.

Particulars stated the action to be brought to recover from the defendants 450*l.*, claimed by the plaintiff for his services as clerk or manager to the defendants from October, 1837, to October, 1839. An order was made for further and better particulars, when the plaintiff delivered the same, with the addition of the words, "after the rate of 200*l.* per annum":—Held, that the plaintiff could not give evidence of a claim for commission on the amount of business done by the defendants through his introduction. *Law* v. *Thompson*, 4 D. & L. 54; 15 M. & W. 541; 15 L. J., Ex. 334.

Special Counts.]—It will not prevent a plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. *Day* v. *Davies*, 5 Car. & P. 340.

A count alleged that the plaintiff was employed by the defendant as a carman, at wages after the rate of 160*l.* a year, and claimed damages for his discharge without just cause during the year; there was also a count for work and labour. The particulars stated that the plaintiff, besides seeking to recover damages under the special count, also sought to recover, under the common count, 37*l.*, the balance of account for a quarter's work done by him for the defendant, commencing on the 30th June, and ending on the 30th September, 1842, after giving credit for 3*l.* paid on account. It appeared that the plaintiff was discharged on the 30th July, 1842, for misconduct, which the jury found to be a sufficient cause for his dismissal; that he worked out that day, and that on the next morning the defendant sent for him, and he remained working there that day also, and then left. The jury found that the value of those two days' work was 40*s.*, but that he was entitled to a month's wages; and he accordingly had a verdict for 10*l.* 6*s.* 8*d.*, allowing for the 3*l.* which had been paid in advance:—Held, that the plaintiff was not precluded by his particulars from recovering this sum. *Hurcum* v. *Stericker*, 10 M. & W. 553; 2 D. (N.S.) 524; 12 L. J., Ex. 17.

A plaintiff declared, on a contract with the defendants, to retain him in their service for one year, at a salary of 200*l.* per annum, alleging for breach that they improperly dismissed him before the end of the year; and in a second count, for work and labour. The particulars were as follows:—"This action is brought to recover one year's salary, from, &c., to, &c., at the rate of 200*l.* per annum, or damages for the dismissal of the plaintiff before the end of such year":—Held, that evidence of services actually rendered was admissible under this particular, upon failure to prove the special contract. *Harris* v. *Montgomery*, 11 C. B. 393; 2 L., M. & P. 425; 20 L. J., C. P. 221; 15 Jur. 757.

A plaintiff sued on a breach of warranty on the sale of wheat. The declaration stated a warranty that the wheat would grow, and a breach that it would not, and that the plaintiff was deprived of great gains. The declaration also contained counts for money had and received and on an account stated. The particulars were for the price of the wheat, but were expressly limited to the common counts:—Held, that this did not prevent the plaintiff from giving evidence of what the value of the crops might have been, with a view to his damages on the first count. *Page* v. *Parey*, 8 Car. & P. 769.

Counts on Bills of Exchange and Promissory Notes.]—Where a particular states a note only, which cannot be received in evidence for want of a stamp, the party admits that his only claim is on the note, and he cannot give evidence of the consideration. *Wade* v. *Beasley*, 4 Esp. 7.

Under a particular, stating that the action is brought to recover the amount of a note, interest on it is recoverable. *Blake* v. *Lawrence*, 4 Esp. 147.

A declaration on a note, with a count on an account stated; the particulars specifying that "the action is brought to recover 555*l.* due on the note set forth in the first count, with interest; and that the plaintiff, for recovery thereof, will avail himself of the whole or any part of the declaration":—Held, that the note, being invalid, was not, by this particular, made admissible evidence of the account stated. *Hedley* v. *Bainbridge*, 3 Q. B. 316; 2 G. & D. 483; 11 L. J., Q. B. 293.

A declaration contained two counts, each on a bill of exchange. The particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiff would rely on the whole or any part of the declaration for the recovery thereof:—Held, sufficient to entitle the plaintiff to proceed on the second count. *Hay* v. *Fisher*, 2 M. & W. 722; M. & H. 286; 6 L. J., Ex. 217.

Under a Count on an Account Stated.]—A first count was on an undertaking to pay such costs,

charges, and expenses as the plaintiff (an attorney) should incur in an action to be brought by him against G. on a bill of exchange, drawn by the defendant only, which was lying due, and which the plaintiff had agreed to take up for the honour of the defendant. In a second count the plaintiff declared as indorsee on the bill; the third was for money paid, and the fourth on an account stated. On the first count the defendant paid into court a sum covering the plaintiff's costs out of pocket. On the second count, the ultimate issue was, whether a bill subsequently given by the defendant to the plaintiff, was given in satisfaction of the first, or as a collateral security. The plaintiff first gave a particular applicable only to the count on the bill of exchange. The defendant obtained an order for particulars "of the bill of costs, charges, and expenses mentioned in the first count of the declaration," and the plaintiff thereupon delivered a particular containing a copy of his whole bill of costs in the action against G., and also the amount of the bill and interest. At the trial, the judge ruled that the costs out of pocket only could be recovered on the first count:—Held, that the particulars were sufficient to enable the plaintiff to recover the rest of the bill of costs under the account stated. *Fisher* v. *Wainwright*, 1 M. & W. 480; 5 D. P. C. 102; 1 Tyr. & G. 606; 5 L. J., Ex. 217.

The defendant gave in evidence, for the purpose of proving that the second bill was given by way of satisfaction, an unsigned account of the plaintiff's claims, which had been delivered by him to the defendant, for the purpose of their being proved under G.'s bankruptcy, and one item of which was the amount of the bill of costs:—Held, that this was not such evidence of an account stated as would have enabled the plaintiff to recover the costs on the account stated, if his particulars had been insufficient for that purpose. *Ib.*

Particulars stated that the plaintiff sought to recover 50*l.*, the amount of the note in the first count, and 50*l.*, the amount of the note in the second count, for the recovery whereof he would avail himself of the whole, or any part, of the declaration. No evidence was given in respect of the notes:—Held, that, under these particulars, an admission by the defendant that he owed the plaintiff 100*l.*, could not be given in evidence in support of the account stated. *Roberts* v. *Elsworth*, 2 D. (N.S.) 456; 10 M. & W. 653; 12 L. J., Ex. 15; 6 Jur. 456.

A declaration contained a count on a deed whereon the sum of 1,500*l.* was claimed as due for principal and interest, and also a count on an account stated. The particulars claimed 1,179*l.* for principal and interest due on the deed set forth in the first count. The defendant pleaded non est factum to the first count, and never indebted to the second. Before the trial the first count was struck out, but the pleadings and particulars were not altered:—Held, that the plaintiff might prove a written admission of 1,179*l.* being due for principal and interest, and recover that sum on the account stated. *Simons* v. *Wood*, 5 Q. B. 170; D. & M. 355; 13 L. J., Q. B. 49; 8 Jur. 355.

d. Security for Costs.

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1. On what Grounds granted.

a. *Residence Abroad.*

Permanent Character.]—If a plaintiff resides permanently abroad, the court will stay proceedings till he gives security for the costs. *Pray* v. *Edie*, 1 Term Rep. 267; 1 R. R. 200. *Elan* v. *Rees*, 3 Doug. 382. *Ganesford* v. *Levy*, 2 H. Bl. 118; *Demanroffe* v. *Jackson*, 13 Price, 603.

Plaintiff is not compellable to give security for costs, unless he state himself, or it be sworn, that he is resident abroad, or going to reside abroad. *Green* v. *Charnock*, 3 Bro. C. C. 371; 1 Ves. J. 396; 2 Cox, 284.

If an action is brought without the knowledge of a plaintiff, who is out of the realm, the court will require security for the costs to be given on his part. *Ball* v. *Adrian*, 1 Taunt. 64.

If a plaintiff, after leaving this country, commences an action, he will be compelled to find security for costs. *Wells* v. *Barton*, 2 D. P. C. 160.

Plaintiff Resident in England—Action in Ireland.]—Security for costs may be required from a plaintiff resident in England or Scotland, The practice of the court of chancery in this respect is not affected by the 71st section of the Supreme Court of Judicature Act (Ireland), 1877. *Nicholson* v. *Wood*, 15 L. R., Ir. 76.

A plaintiff residing in England, obliged, on filing a bill in Ireland, to give security for costs, notwithstanding 41 Geo. 3, c. 90, s. 5, gives an attachment in England to enforce an order or decree made in Ireland for payment of money; the practice of the court not being altered by that act. *Mullett* v. *Christmas*, 2 Ball & B. 422.

The bill prayed that a policy of assurance should be delivered up to be cancelled, and a discovery in aid of a defence to an action at law on it. The plaintiffs resident in England were ordered to give security for costs. *Anderson* v. *Dowling*, 12 Ir. Eq. R. 307.

Foreign Judgment impeached on Ground of Fraud.]—A defendant sued upon a foreign judgment by a plaintiff who is a foreigner resident out of the jurisdiction is entitled to security for the costs of the action. *Crozat* v. *Brogden*, 63 L. J.,

Q. B. 325; [1894] 2 Q. B. 30; 9 R. 296; 70 L. T. 525; 42 W. R. 353—C. A.

Nominal Plaintiff.]—In an action upon a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff; the assignee's written undertaking is not sufficient. *Youde* v. *Youde*, 3 A. & E. 311.

Husband and Wife.]—In an action by husband and wife for a personal injury to the wife, if the husband is resident abroad, he must give security for costs, although the wife is resident in England. *Hanmer* v. *Mangles*, 12 M. & W. 313; 1 D. & L. 395; 13 L. J., Ex. 84; 7 Jur. 1116.

About to leave England.]—The defendant is not entitled to call on a plaintiff to give security for costs, though it is sworn, and not contradicted, that the plaintiff usually resides abroad, and is about to quit the country. *Anon.*, 5 L. J. (O.S.) Ch. 71. But see *Green* v. *Charnock*, supra.

In equity the court will not make an order to stay proceedings, until security be given for the costs, upon the ground of the plaintiff being about to leave the country. *Willis* v. *Garbutt*, 1 Y. & J. 511.

Leaving after Action commenced.]—A person, being in this country by licence from the secretary of state, files a bill; if his licence expires pending the suit, and he leaves this country, defendant may compel him to give security for costs. *O'Connor* v. *Bernard*, 1 Jones, 175.

Affidavit to ground an order for a plaintiff to give security for costs, when it doth not appear by the bill that he lives abroad out of the jurisdiction of the court, if he hath left the kingdom since filing the bill, must go on and say, to settle abroad. *Anon.*, Dick. 775.

A plaintiff being ordered to pay costs, went abroad (as was sworn upon belief, and not denied) permanently, and to avoid payment; he was ordered to give security for costs, and the proceedings in the suit were in the meantime stayed. *Busk* v. *Beetham*, 2 Beav. 537.

Order to stay proceedings until security given for costs, upon affidavit that the plaintiff, since the answer, had abandoned this country and now resides in the Isle of Man. *Weeks* v. *Cole*, 14 Ves. 518.

A plaintiff having gone abroad subsequently to his cause being set down in the demurrer paper for argument, upon a motion for security for costs the court directed that the demurrer should be argued, when, if judgment should be given for the plaintiff, proceedings should be stayed until security for costs was given. *Kemble* v. *Mills*, 1 Man. & G. 565; 8 D. P. C. 836; 1 Scott (N.R.) 402.

A plaintiff who has gone to reside abroad, after bill filed, will be ordered to give security for costs. *Vale* v. *Offert*, 30 L. T. 457; 22 W. R. 629.

Intention to change Domicil.]—A person who had been resident in England went over to Ireland to assert his title to lands in that country. Having failed in an ejectment, he filed a bill, in which he was described as A. B., late of R., in England, but now of the city of Cork. He had been occasionally in Ireland during the last three years, and had stopped at a public-house in Cork, but had not as yet taken any fixed abode in Ireland. In his affidavit to oppose a motion to stay his proceedings until he should give security for costs, he stated that he had made Ireland his fixed domicile and residence, and intended to bring his wife from England to live with him. The motion was refused, without costs. *Rushton* v. *Heazle*, Sau. & Sc. 654, n.

A London stockbroker, whose name was still used in the firm there, was appointed executor of a person who had contracted to grant a lease of certain mines in Ireland, for a large sum. He filed his bill for a specific performance; and in his affidavit to oppose a motion to stay his proceedings until he should give security for costs stated that he had given up his residence in England, and had at some expense removed his family to Ireland, where he had taken a permanent residence. In one passage of his affidavit he stated that it was his intention to reside in Ireland altogether; but the other passages were qualified by a statement to the effect that he intended to reside in Ireland until this suit, and all other affairs of his testator in Ireland, should be finally settled and arranged. The motion was refused without costs. *Pyke* v. *Vigors*, Sau. & Sc. 635.

Return Indefinite.]—A plaintiff, who gave up his house in England, and resided abroad, as he stated, "for a temporary abode," but who left it ambiguous whether and when he intended to return, ordered to find security for costs. *Kennaway* v. *Tripp*, 11 Beav. 588; 18 L. J., Ch. 298.

Where a plaintiff, not being in public service, goes abroad pending a suit and remains there under such circumstances as to render it probable he will not be forthcoming when the defendant may be entitled to call upon him to pay costs, the court will direct him to give security for costs. *Blakeney* v. *Dufaur*, 2 De G. M. & G. 771; 22 L. J., Ch. 389; 17 Jur. 98; 1 W. R. 9.

Where a plaintiff suing in formâ pauperis will be absent from England eighteen months, the court will compel him to give security for costs or stay his proceedings until his return. *Foss* v. *Wagner*, 2 D. P. C. 499.

Plaintiff made to give security for costs, the evidence not being clear that he intended to return from abroad. *Snook* v. *Duncan*, 5 Jur. 1078.

Plaintiff a Seafaring Man.]—Where a plaintiff, who is a mariner, is abroad on a voyage, his family being left in this country, in lodgings, he will not be required to give security for costs. *Ford* v. *Boucher*, 1 Hodges, 58.

A plaintiff, whose family resides permanently within the jurisdiction, but who is himself obliged to be frequently absent in the course of his employment as a seafaring man, cannot be compelled to give security for costs. *Duff* v. *Hore*, Ir. R. 6 C. L. 508.

Security for costs is not required from a foreigner during his absence from this country on board his own ship, if he resides here part of the year. *Durrell* v. *Mattheson*, 3 Moore, 33; 8 Taunt. 711; 21 R. R. 515.

A plaintiff described himself as resident within the jurisdiction. By amendment, he described himself as "of the ship *Wacousta*, now on a voyage to Sydney and back to London, master mariner." It not appearing when he would return within the jurisdiction, security for costs

was ordered to be given. *Stewart* v. *Stewart*, 20 Beav. 322.

A plaintiff, who is a seafaring man, will not be required to give security for costs, although he is abroad, and has no residence or property within the jurisdiction. *Gowran* v. *Barnett*, Sau. & Sc. 651, n.

A seafaring man, whose family had a permanent residence within the jurisdiction, and who resides with them on his return from abroad, but who has himself no fixed residence, will be ordered to give security for the costs of an action brought by him. *Martin* v. *Russell*, 21 L. R., Ir. 196.

Merely Temporary Absence.]—Where a plaintiff sailed for Africa after notice of motion for decree had been given, the court refused to stay proceedings in the cause until he gave security for costs, as it did not appear from the facts that there was any intention of permanent absence on his part. *Edwardes* v. *Burke*, 9 L. T. 406.

If a plaintiff is a native of England, and departs for France for a mere temporary absence, the court will not compel him to give security for costs. *Anon.*, 2 Chit. 152.

Where a native of this country quits it for a mere temporary residence abroad, the court will not require him to give security for costs. *Cole* v. *Beale*, 7 Moore, 613; 1 L. J. (O.S.) C. P. 49.

But a plaintiff will be required to give security for costs, if it appears that he is gone abroad for more than a temporary residence. *Taylor* v. *Fraser*, 2 D. P. C. 622.

The court will not compel a plaintiff to give security for costs because he has gone to serve in a foreign army in a civil war. *Frodsham* v. *Myers*, 4 D. P. C. 280; 1 H. & W. 526.

Security for costs by a plaintiff, gone abroad, refused after answer, on affidavit of his intention to return; and his family remaining in this country. *White* v. *Greathead*, 15 Ves. 2.

The simple fact that the plaintiff is gone abroad is not a sufficient ground to compel him to give security for costs. *Hoby* v. *Hitchcock*, 5 Ves. 699.

Where a plaintiff goes abroad during the progress of a suit in order to attend to his affairs, and not with a view to abscond from his creditors, but with the intention to return to this country, he will not be required to give security for costs. *Home* v. *Thompson*, Sau. & Sc. 622.

Application for security of costs on account of plaintiff leaving kingdom refused. *Adams* v. *Colethurst*, 2 Anstr. 552. *See* 1 R. R. 201, n.

b. *Irish and Scotch Plaintiffs.*

Before the Judgments Extension Act, 1868.]—A Scotchman, not actually domiciled in this country, but only occasionally residing here, is bound to give security for costs. *Naylor* v. *Joseph*, 10 Moore, 522; 3 L. J. (O.S.) C. P. 207.

For such a plaintiff is within the meaning of the general rule applicable to persons who are not amenable to the courts here suing in this country. *Ib.*

A plaintiff resident in Ireland is bound to give security for costs, although he may sometimes come over to and sojourn in this country. *Mahon* v. *Martinez*, 4 Moore, 356.

An Irishman, ordinarily resident in Ireland, and having no place of abode in England, is compellable to give security for costs in an action brought by him in England, notwithstanding that he is at the time an officer in the army, serving with his regiment in Ireland. *Chappell* v. *Watts*, 2 El. & El. 879; 29 L. J., Q. B. 167; 6 Jur. (N.S.) 533; 2 L. T. 283; 8 W. R. 450.

A public company carrying on all its business in Ireland was compelled to give security for costs, although it had 3,000*l.* in a bank in London, and most of the members resided in England. *Limerick and Waterford Ry.* v. *Fraser*, 4 Bing. 394; 1 M. & P. 23; 6 L. J. (O.S.) C. P. 9. S. P., *Edinburgh and Leith Ry.* v. *Dawson*, 7 D. P. C. 573; 1 W. W. & H. 561; 3 Jur. 55. *Kilkenny and Great Southern and Western Ry.* v. *Fielden*, 6 Ex. 81; 6 Railw. Cas. 785; 2 L. M. & P. 124; 20 L. J., Ex. 141; 15 Jur. 191.

So if the plaintiff resides permanently in Ireland. *Fitzgerald* v. *Whitmore*, 1 Term Rep. 362.

Plaintiff residing in Ireland ordered to give security for costs. *Hill* v. *Reardon*, 6 Madd. 46.

Or in Scotland. *M'Lean* v. *Austin*, 1 Tidd's Prac. 575.

The court will compel a Scotchman to give security for costs as a foreigner. *Ker* v. *Munster* (*Earl*), Bunb. 35.

All proceedings stayed until security for costs given, the petitioner being in Scotland, and no step taken by the respondent. *Scott, Ex parte, Western, In re*, 3 Mont. & Ayr. 393; 2 Deac. 556.

Since Judgments Extension Act, 1868.]—Petitioners in chancery who reside in Scotland are still liable to give security for costs, the Judgments Extension Act, 1868, s. 5, applying only to actions. *East Llangynog Lead Mining Co., In re*, 23 W. R. 587.

Since the passing of the Judgments Extension Act, 1868, a plaintiff residing in Scotland is not required to find security for costs. *Raeburn* v. *Andrews*, 43 L. J., Q. B. 73; L. R. 9 Q. B. 118; 30 L. T. 15; 22 W. R. 489. See *Howe Sewing Machine Co., In re Fontaine's Case*, 41 Ch. D. 118; 61 L. T. 170; 37 W. R. 680—C. A.

So, according to the decision of the Irish Court of Queen's Bench, a plaintiff residing in England or Scotland will not, except under special circumstances, be ordered by that court to give security for costs. *White* v. *Carroll*, Ir. R. 8 C. L. 296. S. P., *Yorke* v. *M'Laughlin*, Ir. R. 8 C. L. 547.

But, according to the decisions of the Irish Courts of Common Pleas and Exchequer, a plaintiff resident in Great Britain will be ordered to give security for costs. *Clarke* v. *Croker*, Ir. R. 8 C. L. 318; and *Corner* v. *Irwin*, Ir. R. 8 C. L. 504.

c. *Foreigners in this Country.*

Temporary Residence in United Kingdom.]—The words of r. 6 (*a*) of Ord. LXV. of the Rules of Court, 1883, "temporarily resident within the jurisdiction," have an elastic meaning, the object of the rule being to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted. *Michiels* v. *Empire Palace*, 66 L. T. 132—C. A.

The plaintiff in an action brought to establish his right to considerable landed property in Ireland was at the time of the commencement of

the action resident in France, and an order for security for costs was made on the application of the defendant. Before the order was acted on the plaintiff came within the jurisdiction, and moved to discharge the order. It appeared that the plaintiff, though born in London, had been, since the year 1880, continuously residing in Paris, where he earned his livelihood as an accountant, and occupied apartments held quarterly and furnished by himself. His wife was a Frenchwoman, carrying on the trade of a milliner, in premises at Paris, held in the plaintiff's name. He had resigned his situation as accountant, surrendered his apartments, removed the furniture with the intention of sending it to Ireland, and had instructed his wife to wind up her business, in which request she acquiesced, though no step for the purpose had been as yet taken. He had become tenant of a cottage in Ireland for a term of five years, with power to surrender at the end of fifteen months; he had obtained as yet no employment in Ireland, but was qualified to act as accountant, journalist, or teacher of the French language. He swore that he intended to reside in Ireland for the future, whatever might be the result of the action:—Held, that the facts did not establish to the satisfaction of the court that the plaintiff's residence in Ireland was more than temporary within the meaning of Ord. XXIX. r. 4, and that therefore the order requiring security for costs ought to stand. *Howard* v. *Howard*, 30 L. R., Ir. 340.

Cases before Ord. LXV. r. 6a.]—The court will not require security for costs to be given by a plaintiff, who is a foreigner, and usually resident abroad, if at the time he is actually in this country. *Tambisco* v. *Pacifico*, 7 Ex. 816; 21 L. J., Ex. 276.

It is not a sufficient ground for requiring security for costs, that the plaintiff is a foreigner, lately come to England, having no family connections or permanent abode in it, and likely soon to leave it, if it is not sworn that he has a permanent residence abroad. *Drummond* v. *Tillinghist* or *Tillinghurst*, 16 Q. B. 740; 15 Jur. 384. S. P., *Crispin* v. *Doglioni*, 1 Sw. & Tr. 522; 29 L. J., P. 130; 6 Jur. (N.S.) 303; 1 L. T. 446.

Therefore a sailor born abroad, having a lodging in this country, will not be required to give security for costs upon an affidavit stating, that after his wages were exhausted he would be obliged to go to sea again, but not shewing a domicil abroad. *Ib.*

But a plaintiff, captain of a foreign ship, usually trading to this country, is liable to give security for costs. *Nylander* v. *Barnes*, 6 H. & N. 509; 30 L. J., Ex. 151; 7 Jur. (N.S.) 194; 3 L. T. 819; 9 W. R. 339.

Security for costs is not required from a prisoner of war who sues for wages earned on board an English ship. *Maria* v. *Hall*, 2 Bos. & P. 236; 9 R. R. 696.

A foreign seaman having brought an action for his wages against a foreigner, the court refused to compel him to give security for costs on account of his being on a voyage on board an English ship. *Henshen* v. *Garves*, 2 H. Bl. 383.

So the court refused to stay proceedings till security was given for costs in an action by a foreign seaman serving on board an English ship. *Jacobs* v. *Stevenson*, 1 Bos. & P. 96.

It is in the discretion of the court to allow the mate of a foreign vessel, though not domiciled in England, to prosecute an action for wages without giving security for costs. *The Don Ricardo*, 49 L. J., P. 28; 5 P. D. 121; 42 L. T. 32; 28 W. R. 431.

A foreigner usually residing abroad, who is temporarily residing in England for the purpose of enforcing a claim by action, cannot be called upon to give security for costs. *Redondo* v. *Chaytor*, 48 L. J., Q. B. 697; 4 Q. B. D. 453; 40 L. T. 797; 27 W. R. 701—C. A.

Security is not required from a person whilst in this country, although usually residing abroad. *Anon.*, 8 Taunt. 737.

Although it is sworn that he is about to leave the country. *Ciragno* v. *Hassan*, 6 Taunt. 20; 1 Marsh. 421; 16 R. R. 559.

If a plaintiff is permanently resident abroad, and is only occasionally resident in this country, he will be liable to give security for costs. *Gurney* v. *Key*, 3 D. P. C. 559; 1 H. & W. 203.

The plaintiff ordered to give security for costs where, in the bill, his description was as "of Fort William, Inverness-shire, in the kingdom of Scotland, but now residing in Aldersgate Street, in the city of London," and it appeared that the plaintiff had lodgings in London temporarily only, and had not engaged them for any fixed period. *Ainslie* v. *Sims*, 17 Beav. 57; 1 Eq. Rep. 17; 22 L. J., Ch. 834; 17 Jur. 657. Overruled next case.

A foreigner temporarily resident in this country will not be compelled to give security for costs while he remains in this country. *Cambottie* v. *Inngate*, 1 Eq. Rep. 533; 1 W. R. 533.

d. *Plaintiffs Abroad possessing Property in this Country.*

When Security required.]—An Irish or a foreign railway company is bound to give security for costs, notwithstanding it has personal property in England, and some of its shareholders reside in England, who are responsible to the extent of their unpaid capital. *Kilkenny and Great Southern and Western Ry.* v. *Fielden*, 6 Railw. Cas. 785; 6 Ex. 81; 2 L. M. & P. 124; 20 L. J., Ex. 141; 15 Jur. 191.

So where a Scotch railway company, carrying on their works out of the jurisdiction of the court, has money and exchequer bills in the hands of their bankers in London; such property, notwithstanding the 1 & 2 Vict. c. 110, s. 12, not being of a sufficiently permanent nature. *Edinburgh and Leith Ry.* v. *Dawson*, 7 D. P. C. 573; 1 W. W. & H. 561; 3 Jur. 55.

A plaintiff who resides abroad will not be called upon to give security for costs if he has substantial property in England, whether that property be real or personal. *Hamburger* v. *Poetting*, 47 L. T. 249; 30 W. R. 769.

A plaintiff resident abroad is not subject to the ordinary rule as to giving security for costs, if he is seised or possessed of land in this country. *Swinborne* v. *Carter*, 2 C. L. R. 104; 1 L. & M. 209; 23 L. J., Q. B. 16; 17 Jur. 1165; 2 W. R. 80.

The possession of ample estates in this country is no bar to an application that the plaintiff shall stay his proceedings, until he give security for costs, if he resides out of the jurisdiction. *Lucan (Lord)* v. *Latouche*, 1 Hog, 448.

Land not mortgaged.]—But, in answer to a rule calling upon a plaintiff resident abroad to give security for costs, he must distinctly shew

that the land is not mortgaged or otherwise unavailable for the purposes of an execution. *Swinborne* v. *Carter*, supra.

An affidavit in answer to the application that "the plaintiff was possessed of landed estates in the county of Durham of considerable value over and above all charges affecting the same," does not sufficiently shew that the estates are available to process. *Ib.*

e. *Several Plaintiffs.*

Joint Plaintiffs, one residing Abroad.]—An action was brought against the defendant as a common carrier by two plaintiffs, one residing abroad. The statement of claim alleged a contract by the defendant with the plaintiffs jointly, and in the alternative with each of the plaintiffs separately:—Held, that the plaintiff residing abroad could not be ordered to give security for costs. *D'Hormusgee* v. *Grey*, 52 L. J., Q. B. 192; 10 Q. B. D. 13.

If one of two plaintiffs is resident abroad, and the other in this country, the court will not compel the absent plaintiff to give security for costs. *Anon.*, 1 D. P. C. 300; 2 C. & J. 88. S. P., *Wilson* v. *Minchin*, 1 D. P. C. 299; 2 C. & J. 87; 2 Tyr. 166; 1 L. J., Ex. 39; *M'Connell* v. *Johnston*, 1 East, 431; 6 R. R. 310.

Where one plaintiff resident in England, no security required for costs. *Winthorp* v. *Royal Exchange Assurance Co.*, Dick. 282.

Plaintiff residing abroad not ordered to give security for costs where there were co-plaintiffs residing in England. *Walker* v. *Easterby*, 6 Ves. 612.

One Plaintiff coming within Jurisdiction.]—An action was brought by a mercantile firm, all the members of which were in America, against a firm at Manchester. The defendants put in a defence and counter-claim, and then applied to the judge for an order for the plaintiffs to give security for costs. The plaintiffs filed an affidavit stating that they with other persons carried on business at Manchester, and that the firm there had assets amounting to 2,000*l.* The judge refused the application. On the appeal the plaintiffs produced an affidavit stating that since the order one of the plaintiffs had come to Manchester for the purpose of carrying on the action:—Held, that the affidavit as to the property of the plaintiffs in England was ambiguous and was not sufficient to support the order in the court below. But held, that, as one of the plaintiffs had come to England since the order was made, although for a temporary purpose, the defendants were not entitled to security for costs, and therefore the order must be affirmed. *Redondo* v. *Chaytor* (4 Q. B. D. 453) followed. *Ebrard* v. *Gassier*, 54 L. J., Ch. 441; 28 Ch. D. 232; 52 L. T. 63; 33 W. R. 287—C. A. *See now* Ord. LXV. r. 6a.

f. *In Counter-claims and Cross Actions.*

Arising out of same Matters as Claim.]—Where a foreigner resident out of the jurisdiction sets up a counter-claim arising out of the same matter as the claim, so that it is in substance in the nature of a defence to the claim, the court has a discretion as to whether it will order the defendant to give security for the costs of the counter-claim. *Neck* v. *Taylor*, 62 L. J., Q. B. 514; [1893] 1 Q. B. 560; 4 R. 344; 68 L. T. 399; 41 W. R. 486—C. A.

In an action for breach of contract against the defendant, a foreigner residing abroad, he, by his defence, denied the breaches, and also made a counter-claim for breaches of the same contract by the plaintiff, claiming damages to an amount less than the plaintiff's claim:—Held, that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter-claim. *Mapleson* v. *Masini*, 49 L. J., Q. B. 423; 5 Q. B. D. 144; 28 W. R. 488.

An incorporated society filed a bill against an incorporated company to foreclose a mortgage comprising nearly the whole of the effects of the company. At this time the company was in process of being wound up under the supervision of the court. By leave of the court in the winding up, a bill was filed in the name of the company against the society, praying that it might be declared that the mortgage deed was not binding on the company, or its bondholders or shareholders; but that, if the court held it to be a good security, certain renewed bills might be excluded from its operation, and that it might be declared a security only for bills of exchange accepted by the society; and that, in estimating the debt covered by it, no bills accepted by persons or firms other than the society might be included; and that an account might be taken on this footing of what was due; and that the company might be allowed to redeem on payment of what should be so found due:—Held, that, whether this was a pure cross bill or not, the plaintiffs in it must give security for costs. *City of Moscow Gas Co.* v. *International Financial Society*, 41 L. J., Ch. 350; L. R. 7 Ch. 225; 26 L. T. 377; 20 W. R. 394.

Held, on appeal, that the bill was not a mere cross bill; and that security for costs must be given. *Ib.*

Semble, that even had it been a pure cross bill, security for costs must have been given, as it was filed in the name of a company which was being wound up. *Ib.*

Claim admitted—Costs of Counter-claim.]—A defendant who admits the cause of action sued upon, and sets up a counter-claim founded upon a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing without the jurisdiction. *Winterfield* v. *Bradnum*, 47 L. J., Q. B. 270; 3 Q. B. D. 324; 38 L. T. 250; 26 W. R. 742—C. A.

Where a defendant admits the plaintiff's claim, but sets up a counter-claim in respect of a wholly distinct transaction, the plaintiff ought never to be required to give security for costs. *Ib.*

Counter-claim independent of Claim.]—Where a defendant residing out of the jurisdiction sets up a counter-claim which amounts to an independent action, he may be ordered to give security to the plaintiffs for the costs of the counter-claim. *Lake* v. *Haseltine*, 55 L. J., Q. B. 205.

Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of a cross action, the defendant, if he is residing out of the jurisdiction, may be required to give security for the plaintiff's costs of the counter-claim, and, if the only dispute remaining arises on the counter-claim, it is beyond doubt right that he should be so required. *Sykes* v. *Sacerdoti*, 54 L. J., Q. B. 560; 15 Q. B. D. 423; 53 L. T. 418—C. A.

Admiralty Court—Foreign State Plaintiff.]—The Court of Admiralty has power under s. 34 of the Admiralty Court Act, 1861, to stay proceedings in an action in rem until the plaintiffs have given security to answer the defendants' counter-claim, even though the plaintiff's ship, because it is owned by a foreign government, is by the comity of nations privileged from arrest. *The Newbattle*, 54 L. J., P. 16; 10 P. D. 33; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. C. 356—C. A.

Whether Cross Bill or Defence to Bill.]—Plaintiff in a cross bill will not be compelled to give security for costs, though residing out of jurisdiction. *Thornton* v. *Wilson*, 1 Hog. 20.

The plaintiff in a cross suit (impeaching an instrument which the original suit seeks to enforce), although residing out of the jurisdiction, is not bound, as against the plaintiff in the original suit, to give security for costs. *Vincent* v. *Hunter*, 5 Hare, 320.

A bill was filed by a mortgagee of a reversionary interest, for sale or foreclosure. The defendant by his answer admitted the debt. Then the defendant filed a bill against the plaintiff, alleging that nothing was due from him to the plaintiff, but that the plaintiff was indebted to him, and that the security had been obtained from him by fraud, as had also been his answer in the original suit, and praying an account and payment of what was due to him from the plaintiff, and re-assignment of the property comprised in the security:—Held, that the second suit was a cross suit, and that the plaintiff in it, although out of the jurisdiction, need not give security for costs. *Macgregor* v. *Shaw*, 2 De G. & Sm. 360.

The proceedings of a plaintiff in a bill for dower, who resided out of the jurisdiction, were stayed until she should give security for costs. Secus, if the bill were a cross bill, or for an injunction to restrain proceedings at law. *Maguire* v. *Maguire*, Sau. & Sc. 653.

A. filed an original bill against B., and B. filed a cross bill against A. and others; they all moved that B. might give security for the costs of the cross suit. Motion refused, but leave was given to the co-defendants with A., who were not parties to the original suit, to move that B. might give security for the costs of the cross suit. *Sloggett* v. *Viant*, 13 Sim. 187.

The practice, in the case of a defendant at law filing a bill to restrain an action, was similar to that in the case of bill and cross bill, and security for costs cannot be required. *Watteeu* v. *Billam*, 3 De G. & Sm. 516; 18 L. J., Ch. 455; 14 Jur. 165.

A. filed a bill against B., the registered holder of one thousand shares in a company, and against the company and their secretary, for specific performance of an alleged contract by B. to transfer the shares to A., and for an injunction to restrain the company from transferring the shares to any one else than to A. The company thereupon filed a bill against A. and B., praying for declarations that the alleged contract was fraudulent and void, and that A. and B. were trustees of the shares for the company:—Held, that the second suit was not so strictly in the nature of a cross suit to the first, that A. was deprived of the right of calling upon the company to give security for costs. *Washoe Mining Co.* v. *Ferguson*, L. R. 2 Eq. 371; 14 L. T. 590; 14 W. R. 820.

A plaintiff resident abroad, filing a bill to restrain an action brought against him by the defendant in equity, will not be ordered to give security for costs, although the bill seeks other objects of relief than mere restraint of the action. *Wilkinson* v. *Lewis*, 3 Giff. 394; 8 Jur. (N.S.) 908; 5 L. T. 488.

The test of a cross bill is, that it is a simple bill of defence to an existing attack; and therefore, where a bill did not come within the definition, security for costs was ordered, the plaintiff being abroad. *Tynte* v. *Hodge*, 2 John. & H. 692; 1 N. R. 48; 8 Jur. (N.S.) 1226; 7 L. T. 349; 11 W. R. 52.

A suit instituted for the purposes of defence against the defendant moving, who was plaintiff in a previously existing suit, will, upon a motion for security for costs, be considered as a cross suit as regards the defendant moving, whatever might be the case as regards other defendants to the second suit. Quære, as to the result of such a motion by other defendants to the second suit, not being parties to the first. *Wild* v. *Murray*, 2 Eq. Rep. 1095; 18 Jur. 892; 2 W. R. 613.

Sect. 69 of the Companies Act of 1862 makes no alteration in the principle upon which the court refuses to allow a defendant in a cross suit to call upon the plaintiff in the cross suit to give security for costs; the principle being—not that the defendant by suing the plaintiff originally has admitted the jurisdiction, and cannot afterwards question it, but that a person who, though nominally a plaintiff, is actually a defendant, will be allowed freely to defend himself. Where a company, registered under the act of 1862, was plaintiff in a suit to set aside a policy on which the defendant in the suit had already sued the company in an action, which was still pending, the court refused to order the company to give security, although at the time of the application there was a petition to wind up the company, under which it was afterwards wound up. *Accidental and Marine Insurance Co.* v. *Mercati*, L. R. 3 Eq. 200; 15 L. T. 347; 15 W. R. 88.

In a case where the plaintiff had obtained an order for leave to file a supplemental bill, and for payment of certain costs, one of the defendants presented a petition, praying that so much of the order as related to the payment of costs might be discharged. On an application by the plaintiff, that the petitioner might give security for the costs of this petition, as he was out of the jurisdiction, the court held that, where a person had been brought before the court in a suit, he must have a right to present a petition in that suit; and refused to order the petitioner to give security for costs. *Cochrane* v. *Fearon*, 2 Eq. Rep. 813; 18 Jur. 568.

g. *Misdescription of Party or Residence.*

Residence.]—If plaintiff is insolvent, and gives a wrong residence, ordered to give a note of residence or security for costs. *James* v. *Gilladam*, 2 Anstr. 552.

A plaintiff, who gives a false description in the bill of his place of residence, will be made to give security for costs, although from the nature of his trade he has no residence. *Calvert* v. *Day*, 2 Y. & Coll. 217.

Where a plaintiff, upon his bill, misstates his place of residence, the court will order him to give security for costs. *Sandys* v. *Long*, 2 Myl. & K. 487; 7 Sim. 140.

Plaintiff describing himself as of place where he is rector, but not resident, not obliged to find security for costs. *Sandys* v. *Whately*, 2 Jur. 1038.

The proceedings of a plaintiff, who had misdescribed his residence in the bill, were stayed until he should give security for costs. *Home* v. *Thompson*, Sau. & Sc. 622.

The plaintiff, being the lessee of the opera house, described himself as "of Her Majesty's Theatre, in the county of Middlesex":—Held, that the plaintiff having so described himself in several deeds and transactions which had taken place between the plaintiff and defendant, the defendant was not entitled to security for costs. *Lumley* v. *Hughes*, 2 W. R. 112.

Security for costs will not be ordered to be given merely on the ground that, at the time of filing the bill, the plaintiff was not actually resident at the place of which he is described. *Hurst* v. *Padwick*, 17 L. J., Ch. 169; 12 Jur. 21.

A petitioner having, on his petition, given a false address, and having neither explained it nor given a true address, was ordered to give security for costs, though he was not contemplating going out of the jurisdiction. *Foley, Ex parte, Smith, In re*, 11 Beav. 456.

Although a plaintiff, who wilfully misrepresents his place of residence upon the record, will be ordered to give security for costs, this does not extend to a case where it is done innocently and from mere error. *Lamb* v. *Fottrell*, Ir. R. 8 Eq. 69.

A plaintiff, described in the bill as of Africa, now residing at a given address in England, ordered, under the circumstances, to give security for costs, notwithstanding the defendant had applied for further time to answer, and might, before making that application, have ascertained the facts on which the order was made. *Swanzy* v. *Swanzy*, 4 Kay & J. 237; 27 L. J., Ch. 419; 4 Jur. (N.S.) 1013; 6 W. R. 414.

The proceedings of a plaintiff, who had misdescribed his residence in the bill, were stayed until he gave security for costs. *Shaw* v. *Dempsey*, Sau. & Sc. 628.

A plaintiff, resident abroad, but having an estate and residence at C., in the county of T., being described as of "C., in the county of T.," without further addition, is not a misdescription. *Watson* v. *Pim*, 2 Ir. Eq. R. 26; Sau. & Sc. 642.

No Fixed Abode.]—The circumstance that a plaintiff has no fixed place of abode, and that it is difficult to find him, is not a sufficient ground for compelling him to give security for costs, unless he goes out of the jurisdiction of the court. *Fraser* v. *Palmer*, 3 Y. & Coll. Ex. 279; 8 L. J., Ex. Eq. 39; 3 Jur. 145.

A plaintiff described himself in his bill as of an address where he did not live, but where letters were addressed to him, and duly reached him. He had no fixed residence, and was at the time, and still was, living at the house of a friend:—Held, that he must give security for costs, but leave was given to amend within a week, by inserting his proper address, instead of giving security. *Dick* v. *Munden*, 34 L. J., Ch. 669; 11 Jur. (N.S.) 819; 13 W. R. 1013.

When Plaintiff cannot be Found.]—Upon a subpœna issued for the costs of a defendant against whom the bill had been dismissed, the plaintiff could not be found at the place where she was described as residing in the bill, and no information as to her place of residence could be obtained from her solicitor. On a motion made on the part of the defendants, who continued on the record, and who were threatened by the plaintiff's solicitor with an attachment for want of an answer to the amended bill, the plaintiff was ordered to find security for costs. *Bailey* v. *Gundry*, 1 Keen, 53; 5 L. J., Ch. 199.

A plaintiff, not out of the jurisdiction nor attempting to conceal himself, but not actually residing at the places mentioned on the record as his residence, was, under the circumstances of the case, exonerated from giving security for costs, where it appeared that the plaintiff received letters addressed to him at the place mentioned on the record, and the error was made innocently. *Simpson* v. *Burton*, 1 Beav. 556; 8 L. J., Ch. 328; 3 Jur. 995.

Security for costs will not be enforced against a plaintiff who has described himself as of a house no longer in his occupation, and over which a receiver has been appointed, if his suit can be shown to be a defensive proceeding by cross bill to a suit already pending against him. The plaintiff, by having described himself as of a place in the possession of another, was disentitled to the costs of the unsuccessful motion to make him give security. *Wild* v. *Murray*, 2 Eq. R. 1095; 18 Jur. 892; 2 W. R. 613.

A plaintiff, in mean circumstances, was described as of a house which he had shut up previous to filing the bill, but for which he still paid rent, and where he still kept his furniture. The defendant, who was anxious to have personal communication on different subjects with the plaintiff, had, however, made repeated attempts in vain to do so, and no information could be obtained at the house in question. The costs, however, of a recent proceeding in the suit, which had been ordered to be paid by the plaintiff to the defendant, had been duly paid:—Held, that, as in *Bailey* v. *Gundry* (1 Keen, 53), the plaintiff must give security for costs. *Manby* v. *Bewicke*, 8 De G. M. & G. 468; 2 Jur. (N.S.) 671; 4 W. R. 622. Reversing, 24 L. J., Ch. 664.

The plaintiff described himself of a particular place, and stated that his wife and family resided at this address; that he was a commission agent, and travelled about the country, but had been at his residence within the last few months. Upon an affidavit that he could not be found at his address, and that his place of abode could not be discovered, he was ordered to give security for costs. *Oldale* v. *Whitcher* or *Whitehead*, 28 L. J., Ch. 333; 5 Jur. (N.S.) 84; 7 W. R. 157.

Where a plaintiff could not be found at the residence described in his amended bill, an application by a defendant (made a party to the suit by the amended bill) that the plaintiff might be ordered to give security for costs was refused, with costs, the misdescription having arisen by mistake, and no inquiry as to the residence having been made of his solicitor. *Knight* v. *Cory*, 1 N. R. 229; 32 L. J., Ch. 127; 9 Jur. (N.S.) 491; 7 L. T. 618; 11 W. R. 254.

Change of Residence.]—If the residence of the plaintiff be truly described when the bill is filed, the circumstance that he resides elsewhere at a subsequent period, when the subpœna is served on the defendant, is not a ground for requiring the plaintiff to give security for costs. *Trevanion* v. *Sargon*, 8 L. J., Ch. 207; 3 Jur. 121.

Where, at the time of filing the bill, the description of the plaintiff and next friend was accurate, but became inaccurate by a subsequent change of residence, and one going abroad, there being no wilful intention to mislead, and the next friend about to return to this country, the court refused a motion for requiring security, but without costs. *Kerr* v. *Gillespie*, 7 Beav. 270; 13 L. J., Ch. 135; 8 Jur. 50.

A plaintiff, whose residence was correctly stated in the bill, ordered to give security for costs, because he had frequently changed his place of abode since the bill was filed. *Player* v. *Anderson*, 15 Sim. 104; 15 L. J., Ch. 189; 10 Jur. 169.

A plaintiff, who had inadvertently described herself as of a place she had left at the date of the filing of the bill, was not ordered to give security for costs, and a motion for that purpose was refused; but the court gave the defendant his costs on his not putting plaintiff to amend her bill. *Smith* v. *Cornfoot*, 1 De G. & Sm. 684; 12 Jur. 260.

Amendment.]—A notice of motion was served, that the plaintiff might be ordered to give security for costs, in consequence of misdescription of his residence in the bill. Pending the motion, the bill was amended, and the residence correctly inserted. The motion was refused on the plaintiff paying the costs of it. *Ackerley* v. *Frodsham*, 8 L. J., Ch. 240.

Supplemental Bill.]—Plaintiffs filed a supplemental bill for the purpose of bringing before the court the assignees of a defendant, who had become bankrupt. The plaintiffs were fully described in the original bill, but in the supplemental bill their places of residence were omitted:—Held, on motion, that they must give security for costs. *Campbell* v. *Andrews*, 12 Sim. 578.

Misdescription.]—A married woman had filed a bill describing herself as a spinster, and subsequently obtained an order to revive upon an affidavit by herself and husband that they had been recently married. Upon discovery made that she had been married before filing the original bill, the order to revive was discharged upon the application of the defendant. Liberty given to plaintiffs to amend upon giving the usual security for costs on or before the last day of next term. *Davey* v. *Bennett*, 3 Eq. R. 490; 3 W. R. 353.

The plaintiff brought her bill for redemption, describing herself as A. B., the widow of the mortgagor, and claiming as his devisee and executrix, but she obtained probate of the bill as A. C., otherwise B., spinster:—Held, that as the description of the plaintiff in the suit involved the question of her title under the will, the above variance did not entitle the plaintiff to have the bill taken off the file, or security given for costs. *Griffith* v. *Ricketts*, 5 Hare, 195; 15 L. J., Ch. 230; 10 Jur. 405.

Where the plaintiff only described himself as "working on the line of railway between Sheffield and Manchester":—Held, an insufficient description, and a motion to give security for costs was ordered to stand over to allow him time to amend. *Sibbering* v. *Balcarres (Earl)*, 1 De G. & Sm. 683; 17 L. J., Ch. 132; 12 Jur. 108.

When a sole plaintiff filed a bill under a wrong name, and, by amendment, added his real name, and the defendant moved to take the amended bill off the file:—Held, that plaintiff must give security for the costs of the suit up to the date of the motion. *Andrewes* v. *Nelson*, 15 W. R. 378.

h. *English Officials and Officers Abroad.*

Officials.]—A plaintiff holding in Jamaica the office of stipendiary magistrate, under the 3 & 4 Will. 4, c. 73, is not bound to give security for costs. *Cocking* v. *Alexander*, Fl. & K. 391.

A lieutenant in the navy, holding the office of port captain and harbour-master in the island of Barbadoes, cannot be compelled to find security for costs. *Evering* v. *Chiffenden*, 1 W. W. & H. 560; 7 D. P. C. 536; 3 Jur. 288.

Motion, that the plaintiff, a naval officer on half-pay, who had resided sixteen years in Barbadoes, where he held the office of captain of the port, under the appointment of the crown, might give security for costs refused. *Evelyn* v. *Chippendale*, 9 Sim. 497; 8 L. J., Ch. 232.

A commissioner of the Ionian Islands filling his office out of this country could not be compelled to find security for costs, when a plaintiff. *Nugent (Lord)* v. *Harcourt*, 2 D. P. C. 578.

A plaintiff employed as a civil and sessions judge in the service of the East India Company, is not exempt from giving security for costs. *Plowden* v. *Campbell*, 23 L. J., Q. B. 384; 18 Jur. 910; 2 W. R. 553.

Plaintiff who resides as judge in one of the colonies will not be compelled to give security for costs. *Stanley* v. *Hume*, 1 Hog. 12.

Consul abroad, plaintiff in suit, need not give security for costs. *Colebrook* v. *Jones*, Dick. 154.

Officers.]—A plaintiff, who is a non-commissioned officer, residing with his regiment in India, will not be compelled to give security for costs. *Fisher* v. *Bunbury*, Sau. & Sc. 625.

A motion that a plaintiff, who was a surgeon in the army, residing abroad with his regiment, should give security for costs, was refused with costs. *Wright* v. *Everard*, Sau. & Sc. 651, n.

Application that the plaintiff, out of the jurisdiction, being an officer in her majesty's service on duty with his regiment in India, should give security for costs, refused. *Everard* v. ——, 1 Ir. Eq. R. 421.

An officer on half-pay, resident abroad, is not privileged from giving security for costs. *Long* v. *Tottenham*, 1 Ir. Ch. R. 127.

Where it appears upon the bill that the plaintiff is an officer in his majesty's service, and out of the jurisdiction, the defendant will be entitled to the usual security for costs, unless it be distinctly stated that the plaintiff is on actual service. It is not sufficient to state that the plaintiff is an officer of a particular regiment and residing at a particular place out of the jurisdiction, although the regiment may, in fact, be stationed at that place. *Lillie* v. *Lillie*, 2 Myl. & K. 404.

Security for costs will be required from an officer in the service of the East India Company. *Powell* v. *Bernard*, 1 Hog. 144.

Where a bill described the plaintiff as a lieutenant in her majesty's ship "Gladiator," now on service, the court refused to compel him to give security for costs. *Clark* v. *Fergusson*, 1 Giff. 184; 5 Jur. (N.S.) 1155.

Security for costs will not be required from

an English officer serving in South America. *O'Lawghla* v. *Macdonald*, 8 Taunt. 736 ; 3 Moore, 77.

An officer serving in India, who had been originally in the service of the East India Company, and was by 21 & 22 Vict. c. 106, transferred to the service of the Queen, cannot be compelled to give security for costs. *Whittall* v. *Campbell*, 5 H. & N. 601 ; 29 L. J., Ex. 326 ; 6 Jur. (N.S.) 485 ; 2 L. T. 251 ; 8 W. R. 450.

An officer serving with his regiment in Ireland, who was born in Ireland, and is not shewn to have any residence in England, is not exempt from giving security for costs. *Chappell* v. *Watts*, 2 El. & El. 879 ; 29 L. J., Q. B. 167 ; 6 Jur. (N.S.) 533 ; 2 L. T. 283 ; 8 W. R. 450.

i. *Ambassadors and Foreign Sovereigns.*

The court will not compel a foreign ambassador to give security for costs. *De Montellano* (*Duke*) v. *Christin*, 5 M. & S. 503.

If an ambassador's servant brings a bill, he must give security to answer costs, as being a person privileged. *Goodwin* v. *Archer*, 2 P. W. 452. *Anon.*, Mos. 175.

Where plaintiff is under the protection of a foreign ambassador, he must give security for costs. *Adderly* v. *Smith*, Dick. 355.

The court will compel a foreign potentate, resident abroad, who is a plaintiff, to find security for costs in a cause arising out of commercial transactions. *Brazil* (*Emperor*) v. *Robinson*, 6 A. & E. 801 ; 5 D. P. C. 522 ; 1 N. & P. 817 ; W. W. & D. 278 ; 6 L. J., K. B. 168. S. P., *Greece* (*King*) v. *Wright*, W. W. & D. 594 ; 6 D. P. C. 12 ; 1 Jur. 944.

j. *Peers.*

A plaintiff who is a peer, and out of the jurisdiction, must give the usual security for costs. *Aldborough* (*Lord*) v. *Burton*, 2 Myl. & K. 401.

Security for costs cannot be required from a peer, though residing abroad. *Ferrars* (*Earl*) v. *Robins*, 2 D. P. C. 636.

k. *Executors and Administrators.*

The court will compel an executrix, who is out of the jurisdiction, to give security for costs ; but such security will be confined to those costs only for which she would be liable. *Chamberlain* v. *Chamberlain*, 1 D. P. C. 366.

If a plaintiff is resident abroad, the court will require him to give security for costs, although he sues in the capacity of executor. *Chevalier* v. *Finnis*, 3 Moore, 602 ; 1 Br. & B. 277.

In an action by an administrator for the benefit of the deceased's widow and children, the court refused to order security for costs to be given simply on the ground that he was suing merely for the benefit of others. *Larssen* v. *Monmouthshire Ry. and Canal Co.*, 16 L. T. 289.

Where two executors bring an action, and one is abroad and the other insolvent, the court cannot make an order to stay proceedings if they do not give security for costs. *Sykes* v. *Sykes*, 38 L. J., C. P. 281 ; L. R. 4 C. P. 645 ; 20 L. T. 663 ; 17 W. R. 799.

A plaintiff suing as executor, and residing out of the jurisdiction, may be compelled to give security for costs. *Cathcart* v. *Hewson*, Hayes, 173.

Executors and administrators must give security for costs on the same grounds as other persons. *Shaw* v. *Dempsey*, Sau. & Sc. 628.

l. *Bankruptcy and Insolvency.*

Cause of Action arising pending Bankruptcy.]—An undischarged bankrupt suing in respect of a cause of action arising after he has been adjudicated bankrupt cannot be called on to give security for the costs of the action. *Cook* v. *Whellock*, 59 L. J., Q. B. 329 ; 24 Q. B. D. 658 ; 62 L. T. 675 ; 38 W. R. 534—C. A. Affirming, 54 J. P. 423.

Suing for his own Benefit.]—The fact that a plaintiff is insolvent, and that there is a receiver of his assets, is not necessarily a ground for requiring him to give security for costs. *Malcolm* v. *Hodgkinson* (L. R. 8 Q. B. 209) commented on. A receiving order, made under the Bankruptcy Act, 1883, does not divest the debtor of his property ; and what he recovers as plaintiff in an action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them. Therefore the debtor, against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be the plaintiff. *Rhodes* v. *Dawson*, 55 L. J., Q. B. 134 ; 16 Q. B. D. 548 ; 34 W. R. 240—C. A.

Plaintiff in equity becoming bankrupt will not be compelled to give security for costs. *Anon.*, 2 Anstr. 407 ; 3 R. R. 598.

If plaintiff is insolvent and gives a wrong residence, ordered to give a note of residence, or security for costs. *James* v. *Gilladam*, 2 Anstr. 552.

Plaintiff in equity being found a bankrupt, but disputing the validity of the commission, may proceed in the suit, bringing his assignee before the court by supplemental bill, and cannot be required to give security for costs. *Kelly* v. *Dowling*, 1 Moll. 73.

The court refused to grant a rule compelling a plaintiff to give security for costs by reason of his insolvency, no ground being shown for believing that the action was prosecuted for the benefit of his assignees. *Stead* v. *Williams*, 5 D. & L. 497 ; 5 C. B. 528 ; 17 L. J., C. P. 109 ; 12 Jur. 100.

After verdict in favour of the plaintiff, and a rule for a new trial made absolute, he became bankrupt ; the court compelled him to give security for costs, although there was no affidavit that the action was carried on for the benefit of the assignees. *Denton* v. *Williams*, 8 D. P. C. 123 ; 1 W. W. & H. 327 ; 2 Jur. 872.

After joinder in demurrer, the plaintiff became bankrupt and obtained his certificate. The defendant then applied for security for costs, but plaintiff's assignees not interfering, the court rejected the application. *Beckham* v. *Knight*, 4 Bing. (N.C.) 74 ; 5 Scott, 336 ; 6 D. P. C. 227 ; 3 Hodges, 301 ; 7 L. J., C. P. 19 ; 2 Jur. 16.

Defendant—Trial by Proviso.]—The giving notice of trial by proviso by a defendant in an action on a bill of exchange is not sufficient to make him such an actor in the cause as to induce the court to compel him to give security for costs, although he is insolvent ; and if the plaintiff, after notice of the defendant's insolvency, takes

a step in the cause he will not be allowed to discontinue without payment of costs. *Ford* v. *Stott*, 1 D. (N.S.) 763; 11 L. J., Q. B. 235; 6 Jur. 486.

For Benefit of Creditors.]—A plaintiff since action executed a deed of inspectorship for the benefit of his creditors, and by it he covenanted to give up the whole of his property when required by the inspectors to do so. The action was being proceeded with for the benefit of the creditors:—Held, that the defendant was entitled to security for costs. *Smith* v. *Saunders*, 16 L. T. 386; 15 W. R. 811.

A plaintiff, in an action of trover, filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, s. 125, and a receiver was appointed:—Held, that the plaintiff was rightly ordered to give security for costs. *Malcolm* v. *Hodgkinson*, L. R. 8 Q. B. 209; 21 W. R. 360.

A plaintiff assigned all his effects to a trustee for the benefit of his creditors, with power to sue in his name; afterwards he became insolvent, and also bankrupt, and had not obtained his certificate, and had no means of paying the costs of an action. The trustee having commenced an action in the plaintiff's name and without his authority (except under the assignment), the court stayed the proceedings till he should give the defendant security for costs. *Elliott* v. *Kendrick*, 12 A. & E. 597; 4 P. & D. 306; 9 D. P. C. 195; 1 W. P. C. 45; 10 L. J., Q. B. 42.

The court refused to compel a plaintiff to give security for costs upon an affidavit stating that he was in insolvent circumstances, and had mortgaged or assigned to a third party all his interest in the subject-matter of the action. *Parker* v. *G. W. Ry.*, 9 C. B. 766; 19 L. J., C. P. 335.

Where a plaintiff is bankrupt or insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs. *Goatley* v. *Emmott*, 15 C. B. 291; 24 L. J., C. P. 38; 3 W. R. 64. S. P., *Perkins* v. *Adcock*, 14 M. & W. 808; 3 D. & L. 270; 15 L. J., Ex. 7.

Proof of Solvency.]—Where a plaintiff has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of suit, unless he satisfies the court that he is solvent. The fact that he is carrying on business is not sufficient proof of his solvency. *The Lake Megantic*, 36 L. T. 183.

Where Plaintiff a Trustee in Bankruptcy.]—*See* infra.

Insolvent Corporation.]—A corporation, plaintiff in an action, cannot be required to give security for costs on the ground that a receiver of its property has been appointed by the court. *Dartmouth Harbour Commissioners* v. *Dartmouth Corporation*, 55 L. J., Q. B. 483; 34 W. R. 774.

Company in Liquidation.]—Under s. 69 of the Companies Act, 1862, a judge may require security for costs to be given by a plaintiff company if there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs:—Held, where a company is in liquidation, this fact, in the absence of evidence to the contrary, gives sufficient reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs. *Pure Spirit Co.* v. *Fowler*, 59 L. J., Q. B. 537; 25 Q. B. D. 235; 63 L. T. 559; 38 W. R. 686.

—— **Undertaking by Liquidator—Construction.**]—A limited company, after having commenced an action, was wound-up voluntarily. The defendants thereupon took out a summons for security for costs in the sum of 200*l.* The liquidator opposed the application, and stated in an affidavit that he would set apart a sum out of the assets of the company sufficient to meet the costs. An order was made for security unless the liquidator gave an undertaking in the terms of the affidavit. The liquidator accordingly gave an undertaking in writing to set apart out of the assets of the company a sum sufficient to meet the costs which the company might be liable to pay to the defendants in the action. At the trial verdict and judgment passed for the company, but this was reversed on appeal, and judgment was entered for the defendants. The defendants' costs of the action, including the appeal, were taxed at 790*l.*:—Held, that the liquidator's undertaking must be construed with reference to the summons upon which the order was founded, and must, therefore, be limited to 200*l.* *Hawkins Hill Consolidated Gold Mining Co.* v. *Want*, 62 L. J., Q. B. 505; 4 R. 577; 69 L. T. 297—C. A.

m. *Plaintiff a Trustee in Bankruptcy.*

When Required.]—The court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where he is in insolvent circumstances. *Denston* v. *Ashton* (L. R. 4 Q. B. 590) approved. The observations in *Pooley's Trustee* v. *Whetham* (28 Ch. D. 38) dissented from. *Cowell* v. *Taylor*, 55 L. J., Ch. 92; 31 Ch. D. 34; 53 L. T. 483; 34 W. R. 24—C. A.

Where the trustee of a bankrupt brought an action in his official name as the trustee of the bankrupt, and there was no evidence that the trustee was in insolvent circumstances, the court refused to require him to give security merely because he was suing in his official name. The insolvency of the plaintiff not being established, the court expressed no opinion whether the decision in *Denston* v. *Ashton* (L. R. 4 Q. B. 590) was right or wrong. *Pooley's Trustee* v. *Whetham*, 54 L. J., Ch. 182; 28 Ch. D. 38; 51 L. T. 608; 33 W. R. 423—C. A.

The assignee of a bankrupt suing for the benefit of the estate is not within the rule which requires a mere nominal plaintiff suing for the benefit of a third person to give security for costs. *Denston* v. *Ashton*, 10 B. & S. 768; 38 L. J., Q. B. 254; L. R. 4 Q. B. 590; 21 L. T. 20; 17 W. R. 968.

Where a plaintiff becomes bankrupt in the middle of a cause, the assignees, if they proceed with the action, must give security for all the costs. The defendant may apply for this security at any time before a fresh step in the cause is taken. *Mason* v. *Polhill*, 2 D. P. C. 61; 1 C. & M. 620; 3 Tyr. 595; 2 L. J., Ex. 233.

n. *Action not for Plaintiff's Benefit.*

Assignment—Solicitor.]—On a motion to dismiss an action for want of prosecution (the plaintiff having omitted to give notice of trial

within the proper time), or that the plaintiff might be ordered to give security for costs, the defendant in support of the application adduced evidence that the plaintiff was in insolvent circumstances, that he had no settled residence, that he had mortgaged his interest in the property which was the subject-matter of the action to his solicitor, and that there were charges on the property to its full amount. The costs for which the plaintiff was already liable in the action to the defendant were estimated at about 70*l.*, and the future costs at 50*l.* The judge, being of opinion that the plaintiff was carrying on the action not for his own benefit, but for that of his solicitor, ordered the plaintiff to give security for costs to the amount of 200*l.*, and directed the proceedings to be stayed in the meantime:—Held, on appeal, that the court would not interfere with the discretion of the judge as to ordering security, but that the amount must be reduced to 100*l.* Semble, that such an order ought to be made only under very special circumstances. *Wilmott* v. *Freehold House Property Co.*, 52 L. T. 743; 33 W. R. 554—C. A. *Cp. cases*, supra, col. 360.

Merely Nominal Plaintiff.]—Where, in an action against parish officers for distraining for poor-rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, the court stayed the proceedings until he gave security for costs. *Tenant* v. *Brown*, 5 B. & C. 208.

In an action by a pauper against magistrates for turning him out of a cottage, at the instance of parish officers who claimed the premises as part of the poor-house, the court refused to call on him to give security for costs on the ground that the action had been instituted and encouraged by a third person, who had petitioned the house of lords on the subject, and had thrown out expressions of a determination to see the plaintiff reinstated. *Hearsay* v. *Pechell*, 7 D. P. C. 437; 5 Bing. (N.C.) 466; 7 Scott, 477; 2 Arn. 25; 8 L. J., C. P. 247.

Where an action of trespass appeared to have been brought by a man in very humble circumstances, at the instigation and at the costs of his landlord, the court stayed proceedings until the latter gave security for the defendant's costs. *Ball* v. *Ross*, 1 Scott (N.R.) 217; 1 Man. & G. 445.

A corporation or other similar body, nominally prosecutors, may compel the virtual prosecutors to give security for costs. *Reg.* v. *Southampton Harbour Commissioners*, 20 L. T. 585.

Where the whole interest of a party in an award is assigned to another, the court will not compel the latter to give security for costs in an action brought by the former upon the award. *Day* v. *Smith*, 1 D. P. C. 460. *See also cases* ante, col. 361.

In an action on a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the nominal plaintiff must give security for costs. The assignee's written undertaking is not sufficient. *Youde* v. *Youde*, 3 A. & E. 311.

The court refused to order a plaintiff to give security for costs, on the ground that he had been three times an insolvent and once a bankrupt, and was only suing as trustee for a third person. *Wray* v. *Brown*, 6 Bing. (N.C.) 271; 8 D. P. C. 279; 8 Scott, 557; 9 L. J., C. P. 174; 4 Jur. 271.

A nominal plaintiff who is a pauper will be compelled to give security for costs, and the fact that the action is brought under the direction of the Court of Chancery to try an alleged right will not exempt him from doing so. *Macneal* v. *Biggart*, 18 W. R. 470.

See next sub-division.

o. *Poverty of Plaintiff.*

Security when Ordered.]—A plaintiff will not be compelled to give security for costs merely on the ground of his poverty. *Ross* v. *Jaques*, 8 M. & W. 135; 9 D. P. C. 737; 10 L. J., Ex. 306.

It is no sufficient ground to compel a plaintiff to give security for costs, that he is in extremely destitute circumstances, and wandering about from place to place without a home, and that he had stated, when last seen, that he knew nothing about the action, and that it was carried on by the attorney entirely on his own authority, and without any direction or sanction from him. *Armitage* v. *Grafton*, 1 B. C. Rep. 30; 10 Jur. 377.

The beneficial owner of an old judgment, in order to avoid liability to costs in a suit to be instituted to raise its amount, procured it to be assigned to a pauper, and filed a bill in his name. The proceedings to be stayed until the plaintiff should give security for costs. *Burke* v. *Lidwell*, 1 Jo. & Lat. 703.

Poor relator must give security for costs. *Att.-Gen.* v. *Skinners' Co.*, C. P. Coop. 1.

Security for costs required from a plaintiff, on the ground of poverty, when he had no beneficial interest in the property to be recovered, and it had been assigned to him collusively to evade liability to costs. *Burke* v. *Hutchinson*, 7 Ir. Eq. R. 508.

Security for costs refused, notwithstanding affidavits, stating the poverty of the plaintiff, that he was a trustee as to one moiety of the subject of the suit, and disclosing facts which would be a good defence, and raised a suspicion of champerty and collusion between the plaintiff and his solicitor. *Burke* v. *Hutchinson* (7 Ir. Eq. R. 508) explained. *Worrall* v. *White*, 9 Ir. Eq. R. 572. *S. C.*, 3 Jo. & Lat. 513.

The court will not in an action brought to recover a penalty compel a plaintiff to give security for costs because he is a pauper. *Hamill* v. *Henry*, 5 L. T. 243. See *Browne* v. *Redmond*, 11 Ir. C. L. R. App. xxvi.

See preceding sub-division.

p. *Other Circumstances.*

Transportation.]—A plaintiff who is in prison under sentence of transportation is bound to give security for costs. *Barrett* v. *Power*, 9 Ex. 338; 2 C. L. R. 488; 23 L. J., Ex. 162; 18 Jur. 156; 2 W. R. 220.

A plaintiff will be compelled to stay proceedings until he gives security for costs, on an affidavit that he had been sentenced to transportation, and was then on board the hulks. *Dunn* v. *M'Evoy*, 1 Hog. 355. And see *Baddeley* v. *Harding*, 6 Madd. 214.

Imprisonment.]—Mere imprisonment of plaintiff does not entitle defendant to security for costs. *Baddeley* v. *Harding*, 6 Madd. 214.

Alien.]—Plaintiff, by an order of the secretary of state confined and to be removed out of the kingdom under the Alien Act, ordered on motion,

after appearance and before answer, to give security for costs, according to practice where plaintiff is resident abroad. *Seilaz* v. *Hanson*, 5 Ves. 261.

Plaintiff Absconding.]—After an arrest of a defendant, the plaintiff removed his furniture, and absconded, to avoid a charge of bigamy:—Held, that the defendant was entitled to security for costs. *Rogers* v. *Banger*, 4 D. P. C. 411.

Composition with Creditors.]—The fact of the plaintiffs having compounded with their creditors, and one of them being resident abroad, is no ground for calling upon them to give security for costs. *Thomel* v. *Roelants*, 2 C. B. 290.

Previous Action.]—A plaintiff having brought an ejectment against the defendant, a chancery suit was substituted by arrangement between the parties, and subsequently the bill in equity was dismissed. After this the plaintiff brought a second ejectment against the defendant:—Held, that he might be called upon to give security for costs under s. 93 of the Common Law Procedure Act, 1854, the first action of ejectment not having been successfully prosecuted. *Skene* v. *Davis*, 7 B. & S. 463; 14 L. T. 622; 14 W. R. 776. *See also* STAYING PROCEEDINGS, ante, col. 297.

Change of Parties.]—If, pending a rule for a new trial in ejectment, the plaintiff dies, the defendant is entitled to have security for costs before the rule is argued. *Doe* d. *Cozens* v. *Cozens*, 1 G. & D. 503; 1 Q. B. 426; 9 D. P. C. 1040; 10 L. J., Q. B. 337.

Where, on the trial of an ejectment, a verdict was taken subject to a special case, and, before the terms of it were settled, the plaintiff died:—Held, that this formed no ground for an application for setting aside the verdict or staying proceedings in the action, but that the court would compel the plaintiff to find security for costs. *Doe* d. *Egremont* (*Earl*) v. *Stevens*, 2 D. & L. 993; 14 L. J., Q. B. 258.

Leave was given to the plaintiff in equity to bring an action at law. After the action had been commenced, the plaintiff died. His heir revived the suit, and obtained leave, on a motion which was unopposed, to continue the action. The defendant applied to this court that the new plaintiff might give security for the costs of the action. The court considered that it had no jurisdiction so to order, but it suspended the prosecution of the action until security had been given. *Hilton* v. *Granville* (*Lord*), 5 Beav. 263; 11 L. J., Ch. 388; 6 Jur. 475. *And see* Cr. & Ph. 283.

A plaintiff described himself as resident in Ireland, and the defendant, by obtaining orders for him, waived his right to security for costs. The plaintiff afterwards died, and his personal representative (who was also resident in Ireland) obtained an order to revive under 15 & 16 Vict. c. 86, s. 5:—Held, that the defendant was entitled to an order for security for costs, as against the new plaintiff. *Jackson* v. *Davenport*, 29 Beav. 212; 30 L. J., Ch. 272; 7 Jur. (N.S.) 1224; 9 W. R. 356.

Where the original defendant who had obtained security for costs became bankrupt, his assignees, who had become parties by supplemental bill, were held entitled to call for a fresh security, as they could not have the benefit of the recognizance already entered into. *Ogborne* v. *Bartlett*, Beam. 359.

A defendant who is brought before the court by a bill of revivor, may obtain an order that the plaintiff shall stay proceedings until he gives security for costs. *Wright* v. *Cremorne* (*Lord*), 2 Hog. 18.

Liberty being given to amend, the bill was amended by striking out the names of several co-plaintiffs, and suing by one on behalf of the others:—Held, irregular, but the court allowed the amendment to stand, security being given for costs. *Fellowes* v. *Deere*, 3 Beav. 353.

A nominal party, plaintiff, on moving to be struck out, is only liable to give security for costs up to the time of being struck out. *Trimleston* (*Lady*) v. *Trimleston* (*Lord*), 2 Moll. 325.

On giving security for costs, a formal plaintiff may be struck out of bill as such, and made defendant. *Lloyd* v. *Wingfield*, 1 Hog. 192.

The court will not allow a co-plaintiff to be withdrawn from the record without requiring security to all the defendants for the past costs. *Sweeney* v. *Hall*, Sau. & Sc. 662; 1 Ir. Eq. R. 22.

2. In Particular Actions or Proceedings.

Actions by Married Women.]—*See* HUSBAND AND WIFE.

Actions by Infants.]—*See* INFANT.

Applications for New Trial.]—*See* PRACTICE (NEW TRIAL).

Appeals to Court of Appeal.]—*See* APPEAL.

Appeals from County Courts.]—*See* COUNTY COURT.

Appeals from Mayor's Court.]—*See* MAYOR'S COURT.

In Divorce Proceedings.]—*See* HUSBAND AND WIFE.

Qui tam Action.]—The court will not compel a plaintiff in a qui tam action to give security for costs, though it is sworn that he is a pauper, and has brought a very great number of actions by the same attorney. *Gregory* v. *Elvidge*, 2 D. P. C. 259; 2 C. & M. 336; 4 Tyr. 235.

Or although it appears by affidavit that he is insolvent. *Field* v. *Carron*, 2 H. Bl. 27.

In Ejectment.]—A party residing abroad may, upon being admitted to defend an ejectment as landlord, be required to give security for costs. *Doe* d. *Hudson* v. *Jameson*, 4 M. & Ry. 570.

But a landlord who can satisfy the court or a judge that he is in possession of the land for which an ejectment is brought, either by himself or his tenant, is entitled to appear and defend the ejectment as matter of right, since the 15 & 16 Vict. c. 76; and it is not competent to the court or a judge to impose on him any condition, such as giving security for costs, and even although a foreigner residing out of the jurisdiction of the court. *Butler* v. *Meredith*, 11 Ex. 85; 24 L. J., Ex. 239; 1 Jur. (N.S.) 450; 3 W. R. 443.

Quo Warranto.]—In quo warranto informations, the court will not force an indigent relator to give security for costs, when it does not appear that the fact of indigence had not come to the defendant's knowledge before issue joined. *Rex* v. *Day*, 1 D. P. C. 32.

Information.]—Where in an information and bill the relator is the plaintiff, suing in his own right, the court will not dismiss the information and bill upon the ground that the relator having been required by the attorney-general to give security for costs, has failed to do so. *Att.-Gen.* v. *Knight*, 3 Myl. & C. 154.

Nominal prosecutors may compel the virtual prosecutors to give security for costs. *Reg.* v. *Southampton Harbour Commissioners*, 20 L. T. 585.

Mandamus.]—The court will not oblige a prosecutor of a mandamus to give security for costs, even where it is probable that he is put forward by other persons to try a right in which he has no bonâ fide interest. *Reg.* v. *Malmesbury Corporation*, 9 D. P. C. 359; 5 Jur. 366.

Replevin.]—A defendant in replevin residing abroad must give security for costs. *Selby* v. *Crutchley*, 4 Moore, 280; 1 Br. & B. 505; 21 R. R. 699.

Auditâ querelâ.]—An auditâ querelâ is an action within the 3 & 4 Will. 4, c. 42, s. 34, and as costs may therefore become payable by the plaintiff, he is compellable, when resident abroad, to give security for costs. *Holmes* v. *Pemberton*, 1 El. & El. 369; 28 L. J., Q. B. 172; 5 Jur. (N.S.) 727; 7 W. R. 160.

Interpleader.]—A party made a defendant under an interpleader rule is in the same position as any other defendant; and, therefore, when the plaintiff is resident abroad, is entitled to stay proceedings until security for costs is given. *Benazech* v. *Bessett* or *Bassett*, 1 C. B. 313; 2 D. & L. 801; 14 L. J., C. P. 148; 9 Jur. 376. S. P., *Williams* v. *Crossling*, 3 C. B. 957; 4 D. & L. 660; 16 L. J., C. P. 112.

Where one of the defendants in an interpleader issue is really interested in the result thereof as if he were a plaintiff in an action, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad. *Belmonte* v. *Aynard*, 4 C. P. D. 352; 27 W. R. 789—C. A. Affirming 40 L. T. 627. See *Workmeister* v. *Healy*, Ir. R. 10 C. L. 451. *Cp.* INTERPLEADER.

Action by assignee of an insolvent against a defendant, who was a commission agent, for not accounting for goods delivered by the insolvent to the defendant for sale. The insolvent claimed the goods as belonging to him in the character of executor. An interpleader order for the insolvent to be plaintiff, and the assignee defendant, was made, without requiring the insolvent or the original defendant to give security for costs. *Ridgway* v. *Jones*, 29 L. J., Q. B. 97; 6 Jur. (N.S.) 223; 1 L. T. 368; 8 W. R. 185.

Petition to Tax Solicitor's Bill.]—A person resident out of the jurisdiction presented a petition for taxation of a solicitor's bill of costs; the court ordered the petitioner to give security for the costs of the matter and for the balance alleged to be due to the solicitor. *Cornwall, In re*, 15 L. R., Ir. 144.

On a petition for the taxation of a bill of costs, the petitioner, when resident out of the jurisdiction, must give security for costs, if required. *Dolman, In re*, 11 Jur. 1095.

If a person out of the jurisdiction petition for the taxation of his solicitor's bill, he must give security for the costs of the taxation, and also for the balance that may be found due from him. *Anon.*, 12 Sim. 262.

Where a client, resident abroad, applies for the taxation of his solicitor's bill of costs, on his undertaking to pay, he must give security for the costs of the proceeding. *Passmore, In re*, 1 Beav. 94; 8 L. J., Ch. 229.

Petition to Wind-up Company.]—A petitioner in a petition for winding up a company filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869. No trustee had been appointed:—Held, that the petitioner must give security for costs in the winding-up petition. *Malcolm* v. *Hodgkinson* (L. R. 8 Q. B. 209), and *Brocklebank* v. *King's Lynn Steamship Co.* (3 C. P. D. 365), followed. *Carta Para Gold Mining Co., In re*, 51 L. J., Ch. 191; 19 Ch. D. 457; 46 L. T. 406; 30 W. R. 117.

So petitioner described as resident out of the jurisdiction ordered to give security. *Royal Bank of Australia, In re, Latta, Ex parte*, 3 De G. & Sm. 186; 19 L. J., Ch. 387; 14 Jur. 908.

The rule by which a plaintiff resident out of the jurisdiction is compellable to give security for costs does not in any case extend to other parties:—Held, therefore, that shareholders appearing upon a winding-up petition could not be ordered to give security. *Percy and Kelly Nickel Co., In re*, 45 L. J., Ch. 526; 2 Ch. D. 531; 24 W. R. 1057.

Claim in Winding-up.]—F., who was a foreigner domiciled in Scotland, brought an action in the Queen's Bench Division against the H. company. Upon the company being ordered to be wound-up the proceedings in the action were stayed, and a claim was made in the winding-up. The liquidator asked that F. might be ordered to give security for costs. The court below held that an order in the winding-up would not be enforceable in Scotland under the Judgments Extension Act, 1868, and that F. must give security for costs; but the attention of the court was not called to s. 122 of the Companies Act, 1862, which provides for the enforcing of orders made in the winding-up of a company in England by the courts of Scotland and Ireland. On appeal fresh evidence was adduced which shewed that F. had property in England sufficient to pay the costs of his claim in case he should fail, and on this ground the court discharged the order for security, without expressing any opinion on the point decided. *Howe Sewing Machine Co., In re, Fontaine's Case*, 41 Ch. D. 118; 61 L. T. 170; 37 W. R. 680—C. A.

Petition for Revocation of Patent.]—The principle upon which the court acted in requiring security for costs was, that a person resident out of the jurisdiction is not allowed under ordinary circumstances to institute proceedings in the supreme court here without reasonably satisfying the opposite party that if the application fails there will be an opportunity of recovering the costs of it; where therefore a patentee resident out of the jurisdiction had notice of a petition for revocation of the patent, the patentee is brought before the court as a defendant to defend his right and cannot be ordered to give security for costs. *Miller's Patent, In re*, 63 L. J., Ch. 324; 70 L. T. 270.

Persons not Parties.]—Where a person presenting a petition in a cause not being a party

to it, is out of the jurisdiction of the court, the respondent may make a substantive motion for security for costs. *Atkins* v. *Cooke*, 3 Drew. 694; 26 L. J., Ch. 353; 3 Jur. (N.S.) 283; 5 W. R. 381.

The plaintiff obtained an injunction to restrain the defendants from parting with goods alleged to bear improperly the plaintiff's trade-mark. The defendants, who were shipowners, had no interest in the goods, which had only been put in their hands for transmission. S., a resident in America, who claimed to be owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, and that if necessary he might be added as a defendant to the action:—Held, that S. must give security for the costs of the motion, for that whatever his position as to costs might be if and when he was made a defendant, he must on this motion be treated as a person resident abroad, coming forward to enforce a right, and stood in the position of a plaintiff. *Apollinaris Co.* v. *Wilson*, 55 L. J., Ch. 665; 31 Ch. D. 632; 54 L. T. 478; 34 W. R. 537—C. A.

Petition to refer.]—A foreigner, who claimed to be a creditor of the testator in the cause, petitioned to have his claim referred to the master, after he had made his report: the court made the order, upon condition of his giving security for the costs. *Drever* v. *Maudesley*, 5 Russ. 11.

Defendant having Conduct of Cause.]—After decree, one of several defendants obtained leave to have the conduct of the cause, and, living out of the jurisdiction, was ordered to give only the ordinary security for costs. *Mynn* v. *Hart*, 9 Jur. 860.

3. The Application.

Order LXV. r. 6 (1883).

Time for—Present Practice.]—The old rule in chancery that an application that a next friend should give security for costs must be made before the next material step in the cause is taken, and the old rule at common law, that the like application must be made before issue joined, is abrogated by the new judicature rules; and under r. 8 of Ord. XVI. the court has a judicial discretion to direct security for costs to be given at any time. *Martano* v. *Mann*, 49 L. J., Ch. 510; 14 Ch. D. 419.

The old rule of the Court of Chancery that an application for security for the costs of an action must be made promptly, is inconsistent with the provisions of r. 2 of Ord. LV. that security for costs may be given "at such time or times" as the court may direct, and must be taken to have been abrogated:—Held, therefore, that an application by a defendant for security for the costs of an action brought against him by a limited company might be made after reply and notice of trial. *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 52 L. J., Ch. 640; 23 Ch. D. 358; 48 L. T. 893.

The old rule in chancery, that an application for security for the costs of an action must be made within a reasonable time, is inconsistent with the provision of r. 6 of Ord. LXV., that such security may be "given at such times as the court or a judge shall direct," and it must therefore be taken to have been abrogated. Under r. 6 there is a judicia discretion to direct security for costs to be given at any stage of the proceedings. *Smith, In re, Bain* v. *Bain*, 75 L. T. 46—C. A.

An order for security will not be made where there has been delay in making the application, and expense has been incurred in the meantime by the plaintiff. *Duffy* v. *Joyce*, 25 L. R., Ir. 42.

—— **Practice at Law.**]—The writ of summons in an action under the Summary Procedure on Bills of Exchange (Ireland) Act, 1861, was served on the defendant on the 10th of June, 1882, and on the 20th of June the defendant by notice, required security for costs to be given, on the ground that the plaintiff resided out of the jurisdiction, and, in compliance with the plaintiff's requisition, duly made an affidavit of merits, a copy of which was delivered on the 23rd of June, and upon the same day the defendant, by leave of the court, entered an appearance requiring a statement of claim, the appearance being entered without prejudice to an application for security for costs. No statement of claim was delivered until the 18th of November, 1882. Upon its delivery, the defendant, on the 24th of November, took out a summons for security for costs, and on the 25th delivered his defence, without prejudice to the then pending summons:—Held, that the defendant was entitled to an order for security for costs. *Heil* v. *Lazenby*, 12 L. R., Ir. 75.

An application to compel the plaintiff to give security for costs on the ground of his residing out of the jurisdiction of the court, may be made after an order has been obtained for time to plead on the usual terms. *Dowling* v. *Harman*, 6 M. & W. 131; 8 D. P. C. 165; 9 L. J., Ex. 53; 4 Jur. 43.

An application for security for costs, on the ground of the plaintiff's residing abroad, must be made promptly after the defendant knows that fact. *Duncan* v. *Stent*, 1 D. & R. 348; 5 B. & Ald. 702.

It is no objection to a motion for security for costs on the ground that the plaintiff (a foreigner having a very shadowy residence in this country) has assigned his interest in the result of the action, that the fact was known to the defendant more than a year before, and that the cause is ripe for trial. *Zychlinski* v. *Maltby*, 14 C. B. (N.S.) 322.

Before the trial of a cause, the plaintiff went to reside abroad; the defendant proceeded to trial, with a full knowledge of that circumstance; at the trial a juror was withdrawn by consent, upon a new notice of trial being given:—Held, that the defendant was too late to apply for security for costs. *Wainwright* v. *Bland*, 2 C. M. & R. 740; 4 D. P. C. 547; 1 Tyr. & G. 137; 1 Gale, 333.

Where a plaintiff resides abroad, the court has a discretionary power to require security for costs, notwithstanding the defendant has proceeded in the cause after he knew that the plaintiff resided abroad. *Fletcher* v. *Law*, 5 N. & M. 351; 3 A. & E. 551; 1 H. & W. 430.

It is too late to apply for security for costs after judgment signed. *Borhs* v. *Sessions*, 2 D. P. C. 710.

A motion for security for costs may be made, notwithstanding the defendant is under terms to take short notice of trial, or such notice as the plaintiff can give, provided issue is not joined. *West* v. *Cooke*, 1 C. B. 312; 2 D. & L. 834; 14 L. J., C. P. 151.

In an action for penalties for bribery, an application for security for the costs to be thereafter incurred was refused, the application not having been made until after there had been an abortive trial, and notice of trial had been again given. *Magee* v. *Mark*, 10 Ir. C. L. R. 275.

Security for costs may be applied for at any time before plea pleaded: even after the defendant has had an order for time to plead. *Gurney* v. *Key*, 3 D. P. C. 559; 1 H. & W. 203. S. P., *Wilson* v. *Minchin*, 1 D. P. C. 299; 2 C. & J. 87; 2 Tyr. 166; 1 L. J., Ex. 39.

So at any time after plea pleaded. *Fletcher* v. *Law*, 5 N. & M. 351; 3 A. & E. 551; 1 H. & W. 430.

—— **Practice in Equity.**]—A motion that defendant, residing at Oporto, should give security for costs before he returned there, refused, the answer having been filed. *Whitehead* v. *Murat*, Bunb. 183.

Security for costs not granted, after any step, as answering, or taking time to answer by defendant. *Craig* v. *Bolton*, 2 Bro. C. C. 609.

A defendant may apply for security for costs after answer, if he had no notice, at the time of answering, that the plaintiff was out of the jurisdiction; but if he takes any step in the cause after such notice, he waives the security for costs. *Ib.*

Process for want of an appearance or answer against a defendant is a bar to his application for security for costs. *Groves* v. *Blake*, 1 Hog. 359.

Taking time to answer precludes motion for security for costs against plaintiff abroad. *Prior* v. *White*, 2 Moll. 361.

Where plaintiff is abroad, and the defendant becomes apprised of it, he cannot obtain security for costs, if he afterwards takes any other step in the cause, such as applying for time to answer. *Meliorucchy* v. *Meliorucchy*, 2 Ves. 24. *S. C.*, nom. *Migliorucci* v. *Migliorucci*, Dick. 147.

Security for costs by plaintiff, refused; an answer being by mistake filed after defendant knew plaintiff was abroad, but sworn long before. *Dyott* v. *Dyott*, 1 Madd. 187.

Plaintiff resident in England ordered to give security for costs after appearance by defendant, but before answer. *Stackpoole* v. *O' Callaghan*, 1 Ball & B. 566.

If a plaintiff be out of the jurisdiction, and the defendant require from him security for costs, the right to have the security is waived, if it appear that after the defendant had knowledge that the plaintiff was out of the jurisdiction he permitted any proceeding to be taken in the cause. *Onge* v. *Truelock*, Beat. 341.

Defendant, after an order for time, cannot have security for costs from plaintiff living out of jurisdiction. *Anon.*, 10 Ves. 287.

If a petition is presented under an act of parliament by a person who is out of the jurisdiction, the respondent may require security to be given for costs, notwithstanding he has answered the affidavits in support of the petition. *Scidler, Ex parte*, 12 Sim. 106.

An application for security for costs must be made before any step is taken by the party applying. *Tull, Ex parte, Davis, In re*, 3 Deac. & C. 503; 1 Mont. & Ayr. 80; 3 L. J., Bk. 30.

A motion to stay the proceedings of a plaintiff who appeared by the bill to be resident abroad until he should give security for costs, was refused where the month's notice to answer had been served, and the time for answering had expired. *Eyre* v. *Dwyer*, Sau. & Sc. 653, n.

Plaintiff compelled to give security for costs, on affidavit of his residing in Ireland, the cause not having been at issue, and the venue laid in Middlesex, and proceedings stayed in the meantime. *Moloney* v. *Smith*, M'Clel. & Y. 213.

A motion to stay the proceedings of a plaintiff until he shall give security for costs should be made as early as possible, but circumstances may exist under which such motion would never be too late. *Home* v. *Thompson*, Sau. & Sc. 622.

A feme covert and infant, as co-plaintiffs, by the same next friend, filed a bill in vacation. The defendant filed a demurrer within the month allowed by the rules of court, and, at the time of filing it, served a notice on the plaintiff, that he would apply, on the sitting of the court, to have the proceedings stayed, unless security for costs were given, or the next friend charged:—Held, that the defendant had not, by demurring, taken such a step as, under the circumstances, was a waiver of his right to require security for costs. *Drinan* v. *Mannix*, 2 Con. & L. 87; 3 Dr. & War. 154; 5 Ir. Eq. R. 162, 190.

Where defendant, after having appeared to an injunction bill, suffers the plaintiff to make his order for the injunction absolute, he is too late to require the plaintiff to give security for costs. *Foster* v. *Eyres*, 7 Ir. Eq. R. 638.

Security for costs refused after the time for answering had expired, and a notice had been served to have bill taken as confessed. *Nolan* v. *French*, 10 Ir. Eq. R. 211.

Security for costs refused after the time for answering had expired. *Freel* v. *Trant*, 11 Ir. Eq. R. 278.

When a plaintiff becomes liable to give security for costs after answer, the filing of the replication will not preclude the defendant from obtaining the order. *Long* v. *Tottenham*, 1 Ir. Ch. R. 127.

Where an answer is not required by the notice of a cause petition, the respondent may move for security for costs at any time before he takes a step in the cause, and before the petition is set down in the Lord Chancellor's list for hearing. *Long* v. *Long*, 1 Ir. Ch. R. 618.

But if interrogatories be annexed to the petition, and the respondent is required to answer them by the notice, he must move for security for costs before he takes a step in the cause, and before the time for answering has expired. *Ib.*

A plaintiff described himself as living abroad. Having given notice of motion for the day on which the bill was filed, the defendant appeared and asked for time to answer the affidavits, and he afterwards filed affidavits in opposition:—Held, that he had not thereby waived his right to security for costs. *Murrow* v. *Wilson*, 12 Beav. 497.

A defendant does not, by simply defending an application against him, lose his right to security for costs. *Ib.*

A defendant to an amended bill by a plaintiff out of the jurisdiction at the time of filing both the original and amended bill, not having put in an answer, has not waived his right to obtain security for costs; but defendants to the original bill who have answered and appeared upon interlocutory proceedings, have forfeited that right. *Cooper* v. *Purton*, 8 W. R. 702.

Where it is not clear upon the face of a bill that the defendant is entitled to security for

costs, he by applying for further time to answer does not waive any right that he may have to such security upon grounds dehors the bill, and not discovered by him when he applied for further time, although they might have been so discovered had he made inquiry. *Swanzy* v. *Swanzy*, 4 Kay & J. 237; 27 L. J., Ch. 419; 4 Jur. (N.S.) 1013; 6 W. R. 414.

After Amendment.]—Although a suit may have proceeded to a late stage without security for costs being applied for, yet where the statement of claim has been amended so as to introduce an entirely new case which requires additional and more expensive evidence, an application for security for costs will be entertained. *Northampton Coal Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500; 38 L. T. 82; 26 W. R. 485—C. A.

A plaintiff by his bill described himself as resident within the jurisdiction. The defendant had some notice of his being resident abroad. The defendant answered: and, in a subsequent amendment, a demurrer was allowed, with liberty to amend. The plaintiff having amended and described himself as resident abroad, the defendant obtained an order of course:—Held, under these circumstances, first, that such an order might be obtained as of course, though after answer; secondly, that it was not necessary, in the petition for the order, to state that an answer had been filed; and, thirdly, that though the defendant might have precluded himself from asking for security for costs in the suit as it stood before the last amendment, still he was not so precluded after the plaintiff, by amendment, stated himself to be resident abroad. *Wyllie* v. *Ellice*, 11 Beav. 99; 17 L. J., Ch. 378; 12 Jur. 711.

Matter of Discretion.]—The application that a plaintiff residing abroad do give security is a matter of discretion. *Fisher* v. *Bunbury*, Sau. & Sc. 625.

No Stay of Proceedings.]—The service of a notice of a motion for security for costs is no bar to the entry of process. The entry of a sequestration prevents the defendant from pleading or demurring, even if it was irregular. *Lloyd* v. *Trimleston* (*Lord*), 1 Hog. 482.

Service of notice of motion to give security for costs will not stop the plaintiff's proceeding to hear the cause. *Ivie* v. *Gahan*, 8 Ir. Eq. R. 371.

—— **By whom given.**]—A judge's order, directing that the plaintiff do forthwith give security for costs, is no stay of proceedings in the meantime. *Hill* v. *Fletcher*, infra.

Defendant in Contempt.]—A defendant in contempt, against whom an attachment is sealed, cannot apply for an order that the plaintiff give security. *Trevanion* v. *Sargon*, 8 L. J., Ch. 207; 3 Jur. 121.

Onus of Proof.]—It is not necessary for a defendant to shew the stage of the proceedings, in order to obtain a rule nisi for security for costs. *Cole* v. *Beardy*, 5 D. P. C. 161.

It is for the plaintiff to shew that the motion is not in time. *Jones* v. *Jones*, 2 Tyr. 216; 2 C. & J. 207; 1 D. P. C. 313; 1 L. J., Ex. 77.

Where Defendant also resides Abroad.]—Where a defendant moves that the plaintiff, residing abroad, should give security for costs, the court will not make the rule mutual, on the ground that the defendant is also resident abroad. *Baxter* v. *Morgan*, 2 Marsh. 80; 6 Taunt. 379; 16 R. R. 628.

No Defence on Merits.]—It is no ground for refusing a rule, for the plaintiff to find security for costs, that the defendant has no defence on the merits. *Edinburgh and Leith Ry.* v. *Dawson*, 1 W. W. & H. 561; 7 D. P. C. 573; 3 Jur. 55. S. P., *Ciragno* v. *Hassan*, 1 Marsh. 421; 6 Taunt. 20; 16 R. R. 559.

Semble, the merits of the case cannot be entered into on the application. *Hurst* v. *Padwick*, 17 L. J., Ch. 169; 12 Jur. 21.

Form of Order—Fixed Time.]—The court will not appoint any fixed time before which a plaintiff is to give security for costs. *Broughton* v. *Jeremy*, 1 H. & W. 525.

The plaintiff's attorney undertaking by the order to find security, does not bind the plaintiff or his attorney to give security unless he proceeds with the action. *Hill* v. *Fletcher*, 1 L. M. & P. 518; 5 Ex. 470.

A judge's directing the real plaintiff in an action brought by a nominal plaintiff, who is insolvent, to make himself responsible for the defendant's costs therein, is wrong, and ought to be amended; as the defendant is in such case entitled to security for his costs, to the satisfaction of the master. *Maisi* v. *McNamara*, 5 Ex. 267; 1 L. M. & P. 296. See *Day* v. *Smith* and *Youde* v. *Youde*, ante, col. 363.

Waiver of Right.]—A petitioner—an unsatisfied judgment creditor—residing out of the jurisdiction, asking for an order for the compulsory winding-up of an association, was, on the application of the respondents, ordered to give security for costs to the amount of 100*l.*:—Held, that filing affidavits after taking out a summons for security was not a waiver. *Home Assurance Association, In re*, L. R. 12 Eq. 112; 25 L. T. 199; 19 W. R. 947.

The entry of an appearance requiring a statement of claim is not a waiver of the defendant's right to security for costs from a plaintiff residing out of the jurisdiction. *Tellett* v. *Lalor*, 8 L. R., Ir. 8.

In an action to recover the balance alleged to be due on a bill of exchange between the original parties to the bill, and in which the indorsement of the writ credited the defendants with certain alleged payments, the defendants entered an appearance requiring a statement of claim, and afterwards applied for security for costs, on the ground that the plaintiff resided out of the jurisdiction. The affidavit of merits stated that the bill was an accommodation bill, for which no value was received, and that the defendants had a good defence on the merits:—Held, first, that the defendants had not waived their right to security for costs by appearing; secondly, that the affidavit of merits was sufficient. *Charlesworth* v. *Clayton*, 10 L. R., Ir. 357.

After a defendant has undertaken to accept short notice of trial, he cannot require security for costs from the plaintiff, a foreigner residing abroad. *De Montellano* (*Duke*) v. *Garcias*, 7 Moore, 361; 1 Bing. 67; 1 L. J. (o.s.) C. P. 9. S. P., *Michael* v. *Pariski*, 2 H. Bl. 593; 3 R. R. 512: *Muller* v. *Gernon*, *Steel* v. *Lacy*, 3 Taunt. 272, 273.

A defendant may require security after he has agreed to take short notice of trial, even though

he has no defence on the merits. *Edinburgh and Leith Ry.* v. *Dawson*, 7 D. P. C. 573.

Secus, if he has agreed to take short notice of trial for a specific day. *Ib.*

Motion to stay proceedings until plaintiffs resident abroad should give security for costs, refused with costs, the defendant being aware of the non-residence, but delaying his application until a negotiation for an amicable settlement, opened by him, had terminated unsuccessfully; and several months had elapsed after the notice to press for his answer, and the further time given to him by plaintiff to file his answer had nearly expired:—Held, that the defendant had waived his objection, as, if he meant to rely on it, he should have come immediately, or at least when he was served with the notice to press. *Watson* v. *Pim*, 2 Ir. Eq. R. 26; Sau. & Sc. 642.

Liberty to renew Application.]—On an application by defendants in a suit by a company in liquidation, Malins, V.-C., ordered security sufficient to cover the costs of the defendants' answers, with liberty to renew their application for further security when their answers had been put in. On appeal:—Held, that the matter was one of discretion, and that apart from this the course adopted was convenient and proper. *Western of Canada Oil, Land and Works Co.* v. *Walker*, 45 L. J., Ch. 165; L. R. 10 Ch. 628; 23 W. R. 738.

Past as well as Future Costs.]—Security for costs where the plaintiff has become bankrupt or has filed a petition for liquidation, is not necessarily confined to future costs, but may when applied for promptly, be extended to costs already incurred in the suit. *Brocklebank* v. *King's Lynn Steamship Co.*, 47 L. J., C. P. 321; 3 C. P. D. 365; 38 L. T. 489; 27 W. R. 94.

Under the Judicature Act, when plaintiff goes out of the jurisdiction, security for costs as well past as future may be ordered to such amount as the court may think fit, in accordance with the old common-law practice. *Massey* v. *Allen*, 48 L. J., Ch. 692; 12 Ch. D. 807; 41 L. T. 788; 28 W. R. 243.

The court will not compel a plaintiff to give security for costs already incurred. *Oxenden* v. *Cropper*, 4 D. P. C. 574.

During the pendency of a rule for a new trial obtained by the plaintiff, the court will not compel him to give security for the future costs in the cause. *Ib.*

Where a person not a party to the suit, and out of the jurisdiction, appears in chambers upon an adjourned summons, and is ordered to pay costs, if he subsequently appears by petition in a representative character, the court will not make him pay costs previously incurred before prosecuting his claim in such representative capacity; but, as not being a defendant and being out of the jurisdiction, will make him give security for costs. *Partington* v. *Reynolds*, 6 W. R. 307.

By Summons in Chambers.]—The application for an order to give security for costs should be made by summons in chambers. *Vale* v. *Offert*, 30 L. T. 457; 22 W. R. 629.

Semble, in ordinary cases an application for security for costs should be by summons in chambers, not by motion. *Hamburger* v. *Poetting*, 47 L. T. 249.

A motion that the plaintiff, resident out of the jurisdiction, may give security for costs, must be made upon notice, and is not of course. *Ivie* v. *Keogh*, 7 Ir. Eq. R. 90. S. P., *Nugent* v. *Hill*, 7 Ir. Eq. R. 90.

Applications as to security for costs may properly be made in chambers. *Tynte* v. *Hodge*, 2 John. & H. 692; 1 N. R. 48; 8 Jur. (N.S.) 1226; 7 L. T. 349; 11 W. R. 52.

Previous Demand, when Necessary.] — An application must in all cases be made to the plaintiff or his attorney before a motion for security for costs will be entertained. *Adams* v. *Brown*, 2 M. & Scott, 154; 9 Bing. 81; 1 D. P. C. 273; 1 L. J., C. P. 167. S. P., *Bass* v. *Clive*, 3 M. & S. 283.

Three days' notice to the plaintiff's attorney of an intention to move the court, that the plaintiff give security for costs, is not equivalent to a demand and refusal, and the court will not grant a rule upon such notice. *Huntley* v. *Bulwer*, 6 D. P. C. 633; 6 Scott, 247.

It is not necessary to make a demand previously to moving for security for costs, unless it is intended to be part of the rule that proceedings be stayed in the meantime. *Fountain* v. *Steele*, 5 D. P. C. 331. S. P., *Greece (King)* v. *Wright*, W. W. & D. 594; 1 Jur. 944.

The court will compel a plaintiff, resident out of the jurisdiction, to give security for costs, although no previous application has been made to the plaintiff's attorney, or notice of the motion given. But without such application or notice, the rule nisi will not stay proceedings. *Jones* v. *Jones*, 1 D. P. C. 313; 2 C. & J. 207; 2 Tyr. 216; 1 L. J., Ex. 77. S. P., *Baille* v. *De Bernales*, 1 B. & Ald. 331.

It is not necessary to make any application to the plaintiff's solicitor previous to the notice of a motion to stay the proceedings of a plaintiff until he shall give security for costs. *Shaw* v. *Dempsey*, Sau. & Sc. 628.

Sufficiency of Affidavit in Support.]—An affidavit for security for costs, stating that the plaintiff resides out of the jurisdiction of the court, "as this deponent is informed and believes" is insufficient; and such application, being discharged on account of a defective affidavit, cannot afterwards be renewed on an amended affidavit. *Joynes* v. *Collinson*, 2 D. & L. 449; 13 M. & W. 558; 14 L. J., Ex. 2; 8 Jur. 1010. S. P., *Sandys* v. *Hohler*, 6 D. P. C. 274.

An allegation in an affidavit to obtain security for costs, that the plaintiff is residing abroad, is primâ facie a sufficient statement that he is not abroad for a mere temporary purpose. *Hanmer* v. *Mangles*, 12 M. & W. 313; 1 D. & L. 395; 13 L. J., Ex. 84; 7 Jur. 1116.

An affidavit to compel a plaintiff to give security for costs is sufficient, if it can be collected from the context that the deponent is the defendant in the cause, although he is not so described in terms. *Lontreuil* v. *Phillippe*, 1 B. C. Rep. 87; 10 Jur. 757.

The court will compel a plaintiff to give security for costs, on an affidavit of the defendant's attorney, stating that he believes that the plaintiff resides out of the jurisdiction of the court, and that in a letter relating to the subject-matter of the action, and purporting to come from the plaintiff, he described himself as of a place without the jurisdiction. *Cardwell* v. *Baynes*, 2 C. L. R. 777; 2 W. R. 525.

An application for security for costs was grounded on an affidavit made by the defendant's solicitor, stating that he "believed" that

plaintiff resided in London, but had a registered office in Dublin, and occasionally visited Dublin. The court held the affidavit insufficient to sustain the motion, which was accordingly refused. *Gardiner* v. *Harris*, 8 L. R., Ir. 352.

It is sufficient if an affidavit of the defendant in support of such a motion states positively, though generally, that he has a good defence on the merits. *Duff* v. *Hore*, Ir. R. 6 C. L. 509.

A motion to compel a plaintiff to give security for costs will not be granted where the defendant, in the affidavit on which it is grounded, admits his liability, but disputes the amount, and alleges his intention to pay money into court without specifying the sum. *Kirk* v. *Craig*, 15 W. R. 715.

An affidavit by the defendant to support a motion for security for costs need not specifically negative every circumstance whereby the action could be supported; but it is sufficient that it makes a primâ facie case, if the affidavits on the other side do not allege such circumstance to have occurred. *Brennan* v. *France*, 15 W. R. 997.

A motion to stay the proceedings of the plaintiffs until they should give security for costs was refused with costs, because the defendant's affidavit in support of the motion had misrepresented and suppressed some of the material facts. *Murphy* v. *Archdall*, Sau. & Sc. 630.

4. Amount of Security.

In determining the amount of security for costs to be given under Ord. LV. r. 2, the court, as a general rule, will have regard to the applicant's costs previously incurred as well as to future costs. *Massey* v. *Allen*, 48 L. J., Ch. 692; 12 Ch. D. 807; 41 L. T. 788; 28 W. R. 243.

The old rule of the Court of Chancery, limiting the amount of security, is altogether superseded by Ord. LV. r. 2. *Ib.*

The court will follow the old rule as to the amount to be paid on deposit as a security for costs, unless some special reason is shewn why the amount should be greater. *Paxton* v. *Bell*, 24 W. R. 1013.

In a suit between party and party, the court will not require a plaintiff out of the jurisdiction to find security for costs to a greater amount than 100*l.* (that being the sum prescribed by the consolidated orders), without going into the merits of the case, which it will refuse to do upon an interlocutory application. *Barry* v. *Jenkins*, 19 L. T. 276.

The security for costs directed by the Companies Act of 1862, s. 69, to be given by a limited company is not limited by the amount fixed by the court in the case of a plaintiff being out of the jurisdiction, but the amount is to be determined by an inquiry in chambers, according to the particular circumstances of the case. *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan*, 35 L. J., Ch. 678; L. R. 1 Ch. 437; 12 Jur. (N.S.) 493; 14 L. T. 611; 14 W. R. 811.

The ancient sum of 40*l.*, as the amount in which security must be given to answer costs on the plaintiff's residing abroad, is not increased under adverse motion on any special circumstances. If, however, such a plaintiff asks a favour of the court, further terms may be imposed on him. *Gage* v. *Stafford*, 2 Ves. 557.

The court will not compel a plaintiff to give security for costs to an amount equal to what the defendant's costs may amount to, where the expenses may be very great owing to the witnesses residing at a distance, and out of the jurisdiction of the court. *Kent* v. *Poole*, 1 W. W. & H. 560; 7 D. P. C. 572.

In a quo warranto information the court will compel the relators to give security for costs beyond 20*l.*, if they do not appear to be the bonâ fide relators. *Reg.* v. *Dudley*, 7 D. P. C. 700.

It is the duty of the master to settle the security to be given for costs by plaintiff, a foreign merchant. *Odwyer* v. *Salvador*, Dick. 372.

The court will not interfere with the master's discretion as to the amount of security for costs to be given by a foreign plaintiff, unless a case of manifest and gross error is made out. *French* v. *Maule*, 4 Scott (N.R.) 719; 4 Man. & G. 107.

Several Defendants.]—Where the plaintiff is resident out of the jurisdiction, each defendant in the cause is entitled to a separate security for costs, to be immediately available whenever costs in the cause, or of interlocutory proceedings, are awarded to him against the plaintiff. Even where the order is that the plaintiff give one security for the costs of all the defendants, and such security is given accordingly, it is to be considered as representing a fund, to be applicable, from time to time, in payment of the costs of each of the defendants, according to the priority of the orders by which they were awarded. *Eyre* v. *Mahony*, 6 Ir. Eq. R. 115.

One of several defendants having obtained an order for security, based upon an estimate of the amount of his own costs, the court refused to extend the bond (on the request of the plaintiff) to the costs of all the defendants. *Massey* v. *Allen*, supra.

Where plaintiff is bound to give security, each defendant suing separately is entitled to a separate bond of 40*l.*, though only one is payable. *Lowndes* v. *Robertson*, 4 Madd. 465.

5. Who may be Sureties.

When a plaintiff is required to give security for costs, it is irregular for his solicitor to be his surety. *Panton* v. *Labertouche*, 1 Ph. 265; 12 L. J., Ch. 436; 7 Jur. 589. S. P., *Norman, In re*, 11 Beav. 401.

Where the plaintiff is out of the jurisdiction, a defendant is at liberty to require the security of solvent persons to be given for costs. *Cliffe* v. *Wilkinson*, 4 Sim. 122.

Where a plaintiff resides abroad, and an order is made to stay his proceedings until he gives security for costs, the security of a person also residing abroad, who has large real estates within the jurisdiction, will not be accepted by the court. *Knight* v. *De Blaquiere*, Sau. & Sc. 648; 1 Ir. Eq. R. 375. *And see* Sau. & Sc. 655, n.

But such a surety, along with a co-surety to answer for interlocutory costs might be accepted. *Ib.*

Circumstances exist under which the usual number of sureties might be dispensed with. *Ib.*

An officer in her majesty's army named as obligor in a bond of security for costs is not an insufficient surety from his regiment being at the time quartered in Scotland. *Miller* v. *Hales*, 43 L. J., Ch. 446; L. R. 17 Eq. 430; 30 L. T. 10; 22 W. R. 625.

A. B. was ordered to be substituted for C. D. (a defendant), as the next friend of the plaintiff, and C. D. was ordered to give security for costs

up to that time:—Held, that the proper security was the bond of C. D. and of a responsible surety. *Payne* v. *Little*, 16 Beav. 563; 22 L. J., Ch. 1037; 1 W. R. 238.

The bond of the British Guarantee Association, incorporated by act of parliament, held a sufficient security under an order to give security for costs. *Plestow* v. *Johnson*, 1 Sm. & G. (App.) xx.; 2 Eq. R. 38; 2 W. R. 3.

6. Bankruptcy of Surety.

Fresh Security.]—The surety for costs of a plaintiff, resident abroad, became bankrupt a few days after the decree dismissing the bill with costs, and before the costs had been taxed under it. The plaintiff having afterwards presented a petition of re-hearing, the court ordered the proceedings upon it to be stayed until the plaintiff should have found a new surety. *Lautour* v. *Holcombe*, 1 Ph. 262; 12 L. J., Ch. 167; 7 Jur. 97.

New security ordered to be given for costs, the surety having become bankrupt. *Veitch* v. *Irving*, 11 Sim. 122; 9 L. J., Ch. 327.

Where security has been given, the defendant will not be entitled to fresh security if the sureties become insolvent. *Jones* v. *Jacobs*, 2 D. P. C. 442.

7. Nature of Security.

Deposit of Money.]—Plaintiffs ordered to give security for the costs allowed to deposit money, instead of giving such security, and a reference made to the master to approve of a proper sum. *Fellowes* v. *Deere*, 3 Beav. 353. S. P., *Cliffe* v. *Wilkinson*, 4 Sim. 122.

The plaintiff, in proceedings in a bill of dower, who resided out of the jurisdiction, was allowed the option of giving security or lodging the amount in court. *Maguire* v. *Maguire*, Sau. & Sc. 653, n.

The Court of Exchequer refused to allow a deposit of 40*l.*, the amount of the security, to stand in the stead of the security. *Ker* v. *Munster (Lord)*, Bunb. 35.

Where a petitioner is out of the jurisdiction, he may deposit a sum in lieu of giving security for costs, but the undertaking of his solicitor is insufficient. *Norman, In re*, 11 Beav. 401.

Sum admitted by Defendant.]—Where a defendant admitted a large sum to be due, and the plaintiff keeping two shops, one in London and the other in Paris, went from London to Paris as necessity required, the court would not compel the plaintiff to give security for costs in the action against the defendant for goods sold, but ordered that the defendant should pay the money into court which he acknowledged to be due; and that a sufficient portion of it should be appropriated to that security. *Le Normand* v. *Capua (Prince)*, 6 Jur. 64.

A defendant having pleaded payment of money into court in satisfaction of part of the demand, the court, instead of granting a rule for security for costs, ordered that a reasonable portion of the sum paid in should remain in the hands of the master to meet the defendant's costs, if necessary. *Nylander* v. *Barnes*, 6 H. & N. 509; 30 L. J., Ex. 151; 7 Jur. (N.S.) 194; 3 L. T. 819; 9 W. R. 339.

Money of Plaintiff in Defendant's Hands.]—An order for a security for costs will not be made if the defendant has money of the plaintiff's in his hands. *Duffy* v. *Joyce*, 25 L. R., Ir. 42.

Plaintiff's Claim not Sufficient.]—The demand which the plaintiff seeks to establish in the action is not such a security as is required by the court. *O'Connor* v. *Bernard*, 1 Jones, 175.

Set-off against Judgment.]—A plaintiff being resident out of the jurisdiction of the court, and having already an unsatisfied judgment in this country against the defendant for a larger sum, the court discharged a rule for security for costs, upon the plaintiff's undertaking that the costs in the event of the defendant obtaining a verdict should be set off against the former judgment. *Bristowe* v. *Needham*, 5 Scott (N.R.) 799; 2 D. (N.S.) 651; 4 Man. & G. 906.

8. Increase of Amount.

Time for.]—Where in an action by a foreigner security has been given for costs in an amount afterwards much exceeded by the defendant's costs actually incurred on the trial, it is too late for him to move for further security for costs after a nonsuit and pending a rule for a new trial. *Alivon* v. *Furnival*, 2 C. & M. 555; 4 Tyr. 370; 3 L. J., Ex. 140.

In what Cases.]—A rule of court having been made, directing that legal proceedings might be taken in the name of a corporation against certain commissioners by certain ratepayers interested in the matter, on their giving security to indemnify the corporation against costs, two of the ratepayers entered into a bond in the usual amount of 200*l.*; a mandamus having accordingly issued against the commissioners, and the case having been taken by writ of error to the house of lords, and the bond of indemnity being therefore of insufficient amount to cover the expenses incurred, the court made absolute a rule to increase the amount to such sum as the coroner and attorney of the court should think reasonable. *Reg.* v. *Southampton Harbour Commissioners*, 6 B. & S. 407; 34 L. J., Q. B. 164; 20 L. T. 585.

The usual security for costs by a plaintiff residing out of the jurisdiction, not increased upon special circumstances, as distress; unless the plaintiff asking some favour, terms may be imposed upon him. *Ogilvie* v. *Herne*, 11 Ves. 598.

In an action for libel on a Turkish minister, the defendant having obtained an order for security for costs to the extent of 400*l.* the court refused to increase the sum upon a suggestion that the expenses of witnesses necessary to support the defendant's justification would greatly exceed that sum. *Pisani* v. *Lawson*, 5 Scott, 118; 2 Jur. 48.

Where, upon an interpleader, a party has been let in to defend on the condition of his paying the money into court, and giving security for costs to an amount to be fixed by the master, on whose decision security has been given to a certain amount, quære, if the court can order that security to be increased. At all events, the court will not do so merely because it turns out that, by reason of commissions, or from other causes which were not unforeseen when the master settled the amount of security, the costs are likely to exceed the amount for which the security was given. *Foster* v. *Colby*, 27 L. J., Ex. 55.

The amount of security for costs will not be increased merely because it is apprehended that the expenses attending a commission to examine witnesses will be greater than were anticipated. *Haseltine* v. *Wathins*, 28 L. J., Ex. 40.

9. Discharge of Order.

Plaintiff returning to England.]—The court rescinded a judge's order, staying proceedings in an action, on the ground of the plaintiff being abroad, until security for costs was given (no such security having been given), it being sworn that he had returned to England, and had no intention of going abroad again. *Place* v. *Campbell*, 6 D. & L. 113.

When an order has been properly made for a plaintiff to give security for costs, on the ground that he is a foreigner living abroad, he is not entitled to have the order rescinded, when he afterwards comes to reside within the jurisdiction of the court. *Westenberg* v. *Mortimore*, 44 L. J., C. P. 289; L. R. 10 C. P. 438; 32 L. T. 402.

A plaintiff who, being abroad, has, after service of a writ of summons on the defendant, been ordered to give security for costs, with a stay of proceedings in the meantime, and does not give security, but, on his return to England, has the order discharged, is at liberty to declare, although more than a year has elapsed since the service of the writ of summons. *Ross* v. *Green*, 10 Ex. 891; 3 C. L. R. 510; 24 L. J., Ex. 193; 1 Jur. (N.S.) 285; 3 W. R. 239.

When security for costs has been given by a plaintiff residing out of the jurisdiction, the court will not order the bond to be delivered up to be cancelled before the end of the suit, on the alleged ground that he has since returned to England with the intention of permanently remaining. *Badnall* v. *Hayley*, 4 M. & W. 535; 7 D. P. C. 19; 1 H. & H. 359; 8 L. J., Ex. 46; 2 Jur. 992.

Where a plaintiff has been compelled to give security for costs on the ground that he was out of the jurisdiction; on an application to discharge the rule for that security, on the ground of the plaintiff's return to this country, with an intention permanently to reside here, it is insufficient for the plaintiff's attorney's clerk to make an affidavit to that effect. *Thrasher* v. *Bush*, 2 D. (N.S.) 51; 7 Jur. 217.

Plaintiffs resident abroad, being ordered to give security for costs, afterwards came to reside within the jurisdiction. The order was thereupon discharged, the plaintiffs paying the costs of the application. *Mathews* v. *Chichester*, 30 Beav. 135.

A plaintiff having gone abroad on matters connected with the writ, was ordered to give security for costs, but having returned to this country the order was discharged. *O'Connor* v. *Sierra Nevada Co.*, 24 Beav. 435.

When the plaintiff comes to reside permanently within the jurisdiction, and the order is rescinded, the recognizance entered into as security for the costs of the suit will be vacated. *Sterne* v. *Goodisson*, 7 Ir. Eq. R. 89.

10. Non-compliance with Order.

Judgment unless Security found in Fixed Time.]—Money had been paid into court to await the result of an interpleader issue; the execution creditor who was defendant in the issue lived abroad, and was ordered to provide security for costs, and for that purpose proceedings were stayed. About five months afterwards, as no security had been given, the court granted the claimant leave to sign judgment for the money in court, unless the execution creditor found security in a fortnight. *Melin* v. *Dumont*, 20 L. T. 366; 17 W. R. 673.

Action Dismissed.]—The plaintiff was ordered to give security for costs, the action being stayed in the meantime; but he failed to do so. The defendant applied to dismiss the action for want of prosecution, under Ord. XXIX. r. 1:—Held, following the equity in preference to the common-law practice, that the judge had a discretion to make an order dismissing the action, though the defendant had not abandoned the order for security for costs. *La Grange* v. *McAndrew*, 48 L. J., Q. B. 315; 4 Q. B. D. 210; 39 L. T. 500; 27 W. R. 413.

A plaintiff who had gone to California was ordered to give security for costs. Two months afterwards the defendant moved, that the plaintiff might give security within a limited time, so that the bill might be dismissed:—Held, that the motion was premature. *O'Connor* v. *Sierra Nevada Co.*, 23 Beav. 608.

A plaintiff failed to pay certain costs at a time fixed, and, being in contempt, the defendant, in June, 1860, obtained an order that all further proceedings should be stayed until he had cleared the contempt or given security for costs. He taking no further steps to prosecute his suit, the defendant, in January, 1861, moved to dismiss the bill for want of prosecution; but the motion being wholly irregular, was refused. *Futvoye* v. *Kennard*, 2 Giff. 533; 30 L. J., Ch. 262; 7 Jur. (N.S.) 958; 3 L. T. 687; 9 W. R. 297.

A motion to dismiss allowed, notwithstanding the default of the plaintiff under an order staying proceedings until security for costs was given by him. *Kennedy* v. *Edwards*, 11 Jur. (N.S.) 153; 13 L. T. 498.

—— **If Security not found in Fixed Time.**]—Plaintiff, who, under circumstances, had been ordered to give security for costs by reason of his insolvency, but who had not complied with the order, was ordered to give security within ten days, or his bill to be dismissed. *Tredwell* v. *Byrch*, 1 Y. & Coll. 480.

A plaintiff resident abroad, who had been ordered to give security for costs, but had not complied; ordered to give security, and, on default, his bill to be dismissed. *Camac* v. *Grant*, 1 Sim. 348.

A plaintiff resident abroad, having made default in giving security for costs, the court ordered that he should give security within four days, or that an injunction which he had obtained ex parte should be dissolved; but it refused to order the bill to be dismissed. *Fort* v. *Bank of England*, 10 Sim. 616.

Where an order had been made upon a plaintiff resident abroad to stay his proceedings until he should give security for costs, and he had suffered a long time to elapse without giving security, a further order was made that he should give security before a certain day, or that his bill should stand dismissed with costs. *Powell* v. *Smith*, Sau. & Sc. 654, n.

Plaintiff resident abroad ordered to give security pursuant to former order, on or before

the first day of next term, or in default that his bill should be dismissed with costs. *Knight* v. *Wilson*, 2 Ir. Eq. R. 158.

Where an order has been made upon a plaintiff resident abroad, to stay his proceedings until he should give security for costs, and he had suffered a long time to elapse without giving security, a further order was made that he should give security before a certain day, or that his bill should stand dismissed. *Hardwicke* v. *Warren*, Sau. & Sc. 645 ; 2 Ir. Eq. R. 156. S. P., *Knight* v. *De Blaquiere*, Sau. & Sc. 649 ; 1 Ir. Eq. R. 375.

A plaintiff, having been ordered to give security for costs, gave an insufficient security ; he was ordered to give other security within a month, and having made default, he was ordered to give security within a limited period ; and, in default, that the bill should stand dismissed with costs. *Giddings* v. *Giddings*, 10 Beav. 29 ; 16 L. J., Ch. 183 ; 11 Jur. 549.

A side-bar rule to dismiss the bill for want of prosecution cannot be entered after an order has been obtained by the defendant that the proceedings should be stayed until the plaintiff gave security for costs ; but the defendant might have made a special application to the court, founded on that order, and the plaintiff's non-compliance with it. *Martin* v. *Farrell*, 2 Hog. 151.

A plaintiff having been ordered te give security for costs, and omitting to do so, ordered to perfect his security within a fortnight, or in default that his bill should be dismissed with costs. *Cooper* v. *Purton*, 1 N. R. 468.

A bill was filed on January 15th, 1869, and on the 21st an order was made that the plaintiffs, being out of the jurisdiction, should give security for costs. None having been given, the plaintiffs were ordered to give security within fourteen days, or the bill stand dismissed without any further order. *Charras* v. *Pickering*, 39 L. J., Ch. 190.

When a plaintiff resided in Australia, and a defendant obtained the usual order that he should give security for costs, the court allowed four months for the plaintiff to find such security, and ordered the dismissal of the bill with costs, unless the security should be perfected within that time. *Grant* v. *Ingram*, 20 L. T. 70.

11. Fund in Court.

Payment out to Successful Party—Judgment Reversed — Order on Solicitor to Repay.]—An action being dismissed at the hearing with costs, a sum of money which had been paid into court as security for the defendants' costs was ordered to be paid out to the solicitors for the defendants in part payment of the defendants' costs. The judgment was reversed by the Court of Appeal, and the costs ordered to be paid by the defendants. The plaintiffs asked for an order against the defendants' solicitors for repayment by them : —Held, that the court had no jurisdiction on the appeal to order the defendants' solicitors to refund the money, the solicitors not being present ; nor, semble, could such an order have been made if they had been served with notice of the application. *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85 ; 55 L. T. 558 ; 34 W. R. 749—C. A.

Staying Payment Out.]—A defendant appealed from a decree ordering him to pay the plaintiff's costs. The appeal was dismissed without costs, and the deposit ordered to be returned. The plaintiff who had issued a fi. fa. for the costs of suit, applied for an order staying the repayment of the deposit to the defendant, but the application was refused. *Martyr* v. *Lawrence*, 2 De G. J. & S. 317.

Right to.]—A sum of money was paid into court to abide the result of an action at law. The court declined to regard the money so paid in as a security for the costs incurred in the action. *Flockton* v. *Peake*, 4 N. R. 135 ; 10 L. T. 369 ; 12 W. R. 789.

Right of Intervener to—Order at Instance of Defendant.] — A plaintiff resident out of the jurisdiction lodged a sum of money in court, as security for costs, at the instance of the defendant. After the action had been set down for trial a third party obtained leave to intervene. A verdict was had for the plaintiff, to which the defendant submitted ; but the intervenient obtained a new trial, in which he succeeded on fresh evidence, and was awarded his costs, as against the plaintiff, incurred subsequently to the order for a new trial :—Held, that the intervenient was not entitled to be paid the money lodged in court. *Ryan* v. *Ring*, 25 L. R., Ir. 186.

12. Costs of Application.

No previous Application to Plaintiff.]—The court, in granting a rule for security for costs, will not oblige a defendant to pay the costs of the motion, though no application was made to the plaintiff for security before moving, where the merits have been gone into. *Holmes* v. *Pemberton*, 5 Jur. (N.S.) 727 ; 7 W. R. 160.

If the plaintiff shews cause, the court in granting such rule will not oblige the defendant to pay costs of the motion, though no application for security has been made to the plaintiff before moving, such previous application being only necessary where a stay of proceedings is part of the rule. *Greece* (*King*) v. *Wright*, W. W. & D. 594 ; 1 Jur. 944.

Where no application has been made to the plaintiff for security before moving, the court in granting the rule will oblige the defendant to pay the costs of the motion. *Fletcher* v. *Law*, 5 N. & M. 351 ; 3 A. & E. 551 ; 1 H. & W. 430.

Neglecting to Inquire.]—When the plaintiff cannot be found at the place of residence named in the bill, it is the duty of the defendant to seek information from the plaintiff's solicitor ; and neglect of such inquiry will be visited with costs of the motion for security. *Knight* v. *Cory*, 1 N. R. 229 ; 32 L. J., Ch. 127 ; 9 Jur. (N.S.) 481 ; 7 L. T. 618 ; 11 W. R. 254.

Costs of Inquiries.]—An order having been made that the plaintiff do give security for costs, the defendant sent a person into the country to inquire into the ability of the person proposed as security, and to search for judgments against him. Although this course was not strictly conformable to practice, the costs were not disallowed. *Bainbrigge* v. *Moss*, 3 Kay & J. 62 ; 3 Jur. (N.S.) 107.

e. TRANSFER OF ACTIONS.

See R. S. C., 1883, Ord. XLIX.

1. Application, when granted. 385.
2. Practice, 391.

1. Application, when granted.

Queen's Bench to Admiralty Division.]—A collision having occurred between two ships, by which, besides damage to cargo, personal injuries were occasioned to a fireman on board one ship, an action in the Admiralty Division by the owners of that ship resulted in the other ship being adjudged solely to blame. The owners of the latter having thereupon instituted a limitation action also in the Admiralty Division, the fireman, the present plaintiff, issued a writ in the Queen's Bench Division, claiming 1,000*l.* damages for personal injuries from the owners of the delinquent ship. By the statement of claim in the limitation action, it was alleged that the fireman's was the only claim arising out of the collision in respect of personal injuries, and that it was for 500*l.* The defendants, of whom the fireman was nominally one, replied that his claim was for 1,000*l.* Judgment was given in the limitation action on this basis. Under these circumstances the fireman's action was transferred from the Queen's Bench Division to the Admiralty Division upon application made by the defendants under Ord. LI. r. 2. *Hawkins* v. *Morgan*, 49 L. J., Q. B. 618.

Although an action in which the sole question is a question of salvage may under Ord. XLIX. r. 3, be properly transferred to the Admiralty Division, such a transfer should not be ordered where there are other questions in the action capable of being tried by a jury. *Ocean Steamship Co.* v. *Anderson*, 33 W. R. 536—C. A.

Admiralty to Queen's Bench Division.]—When an action is commenced in the Admiralty Division in a matter over which that division has not jurisdiction, the defendant can insist as of right on its transfer to another division. *The Seaham*, 48 L. J., P. 29; 40 L. T. 38.

Queen's Bench to Chancery Division.]—The common law divisions have jurisdiction to entertain an action to establish a donatio mortis causâ, even where the legal right has not passed to the donee: but in such cases the action is more properly instituted in the Chancery Division. *Cassidy* v. *Belfast Banking Co.*, 22 L. R., Ir. 68.

To an action in the Exchequer Division to recover possession of land, the defendant set up a counter-claim for specific performance of a contract for a lease. Upon a summons taken out in that division by the defendant, and against the plaintiff's will, a judge of the Common Pleas Division at chambers made an order to transfer the action to the Chancery Division, the Lord Chancellor's consent having been obtained:—Held, that, since it appeared on the facts that there was a primâ facie case for specific performance, which, under the practice before the Judicature Acts, would have entitled the defendant on a bill for specific performance to an injunction to restrain the action, and since the question of specific performance could be more conveniently disposed of in the Chancery Division, the action ought to be transferred. *Hillman* v. *Mayhew*, 45 L. J., Ex. 334; 1 Ex. D. 132; 34 L. T. 256; 24 W. R. 435.

W. contracted to purchase a property, and paid a deposit. He afterwards gave notice to rescind the contract on the ground of the vendor's delay in making out a title, after which he went into liquidation. His trustee commenced an action in the Exchequer Division against the vendor for a return of the deposit, and for damages. The vendor delivered a counter-claim for specific performance, insisting that there had not been any such delay as to entitle the purchaser to rescind:—Held, that, as there was a question to be tried which was not a question for a jury, and if the vendor succeeded upon it he would be entitled to relief for giving which the Chancery Division alone had the requisite machinery, the action ought to be transferred to that division. *Holloway* v. *York*, 2 Ex. D. 333; 25 W. R. 403—C. A.

An action will not be transferred from a common law division to the Chancery Division merely because there is an equitable counter-claim, as, for instance, one for specific performance of an agreement, unless there is some practical difficulty in determining the questions raised in the common law division. *Bridges* v. *Dyas*, 12 L. R., Ir. 377.

In an action by a purchaser of land against the vendor for return of the deposit, the defendant counter-claimed for specific performance:—Held, that the action ought to be transferred to the Chancery Division. *London Land Co.* v. *Harris*, 53 L. J., Q. B. 536; 13 Q. B. D. 540; 51 L. T. 296; 33 W. R. 14.

The personal representative of a deceased mortgagee commenced an action in the Queen's Bench Division against the mortgagor for payment of the balance of moneys lent by the mortgagee and interest. Twelve days afterwards the defendant commenced an action in the Chancery Division against the mortgagee's personal representative and heir-at-law claiming an account and payment of the balance owing by the deceased and redemption:—Held, that the first action ought not to be transferred to the Chancery Division, as the accounts could be more conveniently taken before an official referee than before the chief clerk. *Newbould* v. *Steade*, 49 L. T. 649—C. A.

Where the plaintiff brought an action in the Queen's Bench Division, and his claim was to have an account taken of partnership dealings extending over a period of four years, and to have the affairs of the partnership wound up, and also to have an account taken of moneys had and received by the defendant otherwise than under the partnership deed:—Held, that, notwithstanding Ord. XV. r. 1a, this action should be transferred to the Chancery Division for the purpose of having the partnership and other accounts taken, as the Queen's Bench Division had not suitable machinery for the taking of such accounts. *Leslie* v. *Clifford*, 50 L. T. 690.

If in an action in a common law division, where a cross action has also been brought in the Chancery Division, it appears that the whole dispute between the parties can be more conveniently disposed of in the Chancery Division, an order transferring the cause to that division will be made, even though there is a question in the cause which might be properly tried by a jury in the common law division. *Holmes* v. *Harvey*, 35 L. T. 600; 25 W. R. 80.

Where a company was being wound up in the Chancery Division, and the business was being carried on by the liquidator, against whom an action was brought in the Exchequer Division for injuries sustained through the negligence of the company, a motion to transfer the action to the Chancery Division was refused, the plaintiff undertaking to amend his writ by claiming against the liquidator personally, the plaintiff's rights against the company in the winding-up not being prejudiced. *Thames Steam Ferry Co., In re*, 40 L. T. 422; 27 W. R. 493.

The vendor of a piece of land brought an action in the Queen's Bench Division against the purchaser for trespassing on an adjoining piece of land. The defendant alleged in his defence that the plaintiff had agreed to grant him a right of way over the last-mentioned piece of land, and delivered a counter-claim claiming rectification of the deed of conveyance by inserting a grant of such right of way. He also claimed specific performance of an alleged agreement to sell him another adjoining piece of land. The defendant then moved to transfer the action to the Chancery Division:—Held, that the relief asked by the counter-claim was not a sufficient ground for transferring the action to the Chancery Division. *Storey* v. *Waddle*, 4 Q. B. D. 289; 27 W. R. 833—C. A.

When an action has been already commenced in one of the common law divisions, a defendant cannot, by instituting a cross action in the Chancery Division respecting the same subject-matter, and including other subject-matter specially assigned to the Chancery Division by s. 34 of the Judicature Act, 1873, entitle himself to ask for a transfer to the Chancery Division of the first action in cases where the two matters are not so connected as to render it necessary that they should be tried together, and the common law division is able to do complete justice on the matter originally brought before it. *Standard Discount Co.* v. *Barton*, 37 L. T. 581.

Chancery to Queen's Bench Division.]—Principles on which a cause should be transferred from the Chancery Division to the Queen's Bench Division, for the purpose of being heard before the Commercial Court, considered. *Baerlein* v. *Chartered Mercantile Bank*, 65 L. J., Ch. 54; [1895] 2 Ch. 488; 12 R. 581; 72 L. T. 850; 43 W. R. 692—C. A.

Where an action in the Chancery Division is to be tried by a jury, it is the more convenient practice to transfer the action altogether to the Queen's Bench Division. *Martin, In re, Hunt* v. *Chambers*, 51 L. J., Ch. 683; 20 Ch. D. 365; 46 L. T. 399; 30 W. R. 527—C. A.

The court refused to stay or transfer from the Chancery Division an action for account, though there was pending in a more advanced stage a common law action in which the same issues were raised by the plaintiff in the Chancery Division by counter-claim. *Ladd* v. *Puleston*, 52 L. J., Ch. 816; 31 W. R. 539.

On appeal by consent it was ordered that further proceedings in the action in the Chancery Division should be stayed until the trial of the action in the Queen's Bench Division. *S. C.*, 52 L. J., Ch. 976; 48 L. T. 949; 31 W. R. 802—C. A.

An action in the Chancery Division will not be transferred on any ground of convenience merely because it is an action for damages. *Cannot* v. *Morgan*, 45 L. J., Ch. 50; 1 Ch. D. 1; 33 L. T. 402; 24 W. R. 91—C. A.

The fact that a previous action, of which the costs are unpaid, has been commenced and discontinued in one of the common law courts is no ground for a transfer to the corresponding division. *Ib.*

The court will order a transfer of a petition for revocation of a patent to the Queen's Bench Division to be heard by the judge at the same time as an action for damages before a judge and jury in respect of the same subject-matter. *Edge's Patent, In re*, 63 L. T. 370; 38 W. R. 698.

An action for a money demand will not be transferred from the Chancery Division, unless under special circumstances. *Black* v. *Diver*, 1 L. R., Ir. 107.

An action to restrain the use of a trade-name involved, besides the usual trade-mark issues, the special question whether the name had not become the name of a specific machine. Upon motion by defendant for transfer of the action to a common law division and entry for trial, and for the settlement of issues to be tried by judge and jury:—Held, under Rules of Court, 1875, Ord. XXXVI. rr. 3, 26, that the action was unfit for a jury, and motion refused. *Singer Manufacturing Co.* v. *Loog*, 48 L. J., Ch. 647; 11 Ch. D. 656; 40 L. T. 647; 27 W. R. 903.

—— **Administration Bond.**]—Where, in an administration action in the Chancery Division, default was made by a personal representative in matters connected with the estate of the deceased, and another action was subsequently brought in the same court against the personal representative and his sureties upon the bond given by them for the due administration of the estate, and the sureties denied that the acts of default were covered by the bond, the court refused to transfer the second action to a common law division. *Bleakley* v. *Odlum*, 23 L. R., Ir. 165.

Actions relating to same Transactions in different Divisions.]—Three actions arising out of the same series of transactions were pending in different branches of the court, and the second had been ordered to be transferred to the division in which the third was pending. The first action raised an issue distinct from the issues in the other two. On an application that the three actions might be consolidated, they were ordered to come on for trial together, the evidence in each to be used in all, and all further proceedings in the second action were stayed except such as were necessary to bring it on with the other two. *Smith* v. *Whichcord*, 24 W. R. 900.

Administration Proceedings pending.]—When an administration action is pending in the Chancery Division, the judge, in whose court it is pending, can order the transfer to himself of actions brought in other divisions against the executor, if they be brought against him qua executor, but not otherwise. *Chapman* v. *Mason*, 40 L. T. 678.

On a summons by an executor under Ord. LI. r. 2a, for the transfer from the Exchequer to the Chancery Division of an action by a creditor of the estate against the executor personally, which alleged that he had committed a devastavit, but which had been commenced after an order had been made for the administration of the testatrix's estate, and for a stay of proceedings in such action after it had been transferred:—Held,

that the executor was entitled to a transfer of the action, but the court refused to stay the proceedings on the ground that an executor cannot escape liability by reason of an administration order having been made. *Timms, In re*, 47 L. J., Ch. 831 ; 38 L. T. 679 ; 26 W. R. 692.

Where a creditor had obtained in an action in the Exchequer Division an order nisi to sign judgment against the executrix of his debtor, and before judgment had been signed another creditor obtained in the Chancery Division a decree for the administration of the deceased debtor's estate, he was held to have no priority ; and the action in the Exchequer Division was transferred to the Chancery Division and proceedings therein stayed upon motion made for that purpose. *Stubbs, In re, Hanson* v. *Stubbs*, 47 L. J., Ch. 671 ; 8 Ch. D. 154 ; 26 W. R. 736.

An order for the transfer to the judge before whom an administration action is pending of actions against the executors should not be made by the order for administration. *Poole, In re, Poole* v. *Poole*, 55 L. T. 56.

An action may be transferred from the common law division under Ord. L. r. 4, after an order for administration accounts has been made. *Henderson* v. *Maxwell*, 17 L. R., Ir. 225.

Transfer from one Judge of Chancery Division to another.]—Ord. LI. r. 2, has reference only to the transfer of an action from one division to another, and does not authorise a transfer from a judge of one division to another judge of the same division. *Chapman* v. *Real Property Trust*, 7 Ch. D. 732 ; 26 W. R. 587.

An action was brought and a decree made in the Chancery Division for administration of the personal estate of A., and for an inquiry whether his moiety of certain real estate had become assets of his partnership business carried on with B. B., the surviving partner, brought an action for winding up the partnership in another branch of the Chancery Division :—Held, that B.'s action ought to be transferred to the judge before whom the action for administration was pending. *Davis* v. *Davis*, 48 L. J., Ch. 40.

When a bill has been filed in one branch of the court, and a second bill relating to the same estate has been filed in another branch, the second suit, even when a decree in it has been obtained, will be transferred to the branch of the court in which the first bill was filed, and the plaintiff in the second suit will pay the costs of the application for transfer. *Lucas* v. *Siggers*, 41 L. J., Ch. 364 ; L. R. 7 Ch. 517 ; 26 L. T. 651 ; 20 W. R. 458, 478.

As a general rule, a suit instituted in one branch of the court when a suit as to the same matter is pending in another branch will be transferred to the latter, and the plaintiff in the second suit will have to pay the costs of the transfer. But the plaintiff in the first suit ought, before giving notice of motion for transfer, to ask the plaintiff in the second suit for his consent to the application, and if the plaintiff in the first suit neglects to do so, he may have to pay the costs of the application. *Lyall* v. *Weldhen*, L. R. 9 Ch. 287 ; 30 L. T. 146 ; 22 W. R. 633.

The trustees of a marriage settlement filed a bill to have the trusts carried into execution, and marked the cause for Malins, V.-C. A few weeks afterwards the husband and wife filed a bill to have the settlement set aside, or rectified in a way which would give the wife entire control over the fund. This cause was marked for the Master of the Rolls. The trustees applied to have the second cause transferred to the court of Malins, V.-C.:—Held, that the second bill ought to have been filed in the same court as the first, and that the plaintiffs in the second cause must pay the costs of the application to have it transferred to the vice-chancellor, and that regard could not be had to the circumstance that the arrear of causes before the vice-chancellor was very heavy. *Sayers* v. *Corrie*, 43 L. J., Ch. 337; L. R. 9 Ch. 52 ; 29 L. T. 602 ; 22 W. R. 101.

When a case involving voluminous accounts was attached to the court of a judge who had formerly been counsel in the case, and his chief clerk had after much consideration decided the principle upon which the accounts were to be taken, the court refused to order a transfer of the cause to another branch of the court till it became necessary to make some application to the judge in person. *Jackson* v. *Ward*, 29 L. T. 861—L. JJ.

When a person, knowing that a suit has been instituted in one branch of the court, files a bill in another branch of the court in respect of the same subject-matter, the second cause will be ordered to be transferred to the court to which the first cause is attached, and the plaintiff in the second cause will, as a general rule, be ordered to pay the costs of the application for such transfer. *Orrell* v. *Busch*, L. R. 5 Ch. 467 ; 22 L. T. 461 ; 18 W. R. 588.

After a decree has been made in one branch of the court in which no further directions were reserved, but there was liberty to apply, the cause may in a proper case be transferred to another branch of the court which has before it another cause relating to the same matter. *Bryson* v. *Warwick and Napton Canal Co.*, 18 Jur. 893.

The court will order a transfer of a suit from one branch of the court to another, if there is a probability of convenience from so doing. *Curlewis* v. *Whidborne*, 10 W. R. 261.

When two suits relating to the administration of the same estate are instituted in different branches of the court, and in one of these suits a decree has been obtained, the circumstances may be such as to render it proper that that suit should be transferred to the branch of the court where a decree has not been made. *Corser* v. *Jones*, 14 W. R. 704.

Where a petition is presented in two matters which have been dealt with by different branches of the court, it is proper, in the absence of special circumstances, that the petition should be presented in that branch of the court where the prior order in date has been made ; and leave should be obtained, in the usual way, for the transfer into that court of the matter in which the subsequent order has been made. *Browse, In re*, 12 Jur. (N.S.) 153 ; 14 W. R. 298.

Transfer to High Court from Mayor's Court.]—In an action in the Mayor's Court against two defendants, one of whom was a corporation aggregate, an application was made by the defendant corporation to have the action transferred to the Chancery Division of the high court, on the grounds (1) that accounts were required from persons who were not within the jurisdiction of the Mayor's Court ; (2) that it would be necessary to bring several persons into the action as third parties, which could not be effectually done if the action remained in the Mayor's Court ; (3)

that, according to recent decisions, a corporation aggregate could not be made defendants in an action in the Mayor's Court :—Held, that, under these circumstances, it was "fit" that the whole proceeding should be transferred from the inferior court to the high court. *Vickers* v. *Stevens*, 44 L. T. 679 ; 29 W. R. 562. *See* MAYOR'S COURT.

Transfer to and from County Court.]—*See* COUNTY COURT.

From Palatine Court of Lancaster.]—*See* COURT.

Administration of Insolvent Estates—Bankruptcy Court.]—*See* BANKRUPTCY.

2. Practice.

Application on Notice.]—Motions for the transfer of causes from one division to another of the high court should be made on notice. *Humphreys* v. *Edwards*, 45 L. J., Ch. 112.

Consent of President.]—An order for the transfer of a cause is not effectual until the sanction of the president of the division to which it is proposed to transfer the cause has been obtained. *Humphreys* v. *Edwards*, supra.

Quære, whether the Court of Appeal has power to order the transfer of an action without the consent of the president of the division from which it is to be transferred. *Storey* v. *Waddle*, 4 Q. B. D. 289 ; 27 W. R. 833—C. A.

Semble, such consent may be obtained after the order for transfer has been made. *Black* v. *Dixer*, 1 L. R., Ir. 107.

Court of Appeal—Power of.]—The Court of Appeal has no jurisdiction to make an order to transfer a suit which was pending in chancery before the Judicature Act, 1873, came into operation, from one judge to another. *Hutley, In re*, 45 L. J., Ch. 79 ; 1 Ch. D. 11 ; 33 L. T. 337—C. A.

Judge at Chambers—Transfer from Queen's Bench to Chancery Division.]—The effect of ss. 31, 39, of the Judicature Act, 1873, and s. 11, sub.-s. 2, of the Judicature Act, 1875, taken together with Ord. LI. r. 2, and Ord. LIV. r. 2, is, that any judge of the Queen's Bench Division, sitting at chambers, has jurisdiction to order that an action assigned to that division be transferred to the Chancery Division, though he is not a judge of the division to which the action is assigned. *Hillman* v. *Mayhew*, 45 L. J., Ex. 334 ; 1 Ex. D. 132 ; 34 L. T. 256 ; 24 W. R. 435.

Winding-up of Company—Order, by whom made.]—When an order has been made by a judge of the Chancery Division for the winding-up of a company under the Companies Acts, 1862 and 1867, the judge in whose court such winding-up shall be pending has no jurisdiction, under Ord. LI. r. 2a, to order the transfer to him of an action pending against the company in another court of the same division ; such a transfer can only be made by the Lord Chancellor under Ord. LI. r. 1. *Landore Siemens Steel Co., In re* (10 Ch. D. 489), not followed. *Madras Irrigation and Canal Co., In re*, 16 Ch. D. 702 ; 29 W. R. 520.

—— **Application, Ex parte.**]—On the winding-up of a company, the transfer to a judge of the Chancery Division, under Ord. LI. r. 2a, of an action pending in another division can be ordered ex parte. *United Kingdom Electric Telegraph Co., In re*, 29 W. R. 332.

When an order for the compulsory winding-up of a company has been made, an action against the company pending in another division of the court will be transferred on an application ex parte. *Landore Siemens Steel Co., In re*, 10 Ch. D. 489 ; 40 L. T. 35 ; 27 W. R. 304.

On what Principles determined.]—Under s. 24, sub-s. 6, of the Judicature Act, 1873, and in the absence of consent to the contrary, a common law action tried in or transferred to another division is to be determined on the same common law principles as would have been applied to it in the Queen's Bench Division.—Per Fry, L.J. *The Gertrude, The Baron Aberdare*, 13 P. D. 105 ; 59 L. T. 251 ; 36 W. R. 616 ; 6 Asp. M. C. 315.

For Hearing—Further Proceedings, where heard.]—In actions which were transferred to Fry, J., for hearing only, where his lordship has ordered any further proceedings to be heard before himself, any applications which are such as are usually made in chambers should be made to his lordship by summons in chambers, and not by motion, as heretofore. *Snow* v. *Bolton*, 50 L. J., Ch. 743 ; 17 Ch. D. 433 ; 44 L. T. 571 ; 29 W. R. 583. S. P., *Shaw* v. *Brown*, 50 L. J., Ch. 232.

An application to stay further proceedings in an action which has been transferred for the purpose of trial from one judge of the Chancery Division to another may be dealt with by the judge to whom the action was originally attached. *Robinson* v. *Chadwick*, 47 L. J., Ch. 607 ; 7 Ch. D. 878 ; 38 L. T. 415 ; 26 W. R. 421.

Under Ord. LI. r. 1a, a judge, to whom an action has been transferred for trial, has authority to hear a petition by a solicitor under the Solicitors Act, 1860, for costs incurred in recovering property in the action. *Porter* v. *West*, 50 L. J., Ch. 231 ; 43 L. T. 569 ; 29 W. R. 236.

An application for the court to exercise its jurisdiction over a solicitor on account of conduct disclosed in an action may be made in the action, and therefore is a further proceeding within Ord. LI. r. 1a, of the Judicature Act. *Cave* v. *Cave, Cave, In re*, 49 L. J., Ch. 656 ; 43 L. T. 158 ; 28 W. R. 764.

A plaintiff in a partition suit, on the 20th September, gave notice of trial before Malins, V.-C., without a jury. On the 19th November he took out a summons in the chambers of Malins, V.-C., asking that an issue of fact might be tried at Chester before any other question of fact was tried. On the 30th November the plaintiff gave notice of motion before Fry, J., to whom the cause had been transferred, that the action might stand out of the paper for hearing until the Hilary sittings, 1878, which was ordered to come on for hearing on the 11th December. On the 7th December Malins, V.-C., at the request of the plaintiff, adjourned the summons to be heard by Fry, J., at the same time as the motion :—Held, that, in consequence of the delay on the part of the plaintiff, it would be unjust to the defendant to put off the trial for a further time, and both applications must be dismissed. *Lloyd* v. *Jones*, 7 Ch. D. 390 ; 37 L. T. 524.

Re-transfer—In what Cases.]—Where a cause has in pursuance of a general order been transferred from one branch to another branch of the court, the fact that orders on interlocutory applications and relating to special injunctions have been made by the court to which the cause was in the first instance attached will not be sufficient cause for ordering a re-transfer. *Tweddell* v. *Rogerson*, 3 Eq. R. 701—L.JJ.

A cause in which the briefs had been delivered, and in which one of the leading counsel who usually practised in the court where it was originally set down had advised in the case, having been transferred to the court of another vice-chancellor, an application, made with the consent of all parties, for its re-transfer was refused. *Tiffin* v. *Parker*, 12 W. R. 698.

Where a cause has by general order been transferred from one court to another, a re-transfer will not, without consent, be ordered where it will delay the hearing. Where it will not be delayed, the court will give weight to the fact that the judge from whose court it has been transferred has, by means of interlocutory applications, gained an acquaintance with the facts. *Platt* v. *Walter*, 35 L. J., Ch. 728; L. R. 1 Ch. 471; 15 L. T. 111; 14 W. R. 784.

Where, on the occasion of an interlocutory application prior to the transfer of a cause, the question involved in the suit has been argued and dealt with on the merits, that is sufficient ground for ordering a re-transfer to the judge before whom such interlocutory application was heard; but it is no ground for ordering such re-transfer that a precisely similar point has been decided by such judge in a different suit. *Wilson* v. *Gray*, 14 W. R. 783.

Semble, that every order for a transfer is made subject to any application of any party, and that every order for re-transfer is in the nature of an order nisi, and may be obtained ex parte, leaving it to the other side to move to discharge it. *Ib.*

An order will not be made for the re-transfer of a cause on an ex parte application. *Dennis* v. *Morris*, 21 W. R. 43.

f. Consolidation of Actions.

See R. S. C., 1883, Ord. XLIX. r. 8.

By Judicature Act, Common Law Practice adopted.]—Ord. LI. r. 4 of Rules of Supreme Court, 1875, adopts the old practice at common law, and the court can only consolidate actions at the instance of defendants, and not on the application of a number of different plaintiffs against the same defendants. But in such cases the court may, under the general jurisdiction, enlarge the time for taking the next step in several of a series of actions till one of them has been tried as a test action. *Amos* v. *Chadwick*, 4 Ch. D. 869.

In what Cases allowed—Same Parties.]—Six penal actions having been brought in the same court by an informer against a newspaper proprietor for the alleged insertion of six different advertisements in violation of s. 92 of the Larceny Act, 1861, on the defendant's motion the actions were consolidated, and the plaintiff was ordered to pay the costs of the motion. *Bramble* v. *Knox*, 18 W. R. 72.

If a party sues on a bill, and after the action is commenced another bill accepted by the same defendant, of which he is the holder, is dishonoured, and he brings a second action on that, a judge will direct the two actions to be consolidated. *Oldershaw* v. *Tregwell*, 3 Car. & P. 58.

In two actions brought on two several bills of exchange between the same plaintiff and defendant, all the pleas to which concluded to the country, the court, after issue joined, allowed both actions to be consolidated on the plaintiff's undertaking not to delay going to trial, and paying all the costs of the second action up to the time of the rule. *Booth* v. *Payne*, 1 D. (N.S.) 348; 11 L. J., Ex. 256; 5 Jur. 1087.

Where an attorney did different kinds of professional work for a client, and after all the business was transacted sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, and after the expiration of that month commenced an action for the other part, the court made an order for the consolidation of the two actions. *Beardsall* v. *Cheetham*, 27 L. J., Q. B. 367; 6 W. R. 504.

—— **Same Plaintiff—Several Defendants.**]—An order under s. 5 of the Law of Libel Amendment Act, 1888, for the consolidation of several actions against different defendants in respect of the same or substantially the same libel may be made before the defences in the actions have been delivered. *Stone* v. *Press Association*, 66 L. J., Q. B. 662; [1897] 2 Q. B. 159; 77 L. T. 41; 45 W. R. 641—C. A.

The plaintiff having brought an action against the defendant Pike, a newspaper proprietor and publisher, for publishing a libel in his newspaper, and having also at the same time brought a separate action against each of sixteen other defendants for publishing the same libel in their several newspapers, the court (1) refused to make an order to consolidate the said actions on the ground that, although the libel was the same in each case, yet, the several publications and the circumstances attending them being different, the causes of action in the several cases were different; but (2) made an order that all further proceedings in all the said actions, save one to be selected by the plaintiff, be stayed pending the trial of such selected action; and further that, if the plaintiff be dissatisfied with the verdict obtained on the trial of such action, he should be at liberty to select one other action for trial; and further, the defendants by their counsel undertaking to be bound by the verdicts in the said selected first and second actions, that the plaintiff be at liberty to sign judgment against the defendants in all the remaining actions for the maximum amount of damages found by the jury. *Colledge* v. *Pike*, 56 L. T. 124.

Two actions having been brought by the same plaintiff against different defendants on the same policy, the court consolidated them, after a declaration had been delivered in one, at the instance of the defendant in the latter action, though the plaintiff objected. *Hollingsworth* v. *Broderick*, 4 A. & E. 646; 6 N. & M. 240; 1 H. & W. 691.

Where a plaintiff brings several actions upon the same policy against several underwriters, the court will not, without his consent, make a consolidation rule upon the terms of both plaintiff and defendants being bound in all the actions

by the event of one. *Doyle* v. *Anderson*, 1 A. & E. 635; 4 N. & M. 873.

Where two actions were brought by the same plaintiffs against different defendants on different policies on the same ship, the court refused, at the instance of the defendants, to compel the plaintiffs to consolidate, and to be bound by one of the actions, without their consent. *McGregor* v. *Horsfall*, 3 M. & W. 320; 6 D. P. C. 338; 7 L. J., Ex. 71; 2 Jur. 257.

Where upwards of forty actions were brought against underwriters of the policies of insurance, one of which had been assigned by memorandum of transfer signed by some of them, before the bankruptcy of the assured, the court made an order for consolidation, the general principle laid down being, that all actions should be stayed except such as might be really necessary to determine the liability of distinct defendants in each class of cases, but not the plaintiffs. The court ultimately settled that there were two classes of cases, and that two actions should be allowed to proceed. *Syers* v. *Pickersgill*, 27 L. J., Ex. 5; 6 W. R. 16.

On an application to consolidate a number of actions in which the cause of action and the ground of defence appear primâ facie to be the same, it is not a sufficient answer that possibly the position of some of the parties may be different, and raise different questions (especially if such questions will be only as to the amount of their respective liabilities), although the extent of the consolidation must depend on the circumstances. *Ib.*

When an action had been commenced against one for port-dues for three sums of 1*s.*, and actions had also been commenced by the same plaintiff against nine other individuals, and the declarations in the nine actions were identical in form with the declaration in the first, but the particulars claimed sums due at different times, the court refused to consolidate the actions, at the instance of the defendants, without the consent of the plaintiff, as it did not appear that the right was the same, while the damage was clearly several. *Saltash Corporation* v. *Jackman*, 1 D. & L. 851; 13 L. J., Q. B. 105; 8 Jur. 176.

—— **Different Plaintiffs.**]—An action by a husband for an injury done to himself may be consolidated with a separate action by the husband and wife for an injury done to the wife at the same time and place. *Morley* v. *Midland Ry.*, 3 F. & F. 961.

—— **Actions in several Divisions.**]—Three actions arising out of the same series of transactions were pending in different branches of the court, and the second had been ordered to be transferred to the division in which the third was pending. The first action raised an issue distinct from the issues in the other two. On an application that the three actions might be consolidated, they were ordered to come on for trial together, the evidence in each to be used in all, and all further proceedings in the second action were stayed except such as were necessary to bring it on with the other two. *Smith* v. *Whichcord*, 24 W. R. 900.

Conduct of, where Plaintiffs differ.]—Where two actions had been commenced on the same day by different plaintiffs, and had been consolidated, upon a difference of opinion arising between the joint plaintiffs as to the conduct of the action, the plaintiffs who first took a step towards severance by making an application for a change of solicitors were made defendants, and the conduct of the action given to the other plaintiffs, although the claim of the latter was smaller in amount than that of the former. *Holden* v. *Silkstone and Dodworth Coal and Iron Co.*, 45 L. T. 531; 30 W. R. 98.

Where three actions had been commenced for the administration of the same estate, the court (notwithstanding the general rule that the plaintiff in the first action is entitled to the conduct of the proceedings) ordered the three actions to be consolidated, and gave the conduct of the future proceedings in the consolidated causes to the plaintiff in the second action, on the ground that the parties thereto were the persons chiefly interested, by whom the costs would have to be borne, and consequently to whose advantage it would be to keep down the expenses. *Prime's Estate*, *In re*, 48 L. T. 208.

Application by Plaintiff—Causes pending in same Division.]—Under Ord. XLIX. r. 8, of the Rules of the Supreme Court, 1883, an order for the consolidation of causes or matters pending in the same division between the same parties may be made upon the application of the plaintiff. *Martin* v. *Martin & Co.*, 66 L. J., Q. B. 241; [1897] 1 Q. B. 429; 76 L. T. 44; 45 W. R. 260—C. A.

Form of Order.]—Actions having been brought against eight persons upon mutual insurance policies, the court, at their instance, granted a rule for consolidating them, upon the terms that they should admit the amounts for which they were respectively liable in case their liability should be established, and should consent, if necessary, to an order referring it to the master to settle the same. *Lewis* v. *Burkes* or *Banks*, 4 C. B. (N.S.) 330; 27 L. J., C. P. 247; 4 Jur. (N.S.) 663; 6 W. R. 652.

Where five separate actions were brought upon five distinct guarantees of 50*l.* each given by five several parties for the payment of 250*l.*, the proceedings in four of the actions were ordered by a judge to be stayed, the defendants consenting to be bound by the verdict in one, provided that such verdict was to the satisfaction of the judge who tried the cause, the plaintiff to be at liberty to apply to open the order after plea, on the ground that the issue would not decide the merits in the other actions:—Held, that this was a proper order. *Sharpe* v. *Lethbridge*, 4 Man. & G. 37; 4 Scott (N.R.) 722; 11 L. J., C. P. 189; 6 Jur. 399.

The assignee of a replevin bond having brought actions severally against the principal and his two sureties, the court made a rule, that the proceedings in all the actions should be stayed upon payment of the rent due and costs; and that, upon such payment not being made, the first action should be proceeded with, the defendants in the other two actions to be bound by the event of the first. *Bartlett* v. *Bartlett*, 4 Man. & G. 269; 4 Scott (N.R.) 779; 11 L. J., C. P. 223.

Three actions were brought against three obligors of a joint and several bond, conditioned for the good behaviour of the manager of a banking company. After the declarations were delivered, the court, on motion by the defendants, ordered that the plaintiff proceeding in whichever of the actions he should select, pro-

ceedings in the other two should be stayed till the first was tried; the defendants undertaking to be bound by the event of the first tried, but the plaintiff, after such trial, to be at liberty, if disposed so to do, to proceed in the other two. *Anderson* v. *Twogood*, 1 Q. B. 245.

Liability to Solicitor for Costs.]—Separate writs of scire facias had issued against seven, at the suit of E., and in those suits the plaintiff was retained as attorney for each defendant. At the suggestion of the plaintiff, and with the consent of the defendant, a consolidation rule was obtained, by which all the actions were to abide the event of one action:—Held, that the separate retainers were determined when the consolidation was agreed on, and a joint retainer was then given, and therefore the defendant was liable to the plaintiff for the costs subsequently incurred. *Anderson* v. *Boynton*, 13 Q. B. 308; 7 D. & L. 25; 19 L. J., Q. B. 42; 14 Jur. 14.

Test Action—When binding.]—When a number of actions are consolidated, and one of them is ordered to be tried as a test action, the judgment in such action will not bind the parties in all the other actions, unless it has been tried out on its merits upon evidence. *Amos* v. *Chadwick*, 47 L. J., Ch. 871; 9 Ch. D. 459; 39 L. T. 50; 26 W. R. 840—C. A.

Where, therefore, one of seventy-eight actions by different plaintiffs against the same defendants was ordered to be tried as a test action to decide the rights of the plaintiffs in all the other actions, and the plaintiffs in the test action, when it came on for trial, declined to proceed, and judgment was then given for the defendants:—Held, that, notwithstanding Ord. XLI. r. 6, there had been no trial of the test action on the merits, and that the judge had jurisdiction to substitute another of the actions as a test action. *Ib.*

In the absence of agreement, the plaintiff in an action thus constituted a test action has no right to be indemnified against costs by the other plaintiffs. *Ib.*

—— **Discontinuance of.**]—When an action, which had been made a test action (for the purpose of deciding the rights of the plaintiffs in a number of similar actions against the same defendants), came on for trial, the plaintiff declined to proceed, on the ground that he was not in a fit state of health to attend and be examined as a witness. On a previous occasion he had moved for and obtained a postponement of the trial on the ground of his ill-health. A week before the trial an application by the plaintiff in chambers to stay all proceedings in the action had been refused by Malins, V.-C., on the ground that the plaintiff was not dominus litis, but a trustee for the plaintiffs in the other actions. At the trial the plaintiff asked for a postponement, or that an order of discontinuance might be made under Ord. XXIII. r. 1:—Held, that the court could not regard the rights of the plaintiffs in the other actions, but must act as if the plaintiff had not appeared at the trial, and must dismiss the action with costs. *Robinson* v. *Chadwick*, 47 L. J., Ch. 607; 7 Ch. D. 878; 38 L. T. 415; 26 W. R. 556.

—— **When Question may be reopened.**]—Consent to be bound by verdict in one cause out of several upon the same question means such a verdict as ought to stand. *Hodson* v. *Richardson*, 3 Burr. 1477.

Where causes are consolidated, the verdict which is to bind all the others must be perfectly to the satisfaction of the court. *Anon.*, Lofft, 147.

Where a consolidation rule has been entered into, though fresh evidence is discovered, the court will not permit the plaintiff to try the other actions. *Pullen* v. *Parry*, 1 Chit. 709.

If the court thinks it reasonable to open a consolidation rule, and try a second cause, it will extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits. *Cohen* v. *Bulkeley*, 5 Taunt. 165; 14 R. R. 731.

Where a cause has been tried twice by special juries, and a verdict for the plaintiff returned on both occasions, the court will not open a consolidation rule for the trial of another similar action; it not being shown that the cause had not been fully brought before the jury. *Foster* v. *Allenby*, 5 D. P. C. 619; 3 Bing. (N.C.) 896; 4 Scott, 535; 3 Hodges, 23.

Where two actions against underwriters have been consolidated by rule, and the defendant has obtained a verdict in one, the court will not restrain the plaintiff from trying a second cause, included in the rule, till the costs of the first are paid. *Doyle* v. *Douglass*, 4 B. & Ad. 544.

—— **Neglect to appeal—Substitution of other Defendant.**]—Where by an order of the court all the defendants in several actions are bound by the result of a selected action, and the defendant in the selected action refuses to appeal against the judgment, the court has power to substitute another of the defendants for the purpose of prosecuting an appeal. *Briton Medical and General Life Assurance* v. *Jones*, 60 L. T. 637.

See also APPEAL.

By a consolidation rule a defendant in several actions brought by the same plaintiff agreed to be bound by the result of the action which the plaintiff should select to try. The plaintiff proceeded against A. and obtained a verdict, and a rule to set it aside was refused. A. gave notice of appeal to the Exchequer Chamber, but failed to prosecute it, and paid damages and costs to the plaintiff. The defendants in the other actions were refused leave to appeal against the judgment. *Thomas* v. *Winter*, 17 L. T. 148; 16 W. R. 82.

—— **Stay of Proceedings in Remaining Actions.**]—Thirty-eight actions having been brought by different persons against the defendants as directors of an incorporated company, charging misappropriation of moneys advanced by the plaintiffs in different amounts and at different times, but all under similar circumstances:—Held, upon the authority of *Amos* v. *Chadwick* (4 Ch. D. 869 and 9 Ch. D. 459), that it was competent to a judge at chambers, upon the application of the plaintiff, to stay the proceedings in thirty-seven of the actions until after the trial of the thirty-eighth as a test action, proper provision being made in case that action did not satisfactorily dispose of the question in all. *Bennett* v. *Bury* (*Lord*), 49 L. J., C. P. 411; 5 C. P. D. 339; 42 L. T. 480.

Eight separate actions having been brought against a company by eight passengers for breach of contract in supplying them with a less commodious passage for Australia than had been contracted for, the court refused to stay the proceedings in seven of them till the trial of the

eighth, though the defendants offered to be bound in each by the verdict in one. *Westbrook* v. *Australian Royal Mail Steam Navigation Co.*, 14 C. B. 113; 2 C. L. R. 694; 23 L. J., C. P. 42.

Where several causes are consolidated, if a writ of error is issued in the cause tried, and execution taken out for want of bail in error being duly put in, and the writs of error are issued in the other causes, and bail duly put in, execution in those causes is thereby stayed, for the consolidation rule only relates to the verdict. *Aylwin* v. *Favine*, 2 Bos. & P. (N.R.) 430.

Action in Inferior Court—Cross Action in High Court—Plaintiffs.]—When an action is transferred from an inferior court and consolidated with a cross action begun in the high court, the plaintiffs in the action in the inferior court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior court before the cross action in the high court. *The Never Despair*, 53 L. J., P. 30; 9 P. D. 34; 50 L. T. 369; 32 W. R. 599; 5 Asp. M. C. 211. S. P. *The Bjorn*, 9 P. D. 36, n.; 5 Asp. M. C. 212, n.; and *The Cosmopolitan*, 9 P. D. 35, n.; 5 Asp. M. C. 212, n.

g. CUSTODY, PRESERVATION, SALE AND INSPECTION OF PROPERTY.

See R. S. C., 1883, Ord. L.

Preservation—Pumping out Colliery.]—Where serious injury will be inflicted upon property which is the subject of an action unless the defendant continues to act in a particular manner, which he can do with comparatively little trouble and risk, but which the plaintiff cannot do at all, as where a colliery will be drowned unless the person in possession under an agreement for a lease continues to pump, the interim preservation of the property will be secured by the issue of a mandatory injunction restraining the defendant from ceasing to act in that particular matter—e.g. to pump out the colliery. *Strelley* v. *Pearson*, 49 L. J., Ch. 406; 15 Ch. D. 113; 43 L. T. 155; 28 W. R. 752.

—— **Of Property pending Appeal or Litigation.**]—It is a matter of discretion for the Court of Chancery whether it will or will not interfere by interim order respecting the property of a litigant. If the property is in medio (in the actual enjoyment of no one), the court will interfere for the benefit of all concerned. *Owen* v. *Homan*, 4 H. L. Cas. 997; 17 Jur. 861.

See also APPEAL—INJUNCTION.

Order as to Delivery.]—In an action for the return of jewellery which A., as the agent of the plaintiffs, had left with the defendants, but which the defendants claimed to hold against a debt due to them by A., who had, as they alleged, deposited the jewellery with them as his own, and not as plaintiffs', the court made an order under Ord. LII. r. 3, for the delivery up of such jewellery to an officer of the court to abide the event of the action. *Velati* v. *Braham*, 46 L. J., C. P. 415.

The defendants having been restrained from disposing of certain sugars, the property of the plaintiffs, they were ordered, upon motion, to deliver the same to the plaintiffs, the latter accounting for them under the orders of the court. *Beckford* v. *Anderson*, 1 Jur. 772.

Application to stay disposal of personal property must shew specific right in property, and danger of being lost. *Ximenes* v. *Franco*, Dick. 149.

The court will interfere by injunction to secure the property of an association from being appropriated by the trustee, who is also sole director, for the purpose of recouping himself the sums he has advanced, although questions are raised as to the legality of the association, and although relief might be refused at the hearing. *Sheppard* v. *Oxenford*, 1 Kay & J. 509; 3 W. R. 384; and on appeal, 3 W. R. 397.

—— **Claim of Lien on Property.**]—In the absence of fraud, an order under the Rules of the Supreme Court, 1883, Ord. L. r. 8, that property claimed be given up to the party claiming it, can only be made upon condition that the amount for which a lien upon the property is claimed be paid into court, notwithstanding that the value of the property is less than the amount for which the lien is claimed. *Gebrüder Näf* v. *Ploton*, 59 L. J., Q. B. 371; 25 Q. B. D. 13; 63 L. T. 328; 38 W. R. 566—C. A.

Sale of Perishable Goods.]—In a suit in which the bill was filed before the Judicature Acts came into operation, the plaintiff claimed a charge upon certain bonds of a foreign state which were deposited in the bank to the credit of the cause. The suit had not yet come to trial. The defendants in their answer had admitted the plaintiff's title. On an application for an order for the sale of the bonds as perishable goods within the meaning of Ord. LII. r. 2, or upon admission of facts in the pleadings under Ord. XL. r. 11:—Held, that there must be a sale of the bonds, on the ground that, the defendants having by their answer admitted the plaintiff's title, Ord. XL. r. 11, applied, and there was no reason why the relief to which he was entitled should be delayed until the hearing. *Coddington* v. *Jacksonville, Pensacola, and Mobile Ry.*, 39 L. T. 12—C. A.

The expression "goods" in the Rules of the Supreme Court, 1883, Ord. L. r. 2, includes shares in a limited company, and if for "any just and sufficient reason" it is desirable to have them sold at once, they may be sold under the rule in a pending action. *Evans* v. *Davies*, 62 L. J., Ch. 661; [1893] 2 Ch. 216; 3 R. 360; 68 L. T. 244; 41 W. R. 687.

An order in an action may be made under Ord. LII. r. 2, for the sale of a horse which for a "just and sufficient reason it may be desirable to have sold at once." *Bartholomew* v. *Freeman*, 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.

Inspection and Sample—Order ex parte.]—An order to enter for the purpose of inspecting and taking samples under Ord. LII. r. 3, may be made on an ex parte application. *Hennessey* v. *Rohmann*, 36 L. T. 51.

Inspection—In Patent Actions.]—*See* PATENT.

—— **As between co-Plaintiffs or co-Defendants.**]—Ord. L. r. 3, provides that it shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property or thing, being the subject of such cause

or matter, or as to which any question may arise therein. Claims being made against two defendants severally in the same action :—Held, that under the above-mentioned rule inspection could not be granted to one defendant of property belonging to another defendant when there was no right in question as between them in the action. *Brown* v. *Watkins* (16 Q. B. D. 125) explained. *Shaw* v. *Smith*, 56 L. J., Q. B. 174 ; 18 Q. B. D. 193 ; 56 L. T. 40 ; 35 W. R. 188—C. A.

—— **Timber on Ship in Harbour.**]—The court, under Ord. LI. r. 3, gave the plaintiff leave to inspect a ship lying in harbour, on which it was alleged that certain timber, part of the subject-matter of the action, had been placed by the defendant for removal. *Morris* v. *Howell*, 22 L. R., Ir. 77.

—— **of Ship by Trinity Masters.**]—Before the hearing of an action an application was made under 24 Vict. c. 10, s. 18, by the plaintiffs, that two Trinity masters should inspect the lights of the defendants' ship :—Held, that the application was premature, and ought to be refused. *The Victor Covacevich*, 54 L. J., P. 48 ; 10 P. D. 40 ; 52 L. T. 632 ; 5 Asp. M. C. 417.

—— **Of Documents.**]—*See* DISCOVERY.

—— **Property in hands of Agent.**]—Under what circumstances court will, on bill of discovery, direct search to be made in boxes of absent party in hands of defendant as depositary. *Att-Gen.* v. *Elliott*, 1 Price, 377. *See further this Case*, 2 Price, 48.

Inspection ordered, on motion, of articles, claimed by the plaintiffs as heirlooms, in a chest at the bankers of the defendant, insisting by answer on a lien. *Macclesfield* (*Earl*) v. *Davis*, 3 Ves. & B. 16

—— **Goods Pawned.**]—A. sends to his London factor to sell ; factor pawns goods. Pawnee, by answer, admits factor pawned some goods, but knows not whether they were the plaintiff's. Ordered, that A., in the presence of two or more, may have a view of them. *Marsden* v. *Panshall*, 1 Vern. 407.

—— **Entry on Premises to inspect Goods.**]—Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. *Smith* v. *Peters*, 44 L. J., Ch. 613 ; L. R. 20 Eq. 511 ; 23 W. R. 783.

Before 15 & 16 Vict. c. 76, s. 114, in an action for work and labour, a judge had no power to make an order for the plaintiff and his witnesses to enter on the freehold of the defendant for the purpose of inspecting the work done. *Turquand* v. *Strand Union*, 8 D. P. C. 201 ; 4 Jur. 74. S. P., *Newham* v. *Taite*, 6 Scott, 575 ; 1 Arn. 244.

Inspection of Premises.]—Where an action has been referred for trial under s. 14 of the Arbitration Act, 1889, the court or a judge still retains the power, and the referee or arbitrator has also jurisdiction to order inspection of property. As a general rule, the most convenient course is to apply to the referee or arbitrator in the first instance. *Hayward* v. *Mutual Reserve Association* ([1891] 2 Q. B. 236) approved. *MacAlpine* v. *Calder*, 62 L. J., Q. B. 607 ; [1893] 1 Q. B. 545 ; 4 R. 314 ; 68 L. T. 426 ; 41 W. R. 436—C. A.

—— **In what Cases.**]—The respondent, an impropriate rector, having, by decree of Court of Chancery, been found entitled to tithes according to value of warehouses in London, occupied by appellants, and which had never been rented, court has jurisdiction to make order for inspection upon appellants to ascertain value. Such order cannot be executed by force, but operates on person as ground for contempt, or bill pro confesso, if necessary. *East India Co.* v. *Kynaston*, 3 Bligh, 153.

A householder filed a bill against a railway company for an injunction to restrain it from proceeding with its works to the detriment of his premises, until it should have properly entitled itself to do so. The company had put up such a hoarding as prevented him from inspecting the progress of the works, and an order was made that the company should give access to him, his surveyors and builders, to go and view the works in the construction of the railway, carried on close to his house and premises, at all reasonable times of the day, upon his giving half an hour's notice of his desire to do so. *Saul* v. *Metropolitan Ry.*, 16 L. T. 169.

Owners and occupiers of houses in London subject to tithe ; defendants, at suit of tithe owner, ordered to permit witnesses to inspect them preparatory to examination on interrogatories for proving their value. *Kynaston* v. *East India Co.*, 3 Swanst. 248 ; 19 R. R. 202.

Instances of order to permit inspection and entry. *Id.* 264.

See on this subject, *Lonsdale* (*Lord*) v. *Curwen*, 3 Bligh, 168, n. ; *Walker* v. *Fletcher*, id. 172 ; *Brown* v. *Moore*, id. 178.

—— **Authority to dig up Soil.**]—Under r. 3 of Ord. L. the court has power to make an interlocutory order before trial, giving liberty to a plaintiff to enter upon land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection. *Lamb* v. *Beaumont*, 53 L. J., Ch. 1111 ; 27 Ch. D. 356 ; 51 L. T. 197 ; 32 W. R. 985.

An order having been made on motion in a cause in equity before the hearing, giving the plaintiff liberty to enter the defendant's ground for the purpose of inspection, and for the same purpose to break up the soil in the manner therein specified :—Held, that the latter part of the order ought to be discharged, it not being according to the course of the court that such liberty should be given on an interlocutory application before the hearing. *Ennor* v. *Barwell*, 1 De G. F. & J. 529 ; 7 Jur. (N.S.) 788 ; 8 W. R. 300.

—— **Inspection of Mines.**]—An owner of a mine will, on making out a primâ facie case, be allowed to inspect the workings of an adjoining mine, to ascertain whether they are being carried on in such a way as to encroach upon or injure his own mine. *Bennett* v. *Whitehouse*, 28 Beav. 119 ; 29 L. J., Ch. 326 ; 6 Jur. (N.S.) 528 ; 2 L. T. 45 ; 8 W. R. 251.

Where, upon a motion by occupiers of coal

mines, for an injunction to restrain the defendants, who worked adjoining mines, from cutting into the plaintiffs' barriers, the defendants offered an undertaking, and asked for time to answer affidavits, the court refused adversely to order an inspection of the defendants' mines. *Whaley* v. *Braucker*, 10 Jur. (N.S.) 535; 10 L. T. 155; 12 W. R. 570, 595.

The plaintiffs renewed their application a week later, and made out a primâ facie case of trespass; and the defendants having in the meantime filed no affidavits, the court, having no certain plan of the workings, granted an interim order and an order to inspect. *Ib.*

Order upon motion before the hearing, that the plaintiffs and their witnesses should be allowed, until publication, to view and inspect the workings by the defendants in the plaintiffs' mine, of which the defendants were lessees, and which mine was entered and worked by means of a shaft in an adjoining mine belonging to the defendants. *Lewis* v. *Marsh*, 8 Hare, 97.

When the plaintiff and the defendants had mines adjoining one another, and the plaintiff had reason to suspect that the defendants had encroached upon his mines, he obtained leave from them to go underground and examine their mines, and found that at the boundary-line between the two properties, a wall had been recently erected, which prevented him from seeing whether anything had been done on the other side, which belonged to him. The inspector of mines for the district reported that an inspection could safely be made by removing a portion of the wall, and that no practical difficulty existed calculated to endanger the lives of the workmen. An order was then made by a judge that the plaintiff should be at liberty to inspect the mines of the defendants, and, so far as was necessary for the inspection, to make a way through the wall. The plaintiff was directed to give security to the satisfaction of the master, or to deposit 500*l.* to abide any order the court might make as to indemnifying the defendants for any loss they might sustain in consequence of the inspection:—Held, that the order was good, as the courts of common law and the judges thereof have, as ancillary to the power of granting an inspection, a power to remove obstruction, with a view to the inspection. *Bennett* v. *Griffiths*, 30 L. J., Q. B. 98; 7 Jur. (N.S.) 284; 3 L. T. 735; 9 W. R. 332.

—— **No Prayer for—Proof attainable from External Sources.**]—There is no necessity specifically to pray for liberty to inspect premises, it being a species of discovery which the court has jurisdiction to grant if the nature of the case requires it; but, where the plaintiff applied for liberty to inspect the defendant's works to ascertain the particular products used in the manufacture of chemicals which occasioned a nuisance, the motion was refused, on the ground that proof of the nuisance could be obtained from external sources. *Barlow* v. *Bailey*, 22 L. T. 464; 18 W. R. 783.

Costs.]—A judge at chambers on making an order for the inspection of the defendants' property, has discretion to order the plaintiff to pay the costs. *Mitchell* v. *Darley Main Colliery*, 52 L. J., Q. B. 394; 10 Q. B. D. 457; 31 W. R. 549.

Sale of Real Estate—"Cause or Matter relating to Real Estate."]—An action was brought by the infant heir-at-law (by a next friend) of an intestate against the widow, who was the administratrix, claiming accounts of the personal estate, and of the rents and profits of the real estate received by the defendant. The action came on for hearing on motion for judgment, and the court was asked under Ord. LI. r. 1, to make an order for the sale of the real estate. The defendant did not object:—Held, that this was not "a cause or matter relating to real estate" within the meaning of the rule, and that the court could not order a sale under that rule. But, upon a summons under the Settled Land Act, a sale was ordered. *Staines, In re, Staines* v. *Staines*, 55 L. J., Ch. 913; 33 Ch. D. 172; 35 W. R. 75.

Under r. 1 of Ord. LI. the court has power to order a sale of real estate only when it is necessary or expedient for the purposes of the action before it that the property should be sold. No new power to order a sale is conferred. *Robinson, In re, Pickard* v. *Wheater*, 55 L. J., Ch. 307; 31 Ch. D. 247; 53 L. T. 865.

Where property consisted of agricultural land in Norfolk which was much depreciated in value, the court refused to order the estate to be sold under rules of court, 1883, Ord. LI. r. 1, for the purpose of paying the costs of a petition action, in which a declaration of the rights of the parties entitled had been obtained, and a receiver appointed against their father, who had previously been in possession and refused to account, but directed the receiver to apply any funds in his hands after keeping down incumbrances in payment of costs. *Miles* v. *Jarvis*, 50 L. T. 48.

And see EXECUTOR AND ADMINISTRATOR (SALES BY THE COURT).

—— **Injunction to Restrain.**]—Injunction granted restraining sale of estate till answer to bill, alleging parol agreement to exchange, partly performed by plaintiff having purchased estate for that purpose. *Curtis* v. *Buckingham* (*Marquis*), 3 Ves. & B. 168; 13 R. R. 174.

Deeds—Deposit in Court and Custody.]—Deeds sometimes ordered into court for their security. *Dixies* v. *Hillary*, Cary, 19.

Deed in favour of volunteer ordered into court at his suggestion. *Brookbank* v. *Brookbank*, 1 Eq. Abr. 168.

In a suit against an attorney to set aside a conveyance made as a security for untaxed costs, the court refused to order the lodgment of the deed in court. *Carr* v. *Moulds*, Hay. & J. 714.

At the instance of the mortgagee of the reversion, the court declined making a stop-order on deeds brought into the master's office under a decree. *Cotton* v. *Cotton*, 6 Beav. 96.

Documents were ordered to be retained in court for a reasonable time, in order to see whether the plaintiff would not take criminal proceedings against the defendant, in respect of one of them. *Walker* v. *Corke*, 2 Y. & Coll. 277; 8 L. J., Ex. Eq. 56.

Where a son, remainderman in tail, under a settlement made by his grandfather, in which the father was tenant for life, without impeachment of waste, preferred a bill to have the title-deeds brought into court, Lord H. refused to direct it, observing that some third person, and a secure place, agreed upon by the parties, would be a much more proper repository than a master; and he added, that the relief prayed

was the first application of the kind. *Pyncent* v. *Pyncent*, 3 Atk. 571.

In an abstract of a vendor's title, a will which formed part of it was represented as having been proved in the spiritual court, which afterwards appeared not to have been done. The purchaser filed his bill, praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the master for safe custody. It appeared that two other persons were intended under the will, and they were added as parties and, they not objecting, the will was directed to be deposited with the master for safe custody; the vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison* v. *Coppard*, 2 Cox, 319.

The object of a bill being to set aside deeds, the court will not, on motion, go beyond the usual liberty to inspect, &c., and for production at the hearing, by an order to deposit them with the master for safe custody, without a special case establishing danger that they may not be produced; therefore where most of the circumstances relied upon, viz. variations in two deeds, appeared upon the answer, the order was limited to production at the hearing. *Beckford* v. *Wildman*, 16 Ves. 438.

The master's examiner will lodge with the registrar of the court, for the hearing of a cause, deeds deposited in the office for the purposes of the cause, upon receiving a requisition from any of the parties concerned. A motion that he shall be at liberty to do so is unnecessary. *Plumtre* v. *O'Dell*, 5 Ir. Eq. R. 404.

An order having been improperly obtained on this court, for the production of the records of the proceedings in a suit in the Court of Great Sessions, Wales, they were forwarded by the registrar of that court, through his agent in London, to the clerk in court of the plaintiff, the proper officer:—Held, till such order was rescinded, that they were to be deemed to be in the proper custody. *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 662; 7 L. J., Ex. Eq. 42; 1 Jur. 940.

General rule as to the deposit of papers and writings is, that an executor must deposit them for the benefit of the parties interested, unless there are purposes which require that he should retain them. *Freeman* v. *Fairlie*, 3 Mer. 30; 17 R. R. 7.

A. conveys land to trustees on trust to sell if the unsatisfied debts of a partnership, in which he had been concerned, should at a given time exceed 40,000*l.*; the trustees sell and convey to the purchaser by a deed, which recites that the debts of the partnership exceeded the specified amount, and that A. had died intestate as to his real estates; and the heir-at-law of A. joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance; it afterwards appears to be uncertain whether A. had not devised his real estates, and the purchaser files a bill to have protection against or remedy for the alleged defect in his title, which this discovery created:—Held, that he is not entitled to have the books and documents connected with the accounts of the partnership delivered to him or deposited for safe custody. *Hallett* v. *Middleton*, 1 Russ. 243.

Deeds having been deposited with the clerk in court before the hearing, the decree contained the usual direction for the deposit in the master's office of such deeds, &c. as the master might direct. Ordered, on motion, that the deeds, &c. which the master had called for, should be transferred from the custody of the clerk in court into the master's office accordingly. Whether the master has authority, under the decree to make such order, quære. *Glover* v. *Williams*, 2 Jur. 678.

Directions as to political papers affecting living persons left by a testator. *Bean* v. *Griffiths*, 1 Jur. (N.S.) 1045; 3 W. R. 640.

Under a decree in an administration suit, certain creditors supported their claim in chambers by the production of certain documents. The residuary legatees, believing these documents to be forged, applied to have them deposited with the chief clerk and for liberty to have them examined by experts, to test their genuineness:—Ordered, that the documents be deposited with the chief clerk for one month, and that the applicants should have free access to them during that time. *Blakesley* v. *Pegg*, 20 L. T. 57.

Some parties in the cause had the option, under a will, of purchasing certain jewels, which the decree directed to be deposited in the master's office, and the master was to be at liberty to receive proposals from the parties for their purchase. The master declined receiving the jewels, and an order was made that the master should appoint a proper person to have the care of the jewels, who should find security, and have an allowance, and who should allow access thereto, for the purposes in the decree mentioned. *Jervis* v. *Brasier*, 6 L. J., Ch. 63.

—— **Delivery out.**]—Motion that securities be delivered to the executors to receive the money granted. *Jones* v. *Jones*, 3 Bro. C. C. 80.

Deeds not delivered out of court to a devisee, unless the heir is before the court. *Anon.*, 1 Ves. J. 29.

Person, not party in cause, may petition to have deeds belonging to him, and which had been brought into master's office under decree, delivered out to him. *Marriott* v. *White*, 1 Sim. & S. 17.

Petition for delivery of documents (after order on same subject from Queen's Bench) dismissed. *Neale* v. *Postlethwaite*, 2 Jur. 987.

In an abated suit the master has no jurisdiction, under the 16th Order of 1828, to direct the re-delivery of papers deposited in his office. *Alderman* v. *Bannister*, 9 Beav. 516.

An executor, who was under an obligation to deliver a book to a purchaser under the court, made an affidavit that it was lost:—Held, that the purchaser was not bound by that affidavit, but was entitled to an inquiry before the master. *Stubbs* v. *Sargon*, 4 Beav. 90.

Court never orders clerk in court, with whom exhibits have been deposited under usual order, to deliver them up to any other person, for the purpose of their being produced in court, or at the assizes, without consent of all parties, and payment of clerk in court's fees. *Harris* v. *Bodenham*, 1 Sim. & S. 283.

If the original writ is required, the motion cannot be made without producing it. *Ellerton* v. *Thirsk*, 1 Jac. & Walk. 376.

The court will not order original documents to be taken out of the jurisdiction of the court, for the purpose of being produced before a special examiner in the examination of witnesses in the cause, unless a special case be made for that purpose. *Lafone* v. *Falkland Islands Co.*, 4 Kay & J. 39.

But the court has jurisdiction upon a special case being made to make such an order. *Ib.*

A document being deposited in the Record and Writ Clerks' Office, delivery up refused without an order:—Held, that according to the practice, an order must be made, although such practice was most inconvenient; also, that a reference to the Master could only be made under peculiar circumstances. *Rummell* v. *Yarrell*, 1 W. R. 442.

Deeds delivered out upon report as to heir-at-law under order made after the lunatic's death. *Pearson, In re*, C. P. Coop. 314.

h. MANDAMUS, INJUNCTION AND RECEIVER.

1. Effect of Judicature Act, 1873, s. 35, sub-s. 8, 407.
2. Effect of Common Law Procedure Acts, 412.
3. Practice and Procedure.
   a. Mandamus—*See* MANDAMUS.
   b. Injunction—*See* INJUNCTION.
   c. Receiver—*See* RECEIVER.

1. Effect of Judicature Act, s. 25, sub-s. 8.

See R. S. C., 1883, Ord. L. r. 6.

Mandamus—When obtainable.]—A writ of mandamus under s. 25, sub-s. 8, of the Judicature Act, 1873, can only be obtained in a pending cause or matter; the prerogative writ being preserved to the Queen's Bench Division by s. 34. *Paris Skating Rink Co., In re*, 46 L. J., Ch. 831; 6 Ch. D. 731; 25 W. R. 767.

While a petition for winding up a company was pending, notice of motion in the winding-up was given to the company and the directors for a mandamus to direct them to convene an ordinary meeting. An order was made for winding up the company, which was reversed on appeal. The motion for a mandamus was then brought on:—Held, that the court had jurisdiction to direct the issue of a writ of mandamus in every cause or matter pending before it, but inasmuch as the petition had been dismissed there was no longer any matter pending before it in which it could make the order. *Ib.*

—— **Interlocutory Application for.**]—When an action has been commenced in which a mandamus is claimed, an interlocutory application for a mandamus will not be granted unless it can be shewn that the plaintiff will suffer some injury by waiting for the result of the action. *Widnes Alkali Co.* v. *Sheffield and Midland Ry.*, 37 L. T. 131.

Injunction—Jurisdiction of High Court of Justice.]—The extensive jurisdiction of granting injunctions originally given to the common-law courts by the Common Law Procedure Act, 1854, ss. 79, 81 and 82, is now vested, by virtue of the Judicature Act, 1873, in the High Court of Justice. All acts, therefore, which a common-law court, or a court of equity only, could formerly restrain by injunction, can now be restrained by the high court. *Beddow* v. *Beddow*, 47 L. J., Ch. 588; 9 Ch. D. 89; 26 W. R. 570.

The jurisdiction of granting injunctions thus vested in the high court is practically unlimited, and can be exercised by any judge of the high court in any case in which it is right or just to do so, having regard to settled legal reasons or principles. *Ib.*

The court will restrain an arbitrator by injunction from acting, in any case in which he is, in the opinion of the court, unfit or incompetent to act. *Ib.*

—— **Whether Jurisdiction of Court is extended.**]—The words "just or convenient" in s. 25, sub-s. 8, of the Judicature Act, 1873, do not mean that the court is to grant an injunction simply because the court think it convenient; they mean that the court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the court ought to interfere. Now, it has been said that, as a general rule, the court only interferes where there is some question as to property. I do not think that the interference of the court is absolutely confined to that now; there may be cases in which the court would interfere even where personal status is the only thing in question.—Per Jessel, M.R. *Aslatt* v. *Southampton Corporation*, 50 L. J., Ch. 33; 16 Ch. D. 143; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

The powers of the court in granting an injunction, either at the hearing or upon an interlocutory application, have been extended by s. 28, sub-s. 8, of the Judicature (Ireland) Act; and the only limit to the jurisdiction is that the court must be satisfied that it is just and convenient that the order should be made. The court has now jurisdiction to grant an injunction to give effect to a legal right. *Cork Corporation* v. *Rooney*, 7 L. R., Ir. 191.

I have a very strong opinion that the Judicature Act has not dealt with jurisdiction at all, but only with procedure; that it has given to the one division the procedure of the other division, or to the two divisions reciprocally the procedure of the other division, and that in some cases it has amended the procedure of both divisions, but that it has not given to any court a jurisdiction which no court had before. Individually, I should be inclined to hold that if no court had the power of issuing an injunction before the Judicature Act, no part of the high court has power to issue such an injunction now.—Per Brett, L.J. *North London Ry.* v. *G. N. Ry.*, 52 L. J., Q. B. 380; 11 Q. B. D. 36; 48 L. T. 695; 31 W. R. 490.

If it was intended to give the enormously increased power which it is contended is given by s. 25, sub-s. 8, of the Judicature Act, 1873, it is remarkable that it empowers it to be done by interlocutory order. It is said if it can be done by interlocutory order, of course it can be done by a final order at the hearing; no doubt that is true; but when the section only refers to interlocutory orders, is not the primâ facie presumption that it did not intend to give the right to an injunction to parties who before had no legal right whatever, but simply to give to the court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient, to superadd to what would have been previously the remedy, a remedy by way of injunction.—Per Cotton, L.J. *Ib.*

The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every judge of the high court; but inasmuch as one of the main objects of the acts (Judicature Act,

1873, s. 24, sub.-s. 7) is to enable the court to decide, if possible in one proceeding, all the questions in dispute in the same matter and between the same parties, and (Judicature Act, 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the court "just and convenient" so to do, the court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior court. *Hedley* v. *Bates*, 49 L. J., Ch. 170; 13 Ch. D. 498; 42 L. T. 41; 28 W. R. 365.

Sect. 25, sub-s. 8, of the Judicature Act, 1873, does not alter the former practice as to injunctions, but is only intended to do away with certain technical objections. *Fletcher* v. *Rodgers*, 27 W. R. 97—C. A.

The Judicature Act, 1873, s. 25, sub-s. 8, has not altered the principles on which the court acts in granting injunctions. *Gaskin* v. *Balls*, 13 Ch. D. 324; 28 W. R. 552—C. A.

The principles on which the court acts in granting injunctions are not extended by the provisions of the Judicature Act, which enable the court to grant injunctions where it is "just or convenient," which must be read "just as well as convenient." *Day* v. *Brownrigg*, 48 L. J., Ch. 173; 10 Ch. D. 294; 39 L. T. 553; 27 W. R. 217—C. A.

The power of the court to grant injunctions has been enlarged by the Judicature Act, 1873, s. 25, sub-s. 8. *Thomas* v. *Williams*, 49 L. J., Ch. 605; 14 Ch. D. 864, at p. 873; 43 L. T. 91; 28 W. R. 983. *But see* contra, *Dick* v. *Brooks*, 15 Ch. D., at p. 25.

—— **On what Terms.**]—An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the court shall think just," under s. 25, sub-s. 8, of the Judicature Act, 1873. The terms and conditions which the court thought just, and imposed on tenants who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into court. *Shaw* v. *Jersey* (*Earl*), 4 C. P. D. 359; 28 W. R. 142—C. A. Affirming 48 L. J., C. P. 308.

Receiver—Discretion.]—Under sub-s. 8 of s. 25 of the Judicature Act, 1873, the court has a discretion as to the appointment of a receiver. *Prytherch, In re, Prytherch* v. *Williams*, 59 L. J., Ch. 79; 42 Ch. D. 590; 61 L. T. 799; 38 W. R. 61.

—— **Action to recover Possession of Leaseholds.**]—The court has power under the Judicature Act, 1873, s. 25, to appoint a receiver where the title to the property is disputed. *Berry* v. *Keen*, 51 L. J., Ch. 912—C. A.

Dunn v. *Ferrior* (L. R. 3 Ch. 719) and *Talbot* v. *Hope-Scott* (4 K. & J. 139) are no longer law. *Ib.*

—— **Of Property pending Action as to Title.**]—The plaintiff in an ejectment action which was set down for trial, but had been stayed until another action affecting the same property, and brought by the defendant in ejectment against the plaintiff and others, should be ready for trial, moved for a receiver and for attornment to him. The defendant in ejectment set up a defence that in equity the plaintiff was only a sub-mortgagee. The evidence in support of the motion shewed that the property was wasting, and that, even if the plaintiff was only sub-mortgagee, it was insufficient for the original mortgage upon it; and this evidence was not met to the satisfaction of the court:—Held, that under the circumstances it was just and convenient within the Judicature Act, 1873, s. 25, sub-s. 8, now to appoint a receiver; and an order was made accordingly, unless the defendant elected within four days to pay an occupation rent into court, the amount to be settled in chambers. *Real and Personal Advance Co.* v. *McCarthy*, 40 L. T. 878; 27 W. R. 706.

—— **Co-ownership Suit.**]—The court will appoint a receiver in a co-ownership suit where the circumstances exist which in the opinion of the court render such a course just and convenient. *The Ampthill*, 5 P. D. 224; 29 W. R. 523.

—— **Action for Recovery of Land.**]—In an action for recovery of land brought by a landlord against his tenant under a proviso for re-entry for breach of covenant in his lease, a receiver of the rents and profits of the land pending the trial of the action may be appointed on the plaintiff's application. *Gwatkin* v. *Bird*, 52 L. J., Q. B. 263.

Under s. 25, sub-s. 8, of the Judicature Act, 1873, the court has jurisdiction to appoint a receiver wherever it shall appear just or convenient so to do, and consequently in an ejectment action where the title to real property is in dispute. *Foxwell* v. *Van Grutten*, 66 L. J., Ch. 53; [1897] 1 Ch. 64; 75 L. T. 368—C. A.

It is not a proper case for the exercise of this judicial discretion where the defendant in an action for ejectment is the admitted heir-at-law of the last owner, and has as such taken possession of the property in dispute, and there appears to be a question to be decided between the parties, and the property is safe, and there is no evidence of waste; and the mere fact that such defendant is impecunious is not a ground for the appointment of a receiver. *Ib.*

Per Kekewich, J.: An order appointing a receiver in a case of disputed title to real estate should be made subject to the rights of any incumbrancer. *Ib.*

—— **Equitable Execution—"Just and Convenient."**]—A judgment debtor had lands in Surrey subject to an equitable mortgage; and his judgment creditor obtained an order for a receiver of these lands. This order was not registered. After the appointment of the receiver the debtor sold the lands to a purchaser for value without notice:—Held, that under the circumstances of the case it was just and convenient for the court to appoint a receiver within the Judicature Act, 1873, s. 25, sub-s. 8. *Pope, In re*, 55 L. J., Q. B. 522; 17 Q. B. D. 743; 55 L. T. 369; 34 W. R. 693—C. A.

Under the general power to appoint receivers given by the Judicature Act, 1873, s. 25, sub-s. 8, and having regard to Rules of Supreme Court, 1883, Ord. XLII. rr. 4 and 28, the court has jurisdiction to enforce a judgment for payment of money into court by a defaulting trustee, by the appointment of a receiver of his equitabl interest in property in this country; and orde

accordingly where, from the debtor being out of the jurisdiction, service of a writ of attachment could not be effected. *Coney, In re, Coney* v. *Bennett*, 54 L. J., Ch. 1130; 28 Ch. D. 993; 52 L. T. 961; 33 W. R. 701.

An order was made against the defendants in an action, who were defaulting trustees, for the payment of money into court. The defendants having failed to comply with such order, an application was made by the plaintiffs that a writ of attachment might issue against them. At the defendants' instance, however, the court made an order allowing payment by weekly instalments. L., one of the defendants, had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that the plaintiffs in other proceedings had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the plaintiffs for the appointment of a receiver of the furniture by way of equitable execution. For the defendant L. it was contended that the legal and proper remedy of the plaintiffs was by sequestration, and that the court had no jurisdiction to appoint a receiver:—Held, that, although under r. 4 of Ord. XLII. of the Rules of Court, 1883, sequestration was the appropriate remedy, yet under s. 25, sub-s. 8, of the Judicature Act, 1873, the court had jurisdiction to appoint a receiver if it appeared just or convenient so to do; and that, in the present case, it was just and convenient to appoint a receiver, and that an order must be made accordingly. *Whiteley, In re, Whiteley* v. *Learoyd*, 56 L. T. 846.

—— **Deceased's Estate.**]—The Judicature Act, 1873, s. 25, sub-s. 8, enables any judge of the high court to appoint a receiver of a deceased's estate (before grant of probate or administration), notwithstanding the absence of lis pendens; but applications for any such order, being on the way to probate proceedings, are properly made in the Probate Division, and if made elsewhere will not be encouraged. *Parker, In re, Dearing* v. *Brooks*, 54 L. J., Ch. 694.

—— **Mortgagee.**]—A legal mortgagee, being in possession of the mortgaged property, applied to the court for the appointment of a receiver:—Held, that although the mortgagee might, under the Conveyancing Act, 1881, appoint a receiver without coming to the court, it was more desirable, where an action was pending, that the appointment should be made by the court under the Judicature Act, 1873. *Tillett* v. *Nixon*, 53 L. J., Ch. 199; 25 Ch. D. 238; 48 L. T. 598; 32 W. R. 226.

Under s. 25, sub-s. 8, of the Judicature Act, 1873, a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession, and that he has surplus rents in his hands. *Mason* v. *Westoby*, 55 L. J., Ch. 507; 32 Ch. D. 206; 54 L. T. 526; 34 W. R. 498.

Under the power given by the Judicature Act, 1873, s. 25, sub-s. 8, to appoint a receiver in all cases in which it shall appear just and convenient, the order made on interlocutory application for the appointment of a receiver was extended to the whole property comprised in the plaintiff's security, as to part of which he was legal and as to part equitable mortgagee. *Pease* v. *Fletcher*, 45 L. J., Ch. 265; 1 Ch. D. 273; 33 L. T. 644; 24 W. R. 158.

—— **In Partition Action.**]—In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the court has jurisdiction under the Judicature Act, 1873, s. 25, sub-s. 8, to appoint a receiver until the hearing. *Porter* v. *Lopes*, 7 Ch. D. 358; 37 L. T. 824.

—— **Judicature (Ireland) Act, s. 28, sub-s. 8.**]—Section 3 of 19 & 20 Vict. c. 77, has been repealed by the 28th section of the Judicature (Ireland) Act, sub-s. 8, and, therefore, the court may appoint a receiver on foot of any judgment mortgage, notwithstanding that the rental of the estate is less than 100*l.* per annum. The court will, under special circumstances, appoint a receiver where less than one year's interest is due. *Martin's Estate, In re*, 13 L. R., Ir. 43.

In an action to recover damages for obstructing a watercourse, and for an injunction, the plaintiffs obtained a verdict for nominal damages. The defendant having continued the acts of obstruction complained of, the court granted an injunction. *Agnew* v. *McDowell*, 14 L. R., Ir. 445.

Practice—Writ.]—A plaintiff should indorse his writ with a claim for an injunction, or for a receiver when the obtaining of either is a substantial object of his action. *Colebourne* v. *Colebourne*, 45 L. J., Ch. 749; 6 Ch. D. 690; 24 W. R. 235.

—— **Time for Application.**]—Under Ord. LII. r. 4, a defendant in an action may, before judgment, apply for an injunction and a receiver. *Sargant* v. *Read*, 45 L. J., Ch. 206; 1 Ch. D. 600.

The words "interlocutory order" in s. 25, sub-s. 8, of the Judicature Act, 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after. *Smith* v. *Cowell*, 50 L. J., Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227—C. A. S. P., *Salt* v. *Cooper*, 50 L. J., Ch. 529; 16 Ch. D. 544; 43 L. T. 682; 29 W. R. 553—C. A.

The power given by sub-s. 8 of s. 25 can be exercised at the trial of an action, as well as upon an interlocutory application. *Prytherch, In re, Prytherch* v. *Williams*, 59 L. J., Ch. 79; 42 Ch. D. 590; 61 L. T. 799; 38 W. R. 61.

2. Effect of Common Law Procedure Acts.

Mandamus.]—The 17 & 18 Vict. c. 125, s. 68, applies only to the fulfilment of such duties as might be enforced by the prerogative writ of mandamus, and not to the specific performance of contracts. *Benson* v. *Paul*, 6 El. & Bl. 273; 25 L. J., Q. B. 274; 2 Jur. (N.S.) 425; 4 W. R. 493.

But a mandamus may be claimed under the above provisions to enforce the fulfilment of a duty in which the plaintiff is personally interested, where such duty does not arise out of a mere personal contract. *Norris* v. *Irish Land Co.*, 8 El. & Bl. 512; 27 L. J., Q. B. 115; 4 Jur. (N.S.) 235.

An action for a mandamus may lie even when no actual damage has been sustained. *Fotherby* v. *Metropolitan Ry.*, 36 L. J., C. P. 88; L. R. 2 C. P. 188; 12 Jur. (N.S.) 1005; 15 L. T. 243; 15 W. R. 112.

The neglect by a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land which the company has given notice of requiring for the purposes of its act, within a reasonable time after such notice, is an actionable wrong, and the issue of the warrant may be enforced by an action for a mandamus. *Ib.*

A railway company gave a notice to the plaintiff of their intention to take a tenement for which he was rated to the poor; the notice did not contain the particulars mentioned in the Lands Clauses Act, s. 18. In consequence of this notice the plaintiff took other premises, and his former ones remained on his hands unoccupied. The company having failed to proceed with the purchase of the lands after six months had elapsed, the plaintiff commenced an action against them for damages, and claimed a mandamus:—Held, that the notice bound the company to proceed with the purchase of the tenement at the end of the six months, and that he was entitled to a mandamus to compel them to do so. *Morgan* v. *Metropolitan Ry.*, 38 L. J., C. P. 87; L. R. 4 C. P. 97; 19 L. T. 655; 17 W. R. 261—Ex. Ch.

Held, also, that he was entitled to more than nominal damages. *Ib.*

An incorporated body having raised money under statutory powers by debentures, issued some of these debentures to one of their own body in payment for goods supplied by him, such a transaction being illegal under the statute by which they were constituted a corporate body:—Held, in an action by the executors of an innocent holder for value of such securities, the same having been transferred to him from the original mortgagee in the manner provided by the statute, that they were estopped from setting up as a defence the original illegality of the transaction, and that under the Common Law Procedure Act of 1854, s. 68, the writ was in the proper form in praying for a mandamus to compel them to apply the money in their hands in payment of the plaintiffs' claim, it being shewn that the defendants did hold money in their hands raised under the powers of the statute, and applicable to that purpose, and that it was not necessary that the mandamus should direct the defendants to levy a rate for the purpose of satisfying the plaintiffs' demand. *Webb* v. *Herne Bay Commissioners*, 39 L. J., Q. B. 221; L. R. 5 Q. B. 642; 22 L. T. 745; 19 W. R. 241.

When a debt is of such a nature that a mandamus will be granted to enforce its payment, it is not necessary that the amount of the debt should have been previously ascertained, but such amount may be ascertained by the verdict of the jury in the action in which the writ of mandamus is claimed. *Ward* v. *Lowndes*, 28 L. J., Q. B. 265; 5 Jur. (N.S.) 1124; 7 W. R. 489. Affirmed, 1 El. & El. 940; 29 L. J., Q. B. 40; 6 Jur. (N.S.) 247; 1 L. T. 268; 8 W. R. 81—Ex. Ch.

A plea that the causes of action did not accrue within six years is a bad plea to a declaration for a mandamus, as the statute of limitations does not bar an application for such a writ. *Ib.*

A claim to a writ of mandamus cannot be sustained if there is any other equally effectual remedy. *Bush* v. *Beavan*, 1 H. & C. 500; 32 L. J., Ex. 54; 8 Jur. (N.S.) 1015; 7 L. T. 106; 10 W. R. 845.

In an action by executors against the clerk of commissioners for putting into execution a town improvement act, and in which action they claimed a writ of mandamus, the declaration stated that the commissioners were indebted to the testator for the agreed salary payable by them to him for services rendered by him as clerk to the commissioners; and also for other work by him, as the attorney of and otherwise for the commissioners in and about their business; that the debts became and were a charge on any moneys which might be in the hands of the commissioners, and which should have been collected by them under and by virtue of the act; and that if the commissioners should not have in their hands any moneys sufficient to pay the debts, then such debts became a charge and were chargeable on a rate leviable and to be levied by the commissioners under the act. They pleaded to so much of the debts as became due on simple contract, the statute of limitations, and to the debts, except the agreed salary, that no signed bill was delivered; also that the commissioners had no funds whereout they could pay the debts:—Held, first, that the declaration was bad, inasmuch as, assuming that the services in respect of which the "agreed salary" was claimed were payable out of the rates, the others might be services for which the commissioners were personally liable, and consequently the remedy was by action, not by a claim of mandamus. *Ib.*

Held, secondly, that on the same principle the two first pleas were good. *Ib.*

—— **Act of 1852.**]—Where a court of equity has issued an order for an injunction restraining a party from bringing an action, a court of common law will enforce such order by staying proceedings, although no writ of injunction has been actually issued. *Cobbett* v. *Ludlam*, 11 Ex. 446; 25 L. J., Ex. 25.

A court of law will not stay an action on the ground that there is a suit in equity pending in which the same demand comes in question (even although the demand is for a debt as to which and other demands the plaintiff at law has, in equity, consented to a decree for an account), where the court of equity has not stayed the action by injunction; the court of common law having no jurisdiction to stay proceedings on such a ground, and the provision in the above statute only applying where the court of equity has stayed the action by injunction. *Pearse* v. *Robins*, 26 L. J., Ex. 183.

When a plaintiff who has brought proceedings both at law and in equity for the same cause of action elects to proceed in equity under an order of chancery directing that he elect, and that if he elect to proceed in equity the proceedings at law be stayed by injunction, the defendant may, under 15 & 16 Vict. c. 76, s. 101, serve the plaintiff with notice to proceed in the action, and, in default of his proceeding, enter a suggestion and sign judgment for his costs. *Mortimore* v. *Soares*, 1 El. & El. 399; 28 L. J., Q. B. 133; 5 Jur. (N.S.) 574.

The court will not grant a rule nisi to stay such action and subsequent proceedings under s. 226. *Ib.*

—— **Act of 1854—General Principles.**]—An injunction must be founded either upon a contract, or an injury to property of a permanent nature. *Sutton* v. *S. E. Ry.*, 4 H. & C. 325 ; 35 L. J., Ex. 38 ; L. R. 1 Ex. 33 ; 11 Jur. (N.S.) 935 ; 13 L. T. 438 ; 14 W. R. 133.

The court will not grant a writ of injunction, when by so doing the defendant would be called upon to do an illegal act. *L. & N. W. Ry.* v. *Webb*, 9 L. T. 291 ; 12 W. R. 51.

—— **At what Period granted.**]—N. entered into the service of C., a surgeon, as his assistant, under an agreement by which he bound himself not to practise within five miles of a certain village "without the consent in writing of C. first had, under the penalty or penal sum of 100*l.* to be recoverable by C. as liquidated damages, the 100*l.* having been specified by the parties hereto as the amount to be paid and recoverable by C. against N. for the breach or non-observance of the clause." N. having commenced practice within the prescribed distance, C. caused a writ to be served upon him, the indorsement claiming 100*l.* the amount of the penalty, and also that the plaintiff intended to claim a writ of injunction. The court refused to entertain an application for an injunction before declaration. *Carnes* v. *Nisbett*, 7 H. & N. 158 ; 31 L. J., Ex. 273 ; 4 L. T. 558 ; 9 W. R. 811.

—— **In what Cases granted.**]—A plaintiff lent certain photograph portraits to a person who became insolvent, and his assignees having offered the photographs for sale by auction, the defendant purchased them ; and by photographically printing from negatives, he obtained reduced copies, which he published and sold. The plaintiff brought an action against him, and recovered nominal damages for the infringement of the plaintiff's right :—Held, that the plaintiff was entitled to a writ of injunction to restrain the defendant from taking or selling any more copies of the photographs, and also to recover them or their value in detinue. *Mayall* v. *Higbey*, 1 H. & C. 148 ; 31 L. J., Ex. 329 ; 8 Jur. (N.S.) 622 ; 6 L. T. 362 ; 10 W. R. 631.

A railway company having conveyed to A. a piece of land abutting on their viaduct, with a covenant not to build within six feet of the wall of the viaduct, the court, in an action against A.'s widow (who took by assignment) for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building ; it appearing that it had been erected by her undertenant, and consequently that she could not obey the writ, if granted. *L. & S. W. Ry.* v. *Webb*, 15 C. B. (N.S.) 450 ; 9 L. T. 291 ; 12 W. R. 51.

A plaintiff obtained a verdict and judgment against a shareholder in a cost-book copper mining company, in an action for a nuisance caused by working the mine. The plaintiff having afterwards obtained a rule nisi for an injunction, the court discharged the rule, it appearing by affidavit that the shareholder had bonâ fide sold his shares before notice of the application for an injunction. *Matthews* v. *King*, 3 H. & C. 910 ; 13 L. T. 120.

The 17 & 18 Vict. c. 125, s. 82, does not extend to ejectments. *Baylis* v. *Legros*, 2 C. B. (N.S.) 316 ; 26 L. J., C. P. 176 ; 3 Jur. (N.S.) 795 ; 5 W. R. 689.

A plaintiff, who sues for liquidated damages on the breach of an agreement, cannot join therewith a claim for an injunction. *Carnes* v. *Nisbett*, 30 L. J., Ex. 348 ; 7 Jur. (N.S.) 1250 ; 4 L. T. 558 ; 9 W. R. 811.

By a written agreement the plaintiff engaged the defendant as manager in his trade of a butcher at H., and the defendant promised not to carry on that trade on account of himself or any other person within two miles of that place, under a penalty or a forfeiture of 20*l.* The defendant set up in business as a butcher on his own account within the two miles ; and the plaintiff, who by a writ claimed an injunction, sued him for unliquidated damages, and recovered 20*l.* Under these circumstances the court refused a motion for an injunction. *Young* v. *Chalkley*, 16 L. T. 286 ; 15 W. R. 743.

The court will not grant an injunction to restrain a railway company from charging a carrier otherwise than equally with all other persons. *Sutton* v. *S. E. Ry.*, 4 H. & C. 325 ; 35 L. J., Ex. 38 ; L. R. 1 Ex. 33 ; 11 Jur. (N.S.) 935 ; 13 L. T. 438 ; 14 W. R. 133.

A lessor of a mine or vein of coal covenanted that the lessee should and might peaceably and quietly have, hold, occupy, possess and enjoy the mine without any let, suit, trouble, molestation, interruption or disturbance whatsoever. The lessor, in working ironstone, lying between the surface of the soil and the demised coal, caused part of the roof of the coal mine to crush and fall in, and to be flooded. The working of the ironstone was done in a workmanlike manner :—Held, that these acts constituted a breach of the covenant for which the lessee might maintain an action thereon, and (being continued at the time of action brought) also entitled him to an injunction restraining the lessor from working the ironstone within such a distance of the surface as interfered with the lessee getting the coal with full advantage and profit. *Shaw* v. *Stenton*, 2 H. & N. 858 ; 27 L. J., Ex. 253 ; 6 W. R. 327.

In an action for obstructing ancient lights, with a claim for an injunction, after verdict for the plaintiff, the court granted an injunction to restrain the defendant from continuing the wrongful acts complained of, and from committing any injury of the like kind relating to the property and rights of the plaintiff, and from erecting, keeping erected, and continuing the erection of so much of the wall and buildings as was opposite his messuage and premises, so or in such manner as to darken or obstruct any of the ancient lights or windows of the messuage and premises, and from erecting any other building and doing any other act whereby the light and air coming to and entering his messuage and premises by means of the windows might be obstructed, or such messuage and premises might be in any way darkened, and from the repetition or continuance of any act whereby an injury of a like kind might happen to the plaintiff ; the writ of injunction to lie in the office till next term, the defendant undertaking to pull down as much of the wall and building as should be sufficient to restore to the plaintiff the full enjoyment of the light and air he had previously, and to do the same to the satisfaction of a surveyor to be agreed on or nominated by a judge, the defendant to pay the costs of the rule and of the surveyor. *Jessel* v. *Chaplin*, 2 Jur. (N.S.) 931 ; 4 W. R. 610.

—— **Practice.**]—The rule for a writ of injunction to restrain a defendant from infringing a

patent, is a rule to shew cause only in the first instance. *Gittins* v. *Symes*, 15 C. B. 962; 3 C. L. R. 251; 24 L J., C. P. 48; 3 W. R. 115.

An injunction had been obtained, restraining the defendant from carrying on works so as to be a nuisance to the plaintiff. Upon a motion for the costs of a rule for an attachment for a breach of it:—Held, that the injunction was a continuing injunction, and that it was not necessary to reserve to the plaintiff leave to renew the motion for an attachment in case of any future breach. *De La Rue* v. *Fortescue*, 2 H. & N. 324; 26 L. J., Ex. 339.

It is competent for the plaintiff to apply at any time for an attachment in case of disobedience to the injunction. *Ib.*

A defendant cannot plead to a claim in a declaration for a writ of injunction. *Booth* v. *Taylor*, 4 H. & C. 70; 35 L. J., Ex. 56; 11 Jur. (N.S.) 981; 13 L. T. 408; 14 W. R. 131.

A demurrer to so much of a declaration as claims a writ of injunction will not be allowed, unless the facts disclosed shew beyond all doubt that no injunction could be granted. *Bilke* v. *L. C. & D. Ry.*, 3 H. & C. 95; 33 L. J., Ex. 206; 10 Jur. (N.S.) 777; 10 L. T. 651; 12 W. R. 921.

—— **Costs.**]—Where in an action for an alleged nuisance, a writ of injunction has issued, commanding the defendant to pay the costs of the writ, the court will stay the proceedings in respect of the costs until after the trial of the cause. *Grindley* v. *Booth*, 3 H. & C. 669; 34 L. J., Ex. 135; 11 Jur. (N.S.) 745; 12 L. T. 469.

XI. TRIAL.

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a. PLACE OF TRIAL.

1. Generally.

See R. S. C., 1883, Ord. XXXVI. r. 1.

In Amended Statement of Claim.]—A plaintiff who wishes to name some place other than Middlesex as the place of trial must name it in the original statement of claim. If he omits to do so, he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim, he cannot alter it in an amended statement of claim. *Locke* v. *White*, 55 L. J., Ch. 731; 33 Ch. D. 308; 54 L. T. 891; 34 W. R. 747—C. A.

Action in Chancery Division.]—Ord. XXXVI. r. 1, enabling a plaintiff in any action to fix the place of trial by his statement of claim, applies to chancery actions. *Redmayne* v. *Vaughan*, 24 W. R. 983.

Under Ord. XXXVI. r. 1, a plaintiff is entitled to lay the venue of an action in any place that he pleases, although it is specially assigned to the Chancery Division, and has been commenced in that division. *Phillip* v. *Beale*, 54 L. J., Ch. 80; 26 Ch. D. 621; 50 L. T. 433; 32 W. R. 665—C. A.

—— **Trial at Assizes of.**]—The court has power to order an action, as well as a question or issue of fact, to be tried at the assizes. *Wood* v. *Hamblet*, 47 L. J., Ch. 113; 6 Ch. D. 113.

On an application by the plaintiff, with the

concurrence of the defendant, in an action in the chancery division, for an order that the action might be tried at the Staffordshire Assizes :—Held, having regard to Ord. XXXVI. rr. 3, 10, and Ord. XXXVI. r. 29a, that an action as well as a question or issue therein might be ordered to be tried before the commissioners of assize ; that inasmuch as the parties desired it, as the action was for damages only, as it related to property in Staffordshire, and as there were a great many local witnesses, the order asked for should be made, and the above reasons stated on the face of the order as the reasons for which it was expedient that the action should be so tried. *Ib.*

—— **Form of Order.**]—By Ord. XXXVI. r. 29a, the order directing such trial must state on its face the reason for which it is expedient that the action should be so tried. Where both parties wished it, and the action was for damages only, and related to land in the county where the great majority of the witnesses resided, the court made the order, stating these facts on the face of it as the reason. *Ib.*

—— **Delay in Applying.**]—A plaintiff who had set down an action for trial before a judge of the Chancery Division, applied to have a preliminary issue of fact tried at Chester, and the trial of the action postponed. His application was refused on the ground of delay. *Lloyd* v. *Jones*, 47 L. J., Ch. 470 ; 7 Ch. D. 390 ; 37 L. T. 524 ; 26 W. R. 262.

A plaintiff, in a partition suit, on the 20th September gave notice of trial before Malins, V.-C., without a jury. On the 19th November he took out a summons in the chambers of Malins, V.-C., asking that an issue of fact might be tried at Chester before any other question of fact was tried. On the 30th November the plaintiff gave notice of motion before Fry, J., to whom the cause had been transferred, that the action might stand out of the paper for hearing until the Hilary sittings, 1878, which was ordered to come on for hearing on the 11th December. On the 7th December Malins, V.-C., at the request of the plaintiff, adjourned the summons to be heard by Fry, J., at the same time as the motion :—Held, that in consequence of the delay on the part of the plaintiff, it would be unjust to the defendant to put off the trial for a further time, and both applications must be dismissed. *Ib.*

—— **Entry at Assizes—Power to Remit.**]—In a patent action commenced in the Chancery Division, the plaintiff named Manchester as the place of trial, and the action was set down for trial at Manchester Assizes. When the case came on for trial the judge of assize declined to try it, on the ground of pressure of business, and remitted it for trial in the Chancery Division :—Held, that this was not a sufficient ground for an order under Ord. XXXVI. r. 34, that the case might have been made a remanet, and that the order must be discharged. *Fairburn* v. *Household*, 53 L. T. 513—C. A.

A plaintiff had entered his action, being an action for specific performance of a contract, for trial in the associates' book for Middlesex. Motion by the defendant to have it struck out and entered in the chancery registrar's book allowed. *Sykes* v. *Firth*, 46 L. J., Ch. 627.

In Crown Cases.]—In an information of intrusion, the crown may, as of its prerogative, lay the venue in any county, without regard to the local situation of the premises. *Att.-Gen.* v. *Parsons*, 2 M. & W. 23 ; 2 Gale, 227 ; 5 D. P. C. 165 ; 1 Tyr. & G. 980 ; 5 L. J., Ex. 243.

But the crown is not entitled by its prerogative, as matter of right, to change the venue in such an information. *Att.-Gen.* v. *Churchill* (*Lord*), 8 M. & W. 171 ; 9 D. P. C. 772 ; 10 L. J., Ex. 314 ; 5 Jur. 803.

Semble, that the attorney-general for the Prince of Wales has in transitory actions the same powers with regard to laying and retaining the venue in causes arising within the duchy of Cornwall, as the attorney-general for the crown. *Att.-Gen.* (*Prince of Wales*) v. *Crossman*, 4 H. & C. 568 ; L. R. 1 Ex. 381 ; 12 Jur. (N.S.) 712 ; 14 L. T. 856 ; 14 W. R. 996.

Local Venue—Jurisdiction.]—In an action of debt founded on privity of estate, the venue is local. *Whitaker* v. *Forbes*, 45 L. J., C. P. 140 ; 1 C. P. D. 51 ; 33 L. T. 582 ; 24 W. R. 241—C. A.

An executor of the grantee of a rent-charge on land situate in Australia, sued in England the devisee of the lands, in debt for nonpayment thereof :—Held (there being no privity of contract between the parties), that the action was founded on privity of estate, and, in accordance with principle and settled authority, was a local action, and could only be brought in Australia. *Ib.*

An action for damages for trespass to land situated in a foreign country, founded on a disputed claim of title to such land, cannot be tried in the courts of this country. *British South Africa Co.* v. *Companhia de Moçambique*, 63 L. J., Q. B. 70 ; [1893] A. C. 602 ; 6 R. 1 ; 69 L. T. 604—H. L. (E.)

—— **Effect of Abolition of.**]—Ord. XXXVI. r. 1 (R. S. C., 1883), which abolishes local venues, is a rule of procedure only, and does not affect the jurisdiction of the courts of this country. *Ib.*

By Ord. XXXVI. r. 1, of the Rules of 1883, it is enacted that "there shall be no local venue for the trial of any action, except where otherwise provided by statute" :—Held, that this exception applied only to local venues created by statutes passed since the Judicature Act, 1875, and that all local venues created by statute before that date are abolished. *Buckley* v. *Hull Docks Co.*, 62 L. J., Q. B. 449 ; [1893] 2 Q. B. 93 ; 5 R. 547 ; 69 L. T. 347.

The provisions of the Highways Act, 1835, s. 109, as to local venue are abolished by the Rules of Court, 1875, Ord. XXXVI. r. 1. *Phelips* v. *Hadham Highway District Board*, 1 Cab. & E. 67.

—— **Action against Constable.**]—Sect. 19 of 1 & 2 Will. 4, c. 41, by which, in all actions for anything done in pursuance of that act, the venue is to be local, applies only to such acts as a constable might at the date of the statute have been called upon to perform ; the section therefore does not apply in the case of a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson* v. *Russell*, 54 L. J., Q. B. 144 ; 14 Q. B. D. 720 ; 52 L. T. 208 ; 33 W. R. 34 ; 49 J. P. 293—C. A.

Venue—Marginal Statement—Declaration.]—The marginal statement of venue is incorporated with the declaration, and therefore in a local

action it amounted to an averment that the cause of action arose in the county named. *Richardson* v. *Locklin*, 34 L. J., Q. B. 225 ; 11 Jur. (N.S.) 951 ; 12 L. T. 728 ; 13 W. R. 940.

2. Change of Place of Trial.

a. *On what Grounds.*

General Rule.]—A plaintiff may lay the venue where he pleases, and it is for the defendant who seeks to change it to shew a manifest preponderance of convenience in favour of such change. *Cossham* v. *Leach*, 32 L. T. 665.

In an action where the claim is for a substantial amount, the venue which the plaintiff desires to have is not to be changed from London to the country unless there is some very strong reason for so doing. *Ross* v. *Napier*, 30 L. J., Ex. 2 ; 6 Jur. (N.S.) 1161 ; 3 L. T. 442.

The court will not change the venue from the place where the plaintiff has thought fit to lay it, unless there is some great and obvious preponderance of convenience in trying the cause elsewhere. *Drury* v. *Hopwood*, 7 C. B. (N.S.) 835 ; 29 L. J., C. P. 151 ; 6 Jur. (N.S.) 705. S. P., *Helliwell* v. *Hobson*, 3 C. B. (N.S.) 761.

The court will not change a venue laid by a plaintiff unless a defendant can shew some serious injury and injustice to his case by trying it at that venue. *Shroder* v. *Myers*, 34 W. R. 261—C. A.

Residence of Witnesses and Convenience.]—The mere circumstance of a plaintiff being an officer in the navy, and hoping to be shortly appointed to a ship, which would disable him from attending to give evidence at the trial if the venue was changed, is sufficient to induce the court to retain the venue where laid, although it is sworn that all the defendant's witnesses resided at the place to which it was sought to change it. *Channon* v. *Parkhouse*, 13 C. B. (N.S.) 341.

In an action for the specific performance of an agreement, wherein fraud and concealment connected with the conveyance of certain mines and property in the county of Cornwall were alleged, it appeared that the plaintiff resided at Wakefield, in Yorkshire, and most of the witnesses and the defendant in or within an easy distance of London, but that one of the most important witnesses, who was eighty years old, lived in Cornwall, and that the place of business of the solicitor who transacted the business connected with the conveyance was at Plymouth. The plaintiff in his statement of claim had fixed the venue at Exeter. On a motion by the defendant that the venue might be changed to Middlesex, on the ground of convenience and to save expense, and because the action was one which ought properly to be assigned to the Chancery Division, and contained points of law which would probably be referred from the assizes to London :—Held, that the venue must be changed to Middlesex, not because the action was a chancery action, but on the ground of convenience for the witnesses and of saving expense ; also that the necessary delay which must ensue was not in itself a sufficient reason for permitting the case to go to the assizes. *Green* v. *Bennett*, 54 L. J., Ch. 85 ; 50 L. T. 706 ; 32 W. R. 848.

In an action for the breach of a contract made at Liverpool, where the defendant resided, and where the contract was to be performed, the venue was laid in London. A judge on the defendant's application ordered the venue to be changed to Liverpool, upon an affidavit that all his witnesses, thirteen in number, resided there, and that a cross action arising out of the contract was pending there, notwithstanding that the plaintiff's affidavit stated that all but one of his witnesses, twenty-eight in number, resided in London. The court refused to interfere. *Levy* v. *Rice*, L. R. 5 C. P. 119 ; 21 L. T. 717 ; 18 W. R. 458.

In an action on a note, the court will not change the venue from London to the county where it was made, on the defendant stating that all his witnesses live there ; but if his affidavit shews the number of his witnesses, and that a serious inconvenience will arise from bringing them up, it will. *Evans* v. *Weaver*, 1 Bos. & P. 20.

In an action on a bond, the court, upon the application of the defendant, will change the venue to the place where his defence arises, and the witnesses reside. *Foster* v. *Taylor*, 1 Term Rep. 781.

The court will not change the venue, in an action on a deed, to the county where it was executed, on the ground of the defendant's witnesses residing there, if from the pleadings it does not appear necessary to produce many witnesses from that county, unless a question is raised which cannot be expected to be fairly tried there. *Watt* v. *Daniel*, 1 Bos. & P. 425.

Twenty-five witnesses and a horse on one side against ten witnesses on the other :—Held, not such a preponderance of inconvenience as to induce the court to bring back the venue from the place where the cause of action (if any) arose. *Blackman* v. *Bainton*, 15 C. B. (N.S.) 432.

It is no ground for changing the venue in an action for a libel contained in a letter written and sent to a person in the county to which the venue is sought to be changed, that the defendant (who has pleaded not guilty only) has many witnesses resident in that county whom he intends to call in mitigation, and that the plaintiff has no witnesses in the county where the venue was originally laid. *Wheatcroft* v. *Mousley*, 11 C. B. 677.

The venue had been removed from Berkshire to Middlesex at the instance of the plaintiff, upon a suggestion that a material witness was ill and not likely to live till the next assizes. The witness dying, and it appearing that another cause between the same parties and arising out of the same transaction stood for trial at the next assizes for Berkshire, and that most of the witnesses in both actions resided at or near Reading, the venue was restored to Berkshire, on terms. *Knight* v. *Bigsby*, 6 Scott (N.R.) 168.

In an action against bankers at Newcastle-upon-Tyne, a rule to change the venue from London to Cumberland or Northumberland was made absolute, with certain conditions as to the defraying by the defendant of the additional expenses of the plaintiff's witnesses, on the ground of the great inconvenience which would be occasioned by the defendant's having to carry their banking books and clerks to London. *Attwood* v. *Ridley*, 2 Man. & G. 893 ; 3 Scott (N.R.) 319.

The plaintiff had become bankrupt and had assigned all his interest, and was anxious to go abroad permanently ; he was a material witness ; the court changed the venue to London on

security for costs being given. *James* v. *Isaac*, 1 W. R. 355.

Impartial Trial.]—In support of an application to enter a suggestion to try a cause in Nottinghamshire instead of Lincolnshire, upon the ground that the lessor of the plaintiff could not have a fair and impartial trial in the former county, an affidavit was produced alleging that two attorneys, whom the lessor of the plaintiff had successively employed to conduct the cause, had abandoned his interest, the one on account of a bribe paid to him by the defendant, the other on account of an intimacy which existed between him and the defendant, and also that the defendant was a person of large property and possessing great influence in the county, and that he had said he would "do as he liked at Lincoln," more especially as the lessor of the plaintiff was a poor man:—Held, insufficient. *Doe* d. *Hickman* v. *Hickman*, 9 D. P. C. 364.

Manifestations of applause at the close of counsel's speech by some of the jury at the first trial, is not a sufficient ground for changing the venue of the second trial. *O'Connor* v. *Malone*, Macl. & R. 468; 6 Cl. & F. 572.

It is no ground for changing the venue, in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has, since the commencement of the action, evinced a disposition to exercise it to the prejudice of the plaintiff. *Walker* v. *Brogden*, 17 C. B. (N.S.) 571.

But the court intimated that it would interfere if the defendant should, before the trial, publish anything in relation to the matter of the action reflecting upon the plaintiff. *Ib.* See *Watt* v. *Daniel*, 1 Bos. & P. 425.

An action was brought for a series of libels in a Bristol newspaper, and the plaintiff, the defendant, and a large number of witnesses resided near Bristol. The plaintiff laid the venue in Middlesex and the master changed it to Bristol. The plaintiff's solicitor deposed that the alleged libels had given rise to strong local prejudice, rendering it impossible that the action could be fairly tried at Bristol:—Held, that the venue must be restored to Middlesex. *Cossham* v. *Leach*, 32 L. T. 665.

The court will make a rule absolute for entering a suggestion on the record, to remove the trial of a cause from the county where the cause of action arose, and where the venue is laid, to an adjoining county, the action being for trespass on a close, and it being sworn that the defendant and others riotously and tumultuously assembled and broke down the fences, without imposing any terms upon the plaintiff. *Jones* v. *Price*, 7 D. P. C. 103.

It is a ground for an application to change the venue, that the attorney for the defendant is under-sheriff of the county where the venue is laid, and has made it a special jury case. *Hilton* v. *Green*, 10 W. R. 627.

It is not a sufficient reason to change the venue of an issue to try the validity of a will that one of the parties interested, and whose conduct is impeached, is lord lieutenant of the county where the action is to be tried. *Hopwood* v. *Derby (Earl)*, 1 Kay & J. 255.

The influence upon the minds of the jurors, which might possibly be produced by the reputation of a material witness on a trial, in affecting the relative credit to be given to the testimony of that and the other witnesses, is no ground for changing the venue from the county or neighbourhood in which such material witness resides and is best known. *M'Gregor* v. *Topham*, 3 Hare, 488.

Cause of Action arising—Breach.]—A judge having made an order to change the venue from Middlesex to London, upon an affidavit stating that the action was brought for a breach of duty by the defendant, as the plaintiff's agent in the sale of indigo; that the sale took place in London; that the cause of action, if any, arose there; and that, in the deponent's judgment and belief, the cause ought to be tried by a jury of merchants in London; the court refused to disturb it. *Begg* v. *Forbes*, 13 C. B. 614.

View Necessary.]—In an action upon a covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay, though most of the plaintiff's witnesses resided in the county where the venue was laid. *Hodinott* v. *Cox*, 8 East, 268.

Most Eminent Counsel Retained.]—It is not a sufficient reason for changing the venue that either party has retained the most eminent counsel on the circuit in which the venue lies, unless it is done oppressively. *Curtis* v. *Lewis*, 12 W. R. 951.

Where Jury unable to Agree.]—Where the jury on the trial of an action against a candidate for election expenses could not agree, the court permitted the venue to be changed to London or Middlesex. *Brown* v. *Vernon*, 2 L. T. 251.

b. *Who may Apply.*

One of several Defendants.]—A motion to change the venue cannot be made by one of three defendants without the consent of the other two, notwithstanding they have suffered judgment by default, and colluded with the plaintiff, as it was suggested, to withhold their consent. *Anon.*, 2 Chit. 417.

One of several defendants may in general change the venue on the common affidavit without the consent of the others; and if the latter were prejudiced by that step they should have applied on special grounds to bring it back. *Job* v. *Butterfield*, 1 L. M. & P. 734; 5 Ex. 827; 20 L. J., Ex. 8.

Under Terms to take Short Notice of Trial.]—Where a defendant is under terms to take short notice of trial he cannot move to change the venue upon the common affidavit. *Clulee* or *Cluny* v. *Bradley*, 13 C. B. 604; 2 C. L. R. 1; 23 L. J., C. P. 38; 18 Jur. 177; 2 W. R. 79.

The fact of a defendant being under terms to take short notice of trial does not absolutely preclude him from applying to change the venue where the case is in other respects a fit one for the exercise of a judge's discretion. *Jackson* v. *Kidd*, 8 C. B. (N.S.) 354; 29 L. J., C. P. 221; 6 Jur. (N.S.) 1094, 1117.

c. *When Application to be made.*

Not before Issue Joined or Plea Pleaded.]—It is more convenient, as a general rule, that the application to change the venue be made before issue joined; but this should not prejudice either

party from applying after issue is joined to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county. *De Rothschild* v. *Shilston*, 8 Ex. 503; 22 L. J., Ex. 279; 17 Jur. 561; 1 W. R. 439.

In the Common Pleas an order to change the venue of an action could not be granted till after issue joined. *Ramsden* v. *Skip*, 13 C. B. 601; 22 L. J., C. P. 186; 17 Jur. 537; 1 W. R. 353.

The venue may be changed in an action on a specialty before issue joined upon an affidavit disclosing special circumstances. *Pashley* v. *Birmingham Corporation*, 14 C. B. 421.

If the pleadings and facts of the case are such that the court cannot fail to see what the issues joined must be, the application may be granted before issue joined. *Dowler* v. *Collis*, 4 M. & W. 531; 7 D. P. C. 55; 8 L. J., Ex. 47.

In an action on a note the application to change the venue cannot be made before plea. *Parmeter* v. *Otway*, 3 D. P. C. 66.

If a motion to change the venue rests on special grounds it ought not to be made till after plea. *Cotterill* v. *Dixon*, 1 C. & M. 661; 3 Tyr. 705; 2 D. P. C. 112.

In a local action a suggestion to try the cause in an adjoining county could not be granted before issue joined. *Tolson* v. *Carlisle* (*Bishop*), 7 C. B. 79.

In an action on a specialty, an application to change the venue cannot be made until after issue joined. *Youde* v. *Youde*, 4 D. P. C. 32; 1 H. & W. 338.

Or in a local action, under 3 & 4 Will. 4, c. 42, s. 22, cannot be made till issue is joined. *Bell* v. *Harrison*, 2 C. M. & R. 733; 4 D. P. C. 181; 1 Gale, 269.

The court will not, before issue joined, entertain a motion to change the venue in an action on a specialty. *Weatherby* v. *Goring*, 5 D. & R. 441; 3 B. & C. 552.

In an action of covenant on a farming lease, the court will not change the venue before issue joined. *Maude* v. *Sessions*, 1 C. M. & R. 86. *S. C.*, nom. *Bohrs* v. *Sessions*, 2 D. P. C. 699; 4 Tyr. 272; 3 L. J., Ex. 354.

The venue cannot be changed in an indictment for conspiracy until issue is joined. *Rex* v. *Forbes*, 2 D. P. C. 440.

The venue in an action of slander could not be changed on special grounds until after issue joined. *Hodge* v. *Churchward*, 5 C. B. 495; 5 D. & L. 514; 17 L. J., C. P. 175; 12 Jur. 247.

d. *Affidavits on Application.*

By whom made.]—It is not of itself a sufficient objection to an affidavit for changing the venue, that it is made by the attorney in the cause, and not by the defendant. *Biddell* v. *Smith*, 2 D. P. C. 219.

Good Defence.]—An affidavit of a good defence on the merits is not necessary where the facts sworn to amount to a good defence; e.g. where it is sworn that the debt has been satisfied. *Johnson* v. *Beresford*, 2 C. & M. 222; 4 Tyr. 75; 2 D. P. C. 260; 3 L. J., Ex. 37.

Cause of Action.]—An affidavit to change the venue must state the cause of action. *Fenwick* v. *Farrow*, 1 Chit. 334.

So an affidavit to change the venue from A. to B. must state that the cause of action arose in B. and not in A., or elsewhere out of B. *Allen* v. *Griffiths*, 3 Term Rep. 495.

An application to change the venue from A. to B. in an action for goods sold and delivered, upon an affidavit that the cause of action arose at B. and not elsewhere, may be successfully answered by an affidavit that the goods were sold at C. *Collins* v. *Jacobs*, 3 Bos. & P. 579.

An affidavit must not only state that the cause of action arose in the county to which the removal is prayed, but also that it did not arise elsewhere. *Jones* v. *Pearce*, 2 D. P. C. 54.

A defendant in his affidavit to obtain a rule nisi to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of the venue; but he may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shews that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed. *De Rothschild* v. *Shilston*, 8 Ex. 503; 22 L. J., Ex. 279; 17 Jur. 561; 1 W. R. 439.

The common affidavit that the cause of action arose in the county to which the venue is sought to be changed is insufficient; the special circumstances of the cases must be shewn as ground for the application. *Ramsden* v. *Skip*, 13 C. B. 601; 22 L. J., C. P. 186; 17 Jur. 537; 1 W. R. 353.

The rule that the venue cannot be changed on the common affidavit after plea is still in force. *Begg* v. *Forbes*, 13 C. B. 614; 2 C. L. R. 856; 23 L. J., C. P. 222.

The new rule as to change of venue only changes the practice in so far that the order cannot be made of course on the common affidavit, but it must be made by the court or a judge on a rule of summons, so that it may be answered in the first instance. *Ib.*

—— **Manifestly Incorrect.**]—A declaration on a policy of insurance from Baltimore to Liverpool alleged a loss by perils of the sea. The court refused to allow the venue to be changed from the southern division of Lancashire to London, upon the usual affidavit that the cause of action arose in London and not elsewhere, the declaration shewing that such statement could not be correct, although the policy was effected in London and the loss was payable there. *Butler* v. *Fox*, 7 C. B. 970; 7 D. & L. 112; 18 L. J., C. P. 304.

Must shew Balance of Convenience.]—The court refused to change the venue after issue joined, and notice of trial given, where it was not shewn in the affidavit in support of the application that the change would not be inconvenient to the plaintiff, or in what respect it would be productive of convenience for the defendant. *Hams* v. *Pawlett*, 5 D. & L. 780; 5 C. B. 807; 17 L. J., C. P. 210.

In Opposition.]—On a motion to change the venue from London to Worcester, on the usual affidavit, an affidavit, stating that the action was brought for the seduction of the plaintiff's daughter, and that she was so ill that it was not expected that she would live till the assizes, is a sufficient answer to the application. *Wing* v. *Jenkins*, 7 Moore, 62.

The court discharged a rule for changing the

venue on an affidavit that the defendant's attorney had said that he should change the venue to postpone the trial, and (which was the fact) that in the interim an act would come into operation which would defeat the plaintiff's claim. *Amner* v. *Cattell*, 5 Bing. 208 ; 2 M. & P. 367 ; 7 L. J. (O.S.) C. P. 78.

An affidavit to bring back the venue, made by the plaintiff's wife, is insufficient, unless it appears that the husband was too ill to attend before a commissioner to make one, and that the wife is fully acquainted with the nature and particulars of the action. The proper person to make the affidavit under such circumstances is the plaintiff's attorney. *Williams* v. *Higgs*, 6 M. & W. 133 ; 8 D. P. C. 165 ; 9 L. J., Ex. 59 ; 4 Jur. 73.

A plaintiff falsifying the defendant's affidavit to change the venue, the venue was retained, though the plaintiff could not undertake to give material evidence in London, where he had laid it ; either venue being inconvenient to one or other of the parties. *Dick* v. *Norrish*, 3 Taunt. 464.

e. *Practice.*

Terms on which Granted.]—A summons to change the venue from London to Newcastle being opposed by the plaintiff, the judge indorsed the summons, "No order, the plaintiff undertaking to tax, if successful, as if tried in Northumberland" : — Held, that this was binding upon the plaintiff as an undertaking, though no order was ever drawn up. *Clarke* v. *Tyne Improvement Commissioners*, 37 L. J., C. P. 110 ; L. R. 3 C. P. 230 ; 17 L. T. 509 ; 16 W. R. 480.

In taxing the costs on the footing of this undertaking, the master has a discretion as to what expenses would probably not have been incurred if the cause had been tried at Newcastle ; and the court will not interfere with such taxation unless clearly shewn that the discretion has been wrongly exercised. *Ib.*

A cause having been set down for trial in Middlesex, and a rule obtained for a special jury, the parties agreed that the venue should be changed to London, and that the costs occasioned by the arrangement should be costs in the cause. At the trial the cause was referred to an arbitrator : —Held, that the successful party was entitled to the additional costs of the special jury occasioned by the change of venue from Middlesex to London. *Greve* or *Geeres* v. *Gorton*, 15 M. & W. 186 ; 3 D. & L. 481 ; 15 L. J., Ex. 169 ; 10 Jur. 272.

Where a plaintiff is entitled to change the venue as a matter of right, the court will not, at the instance of the defendant, impose terms. *Turnley* v. *L. & N. W. Ry.*, 16 C. B. 575.

Where the order is intended to be without prejudice to a change of venue, it should be so expressed in the summons. *Waring* v. *Holt*, 3 Price, 3.

Order not drawn up — Original Venue.]—Where an order has been made by indorsement on a summons, either by a judge or by the opposite party, to change the venue to a different county, the trial in such county, after notice of trial for such county, is a mere irregularity, although the order has not been properly drawn up nor the venue in the declaration altered according to it ; and the proceedings will not be set aside after judgment has been signed, or the first four days of the next ensuing term have elapsed. *Selwyn* v. *Smith*, 26 L. J., Ex. 226.

Appeal from Discretion.]—Where a defendant, on an application to change the venue on the ground of preponderance of convenience in a trial at the place to which he seeks to change it, comes by way of appeal from a judge at chambers, he must make out such a strong case of preponderance of convenience as will satisfy the court that the determination of the judge was wrong. *Church* v. *Barnett*, 40 L. J., C. P. 138 ; L. R. 6 C. P. 116 ; 23 L. T. 705 ; 19 W. R. 411.

In an action by an owner of a ship against the Mersey Dock and Harbour Board for negligence, whereby the ship was lost, the venue was laid in London. A similar action by the owner of the cargo had been tried at Liverpool, and a verdict found for the defendants. The judge who tried that cause having, on the defendant's application, refused an order changing the venue to Liverpool, being of opinion that a fair trial could not be had there, the court refused to interfere, although the parties and all the witnesses resided there, and a view would be necessary, and great inconvenience and expense would result from the trial in London. *Penhallow* v. *Mersey Dock and Harbour Board*, 29 L. J., Ex. 21.

The court will not interfere to set aside a judge's order to change the venue made after issue joined, the defendant being under terms of taking short notice of trial, on the ground that the affidavit on which the order was made was insufficient. *Cartwright* v. *Frost*, 3 H. & N. 278 ; 27 L. J., Ex. 352 ; 4 Jur. (N.S.) 464 ; 6 W. R. 542.

Where the venue was changed from L. to S., on an affidavit that the cause of action arose at S., and the witnesses lived there :—Held, that this was not the common affidavit, and that the decision of the judge ought not to be interfered with. *Ib.*

When a judge has, in the exercise of his discretion, made an order to change the venue, the court will not interfere, unless it is manifest that he has acted upon a misconception of the facts. *Schuster* v. *Wheelwright*, 8 C. B. (N.S.) 383 ; 29 L. J., C. P. 222 ; 6 Jur. (N.S.) 944.

Or unless some overwhelming inconvenience or injustice would otherwise result. *Ross* v. *Napier*, 30 L. J., Ex. 2 ; 6 Jur. (N.S.) 1161 ; 3 L. T. 442.

In an action for a wrongful distress in Buckinghamshire, the venue having been changed thereto, the court refused to bring it back to Middlesex merely on the ground that some of the witnesses resided there. *Benham* v. *Wetherel*, 11 W. R. 66.

Where a cause of action arose in the country, and the venue had been changed from London thither, it is no ground for bringing it back to London that as sittings there would be more frequent than the assizes, it would be more convenient for the plaintiff to try there than in the country, and the expense would not be much greater. *Cole* v. *Hull Dock Co.*, 11 W. R. 284.

In a probate suit, where the nominal plaintiff, who was claiming an intestacy, had inserted the place of trial in his statement of claim, the defendants, who were propounding a will of the deceased, and upon whom the onus of proof at the trial would lie to establish that will, applied upon summons to change the venue from the assizes to Middlesex, and the judge made the order. Upon the plaintiff's appealing, upon motion, to set aside the order :—Held, that the order was right, that the venue should stand

changed, and that the case should come on for trial in the Probate Court, the more especially as there appeared to be a doubt as to whether the case could be conveniently disposed of at the approaching assizes. From this order the plaintiffs, upon special leave given, appealed to the Court of Appeal; whereupon the Lords Justices, after consulting the judge appointed to preside at the assizes in question, and having ascertained from him that the cause-list was a light one, and that the case could, without difficulty, be disposed of at the approaching assizes, and that there was a misapprehension in supposing that it could not, directed the case to be so tried, and ordered accordingly. *Jackson* v. *Braithwaite*, 63 L. T. 231—C. A.

Amendment of Statement of Claim.]—A plaintiff who wishes to name some place other than Middlesex as the place of trial must name it in the original statement of claim. If he omits to do so, he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim, he cannot alter it in an amended statement of claim. *Locke* v. *White*, 55 L. J., Ch. 731; 33 Ch. D. 308; 54 L. T. 891; 34 W. R. 747—C. A.

A declaration for a penalty was amended by altering the venue from the county at large to an inferior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the court that the plaintiff was proceeding on the same fact for which the action was originally brought when laid by mistake in the wrong county, though there was no affidavit that it was the same. *Petre* v. *Craft*, 4 East, 433.

So also in another case, though it appeared that there were distinct causes of action in the two different counties, upon an affidavit that the plaintiff proceeded on a mistake in supposing that both causes of action could be proved in the county where the election was holden. *Dover* v. *Mestaer*, 5 East, 435; 1 Smith, 123.

The court will not amend a declaration, by changing the venue, unless the plaintiff shews substantial ground for it. *Fife* v. *Bowstead* or *Bousfield*, 2 D. (N.S.) 705; 12 L. J., Q. B. 186; 7 Jur. 491.

Where a plaintiff is entitled to amend his declaration, by changing the venue, as a matter of right, the court will not, at the instance of the defendant, impose terms. *Turnley* v. *L. & N. W. Ry.*, 16 C. B. 575.

b. Mode of Trial.

1. Trial by Judge alone, or by Judge and Jury.

See Ord. XXXVI. rr. 2—10.

Commercial List — Application by Plaintiff before Appearance.]—After the issue of the writ in a commercial cause the judge charged with commercial causes may, upon the application of the plaintiff, and before the defendant has appeared or the time limited for appearance has expired, order that the cause be entered in the commercial list, and that the costs of the application be costs in the cause. *Barry* v. *Peruvian Corporation*, 65 L. J., Q. B. 191; [1896] 1 Q. B. 208; 73 L. T. 678; 44 W. R. 487—C. A.

The defendant may appear and apply to the judge to set aside the order but only upon the ground that the cause is not in fact a commercial cause. *Ib.*

—— **Evidence.**]—The judge charged with commercial business has no greater power than other judges to dispense with the technical rules of evidence. *Baerlein* v. *Chartered Bank of India, London and China*, 65 L. J., Ch. 54; [1895] 2 Ch. 488; 12 R. 581; 72 L. T. 850; 43 W. R. 692—C. A.

Order for Trial by Judge with Jury—Discretion.]—A party who desires that an action shall be tried with a jury must obtain an order to that effect; and if the case falls within Ord. XXXVI. r. 6, the master has no discretion but must make the order. *Trower* v. *Law Life Assurance Society*, 54 L. J., Q. B. 407; 52 L. T. 888; 33 W. R. 674—C. A.

Before Rules of 1883—In ordinary Cases Party might insist on Trial by Jury.]—Where a plaintiff gives notice of trial before a judge sitting with assessors, the defendant has a right under Ord. XXXVI. r. 3, by giving notice within the time specified, to insist on a trial before a judge and jury; and the Judicature Acts and Rules of Court do not give power to the court or a judge to deprive him of this right. *Sugg* v. *Silber*, 45 L. J., Q. B. 460; 1 Q. B. D. 362; 34 L. T. 682; 24 W. R. 640.

The plaintiff's claim in a suit for administration instituted prior to the 1st of November, 1875, having been disputed, he, after issue joined subsequently to the 1st of November, 1875, gave notice of trial with a jury in Middlesex, but subsequently intimated to the defendant that the trial would be before the judge only, and the case was set down for hearing. The defendant having claimed to have a jury:—Held, that, under Ord. XXXVI. r. 3, the defendant had the right which he claimed; and that where the case was of a nature fit to be tried by a jury, the right should not ordinarily be interfered with by the exercise of the discretion given to the court by r. 26. *Clarke* v. *Cookson*, 45 L. J., Ch. 752; 2 Ch. D. 746; 34 L. T. 646; 24 W. R. 535.

An order was made in a patent cause by a judge at chambers, at the instance of the plaintiff, in opposition to the wish of the defendant, that the cause should be tried before a judge sitting with assessors, and that the notice of trial, given before the Judicature Acts, should be varied accordingly; the defendant thereupon gave notice that he required to have the issues of fact tried before a judge and jury; the plaintiff having applied to have assessors nominated in pursuance of the order, the judge at chambers referred the whole matter to the court:—Held, that the defendant was entitled, under Ord. XXXVI. r. 3, to have the case tried by a judge and jury, instead of by a judge and assessors. *Ib.*

Any party to an action now has a right, subject to the control of the court, and to the observance of certain formalities, to submit issues of fact to a jury. *Clements* v. *Norris*, 6 Ch. D. 129; 38 L. T. 591; 26 W. R. 94.

The court will distinguish between what ought and what ought not to go to a jury. *Ib.*

In an action for a mandatory injunction to restrain the defendant from permitting a building to remain so as to obstruct the plaintiff's ancient lights, the defendant having given notice under Ord. XXXVI. r. 3, for the trial of issues of fact by jury, on a motion by the plaintiffs

that the action might be tried by a judge without a jury:—Held, that the case did not come within that rule, and that the defendant was entitled to have the action tried according to his notice. *Bordier* v. *Burrell*, 46 L. J., Ch. 615; 5 Ch. D. 512; 25 W. R. 801.

The defendant in a civil action for libel has the same right to a trial by jury as a defendant in any other civil action; he has no higher right. Fox's Act (32 Geo. 3, c. 60) does not apply to a civil action for libel. *Thomas* v. *Williams*, 49 L. J., Ch. 605; 14 Ch. D. 864; 43 L. T. 91; 28 W. R. 983.

Where all Defendants do not Concur.]—When there are two or more defendants to an action or suit, one of them alone, in opposition to or without the concurrence of the others, is not entitled, under Ord. XXXVI. r. 3, to require the action to be tried before a jury. *Back* v. *Hay*, 5 Ch. D. 235; 36 L. T. 295; 25 W. R. 392.

Where there is more than one defendant, and all do not desire, that is, do not request a trial before a jury, the court will not comply with the request of one defendant to have the action tried before a jury unless it is of opinion that the case comes within Ord. XXXVI. r. 27. The refusal of one defendant does not prevent an action being tried before a jury; but it imposes on the defendant who desires such a trial the duty of shewing that it is more convenient. *Mirehouse* v. *Barnett*, 47 L. J., Ch. 689; 26 W. R. 690.

Time for Application for Trial by Jury.]—By Ord. XXXVI. r. 6, upon the application within ten days after notice of trial has been given, of any party for a trial with a jury of the cause, an order shall be made for a trial with a jury. Notice of a trial was given by the plaintiff, but the cause was not entered for trial by either party within the time prescribed by the rules, and the notice was therefore no longer in force. The plaintiff gave a second notice of trial, entered the cause for trial on the same day, and then applied for a trial by jury:—Held, that under Ord. XXXVI. r. 6, the application for a jury was too late. *Tonsley* v. *Heffer*, 56 L. J., Q. B. 656; 19 Q. B. D. 153; 57 L. T. 481; 36 W. R. 48.

An action for an injunction and account having been commenced, the plaintiff moved on the 11th December, 1885, for an interim injunction. An order was then made that the motion should stand over until the trial of the action, the plaintiff undertaking to set down the cause for trial forthwith, and deliver a statement of claim within ten days. The defendant gave an undertaking in the terms of the notice of motion. The notice of trial was given on the 12th December, 1885, the statement of claim was delivered on the 19th December, 1885, and the defence and counterclaim were delivered on the 4th January, 1886. On the same date plaintiff received notice of the defendant's intention to apply for a trial before a jury:—Held, upon the construction of the Rules of Court, Ord. XXXVI. r. 6, as amended by the Rules of Court of December, 1885, that the application was made too late, and that no case had been made out for the exercise of the discretion to enlarge the time under the Rules of Court, 1883, Ord. LXIV. r. 7. *Moore* v. *Deakin*, 53 L. T. 858; 34 W. R. 227.

Interpleader.]—An interpleader issue having been directed, the issue was drawn up for trial with a jury, and the trial took place before a judge and a jury. A new trial having been ordered, the plaintiff gave notice of trial before a judge alone. The defendant did not give a counter-notice, but objected at the trial to the jurisdiction of the judge to try the case without a jury:—Held, that it was not competent for the plaintiff to give such notice, and that the issue could not be tried by a judge without a jury. *Hamlyn* v. *Betteley*, 50 L. J., Q. B. 1; 6 Q. B. D. 63; 43 L. T. 790; 29 W. R. 275—C. A. *See now* Rules of Supreme Court, 1883, Ord. LVII. r. 13.

Right to Trial by Judge and Jury—Discretion.]—An action commenced in the Queen's Bench Division which before the Judicature Act, 1873, might have been brought in either the chancery or common law courts, is a cause or matter within Ord. XXXVI. r. 4, which "could without any consent of parties have been tried without a jury," and the defendants cannot as a matter of right have the action tried with a jury. *Baring* v. *North-Western of Uruguay Ry.*, [1893] 2 Q. B. 406; 9 R. 614; 69 L. T. 740—C. A.

Rule 6 of Ord. XXXVI. of the Rules of the Supreme Court, 1883, does not give a right to an order for a trial with a jury in an action in the Chancery Division, that being an action which, before the Judicature Act, 1873, could, without any consent of parties, have been tried without a jury. In such an action the court has a discretion, under rule 7 (a), to order a trial with a jury, but the onus is on the party asking for that mode of trial to shew some good reason for it. *Jenkins* v. *Bushby*, 60 L. J., Ch. 254; [1891] 1 Ch. 484; 64 L. T. 213; 39 W. R. 321—C. A.

Causes or matters, which previously to the passing of the Judicature Act could, without any consent of parties, have been tried without a jury, are excluded from the operation of Ord. XXXVI. r. 6, and the parties are, therefore, not entitled as of right to a trial with a jury. In such causes or matters an application for a trial with a jury must be made under Ord. XXXVI. r. 7, in which case it is in the discretion of the court or judge to grant the application. *The Temple Bar*, 55 L. J., P. 1; 11 P. D. 6; 53 L. T. 904; 34 W. R. 68; 5 Asp. M. C. 509—C. A.

In an action in rem for necessaries for a ship the trial was directed to be before a judge at the assizes. The plaintiff applied for an order that the action should be tried with a jury, alleging that he was entitled under Ord. XXXVI. r. 6, to such an order as of right. The judge refused the application:—Held, that the action was not within Ord. XXXVI. r. 6, and that the application could only be made under r. 7 of that order, and therefore the judge would have a discretion to grant the application. *Ib.*

Where, in an action brought in the Chancery Division to restrain a nuisance, either party applies for a trial by jury, he cannot claim a jury as a matter of right, but the application is one to the discretion of the court under Ord. XXXVI. r. 7 (a), and he has not even such primâ facie right to a jury as to throw on the other side the burden of shewing that the case can be tried as well without a jury. *Tinson* v. *Wilson*, 38 Ch. D. 72; 59 L. T. 76; 36 W. R. 418—C. A.

The right of a defendant, under r. 6 of Ord. XXXVI., to have an issue of fact sent for trial by a judge and jury, is subject to the discretion

of the court under rr. 4 and 5 of the same order; and the court, in the exercise of such discretion, will refuse to send the issue for trial by a judge and jury, if it does not appear desirable. *Moss* v. *Bradburn*, 32 W. R. 368.

An action which falls within one of the classes of actions which by s. 34 of the Judicature Act, 1873, are especially assigned to the Chancery Division, will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action. If such an action depends on the determination of mixed questions of law and fact, it ought to be tried by a judge without a jury, and an order will be made for its trial by the judge of the Chancery Division to whom it has been assigned, without a jury, even though the plaintiff has by his statement of claim proposed a different venue. The mere fact that the action will be tried more quickly, is not a sufficient reason for sending it to be tried at the assizes. *Cardinall* v. *Cardinall*, 53 L. J., Ch. 636; 25 Ch. D. 772; 32 W. R. 411.

In an action for injunction to restrain infringement of copyright and for damages:—Held, that the defendant had no right to a trial by jury, but that, under Ord. XXXVI. rr. 4 and 7a, the court had a discretion, which it exercised by directing a trial without a jury. Semble, that the burden of proof was on the party applying for a jury. *Coote* v. *Ingram*, 56 L. J., Ch. 634; 35 Ch. D. 117; 56 L. T. 300; 35 W. R. 390.

In an action brought by the plaintiff in the Chancery Division against the defendants, in respect of an infringement by them of his registered trade-mark, and claiming an account of profits or damages, the defendants submitted to a perpetual injunction; and the only question remaining to be tried was, what damages should be paid, the plaintiff waiving any accounts of profits. The plaintiff applied to the court that the action might be transferred to the Queen's Bench Division, so that it might be tried with a jury. This application was opposed by the defendants, on the ground that, under r. 4 of Ord. XXXVI. of the Rules of Court, 1883, the judge had a discretion; and that the damages could be as well ascertained by the judge in court or chambers as by a jury:—Held, that the judge had no discretion, and that under r. 6 of Ord. XXXVI. an order must be made for a trial with a jury. But held, that, even if the court had a discretion, this was not a case in which such discretion ought to be exercised, the only question remaining at issue in the action being in regard to the amount of damages for the infringement of the trade-mark, which question would be more properly tried with than without a jury. *Fennessy* v. *Rabbits*, 56 L. T. 138.

The plaintiff, in an action to set aside deeds on the ground of fraud, named Cardigan as the place of trial in his statement of claim. On motion by a defendant before issue joined, the court ordered the action to be tried in the Chancery Division, without a jury, and this decision was affirmed by the Court of Appeal. *Powell* v. *Cobb*, 54 L. J., Ch. 962; 29 Ch. D. 486; 53 L. T. 188—C. A.

An action to restrain the defendants from obstructing the plaintiff's water rights was set down in the Chancery Division on the 27th May, and briefs were delivered on the 7th July. On motion by the defendants that the trial might take place at Manchester before a judge and jury:—Held, that the defendants had an absolute right to trial by jury; that Manchester was the proper place for the trial; the costs to be reserved on account of the defendants' delay in bringing their motion. *Old Mill Co.* v. *Duckinfield Local Board*, 54 L. J., Ch. 160; 51 L. T. 414.

The plaintiffs sued in respect of certain alterations made by the defendant in his house at Bath, which adjoined the plaintiffs' house. The plaintiffs claimed, first, specific performance of an agreement entered into upon a sale of the land on which the house stood, whereby a certain building scheme was provided; and, secondly, an injunction to restrain the defendant from so building as to interfere with the light and air coming to the plaintiffs' house. A motion was made on behalf of the defendant for an order that the action might be tried before a judge and jury, and that the trial might take place at the forthcoming assizes at Bristol. The defendant's contention was that, the issue as to obstructing ancient lights not being one of those matters which, by the Judicature Act, 1873, were assigned to the Chancery Division, the court had, so far as that part of the action was concerned, no discretion in the matter; but that the defendant had a right to have that issue, at all events, tried before a judge and jury. Further, that supposing such a right did not exist, yet as this issue was quite independent of the question of specific performance, and as, moreover, the locus in quo was Bath, and therefore great expense would be saved by having the trial at Bristol, the court, in the exercise of its discretion, ought to direct a trial before a jury:—Held, that the action being one which by the Judicature Act was assigned to the Chancery Division, the court had a discretion whether or not it would allow a trial by jury; and that the defendant had no right to say that he would split the action in two and insist upon one portion of it being tried before a jury. Held, also, that as to the exercise of that discretion this was not a case in which the issue sought to be tried before a jury was preliminary to the rest of the action, and might put an end to it; that, in whichever way the issue as to the obstruction of light was decided, the question of specific performance would remain, and would have to be tried in the Chancery Division; and that, therefore, the application must be refused. *Sheppard* v. *Gilmore*, 53 L. T. 625; 34 W. R. 179.

In an action for dissolution of partnership, the plaintiffs, by their statement of claim, made numerous charges of a serious nature affecting the character of the defendant, including charges of fraud, maintenance, and perjury. The defendant selected five of the most serious of these charges, and applied to the court, asking that issues should be directed to be tried before a judge and a special jury:—Held, that the real issue in the action was whether the defendant had been guilty of such conduct as to render a dissolution of the partnership necessary, and therefore that, even if the defendant should succeed on all such issues, it would not necessarily follow that the partnership ought not to be dissolved; and that the application must accordingly be refused. *Ehrmann* v. *Ehrmann*, 72 L. T. 548—C. A.

—— **Counterclaim for Damages — Plaintiff applying for Whole Action to be Tried with a Jury.**]—The plaintiff brought an action for

redemption of shares mortgaged by him. The defendant, by counterclaim, sought relief incident to his position as mortgagee, and also damages for alleged fraudulent misrepresentations made by the plaintiff to the defendant, which affected the amount of the balance, to secure which the mortgage was given. The plaintiff applied to have the action tried with a jury, which was refused:—Held, on appeal, that the case did not come within Ord. XXXVI. r. 6, so as to give the plaintiff a right to have the action tried with a jury; that his proper course would have been to apply to have the counterclaim for damages tried separately, as a claim which could not be conveniently tried in the pending action, and that the appeal must be dismissed. *Lynch* v. *Macdonald*, 57 L. J., Ch. 651; 37 Ch. D. 227; 58 L. T. 293; 36 W. R. 419—C. A.

—— **Prolonged Examination of Documents—Local Prejudice against Defendants.**]—Where, in an action (the place of trial being Durham) to restrain the Ecclesiastical Commissioners from working mines under the plaintiff's land the plaintiff applied for a trial by jury, the court refused to order such trial upon evidence (1) that the issue was one requiring a prolonged examination of documents under Ord. XXXVI. r. 6, and (2) that the Ecclesiastical Commissioners could not get a fair trial, on account of the local prejudice existing against them as landlords. *Shafto* v. *Bolckow, Vaughan & Co.*, 57 L. T. 17; 35 W. R. 686.

—— **Action assigned to Chancery Division—Joinder of Cause of Action not so assigned.**]—The plaintiff commenced an action in the Chancery Division, alleging that the defendant was trustee of a sum of 700*l.* for her, and claiming payment of that sum with interest, and, if necessary, an account of profits made by the defendant by using it in his business, and also claiming the return of certain chattels, or their value, and damages for their detention. The defendant denied the trust, stated that the money had been lent to him by the plaintiff and long ago repaid, and denied that he ever had any chattels of the plaintiff in his possession. The plaintiff, after the defence had been put in, applied to have the issues of fact tried by a jury:—Held, that the action came within Ord. XXXVI. r. 3, and not within r. 6, of the same order. That the action, therefore, was to be tried by a judge without a jury, unless it could be made out that it was better to have it tried by jury, and that in the present case this was not shewn. *Gardner* v. *Jay*, 54 L. J., Ch. 762; 29 Ch. D. 50; 52 L. T. 395; 33 W. R. 470—C. A.

—— **Chancery Division—Onus of Proof.**]—If a plaintiff, who has commenced an action in the Chancery Division, desires afterwards to have it tried by a jury, the onus is on him to show some reason why it should not be tried in the manner in which it would in the ordinary course be tried in that division. If he does not discharge that onus, an application by him to have the action tried by a jury will be refused. *Att.-Gen.* v. *Vyner*, 38 W. R. 194—C. A. S. P., *Jenkins* v. *Bushby*, 60 L. J., Ch. 254; [1891] 1 Ch. 484; 64 L. T. 213; 39 W. R. 321—C. A.

—— **Under Rules of 1875.**]—In an action by an executor to establish a will, the heir-at-law was cited. The plaintiff gave notice of trial by jury. The action was twice tried by a special jury, before Sir James Hannen, and in each case the jury disagreed and were discharged. The plaintiff having set the action down for trial again before a special jury, the defendants applied for special directions as to the further trial. Sir J. Hannen, the heir-at-law appearing and not opposing, made an order that the action should be tried by a judge without a jury. The plaintiff appealed:—Held, that the case was one where, under 20 & 21 Vict. c. 77, s. 35, as the heir-at-law did not ask for a jury, the judge could before the Judicature Act, without any consent, have ordered the action to be tried without a jury: that a choice of the mode of trial under Ord. XXXVI. r. 3, did not exclude the application of r. 26, and that the judge therefore had jurisdiction to make the order appealed from. *Burgoine* v. *Moordaff, Moordaff, In re*, 52 L. J., P. 77; 8 P. D. 205; 48 L. T. 504; 31 W. R. 735—C. A.

The court will not, in the absence of special cause, by the exercise of the discretion given by Ord. XXXVI. r. 26, deprive a defendant in a nuisance case of his statutory right under Ord. XXXVI. r. 3, to have the question, or issues of fact, in the action tried by jury at the assizes for the county in which the works from which the alleged nuisance proceeds are situated. *West* v. *White*, 46 L. J., Ch. 333; 4 Ch. D. 631; 36 L. T. 95; 25 W. R. 342.

In actions which before the coming into operation of the Judicature Acts could only have been brought as suits in the Court of Chancery, the High Court has now the same discretion as the Court of Chancery formerly had, whether there shall be a trial by jury. The parties have in such cases no absolute right to a trial by jury. *Birmingham Syndicate* v. *Swindell*, 45 L. J., Ch. 756; 3 Ch. D. 127; 35 L. T. 111; 24 W. R. 911—C. A.

Although the principal issue in a chancery action may be of a nature which would ordinarily be properly tried by a jury, the judge has an absolute discretion, under Ord. XXXVI. r. 26, to order it to be tried by himself alone if, having regard to all the questions which may be raised, and the whole nature of the case, he considers that it ought not to be tried by a jury. *Garling* v. *Royds*, 25 W. R. 123.

When the intention of the parties has to be collected from a series of documents, or a voluminous correspondence, the action ought not to be tried by a jury. *Ib.*

Upon motion by the defendant under Rules of Court, 1875, Ord. XXXVI. r. 3, that certain specified issues of fact might be tried before a judge or jury in the country:—Held, that it was obligatory on the court to order the trial subject to the discretion given by r. 26; and it not appearing to the court desirable to direct a trial without a jury, the motion was acceded to, the issues to be settled in chambers. *Powell* v. *Williams*, 12 Ch. D. 234; 40 L. T. 679; 27 W. R. 796.

A plaintiff filed a bill in the Court of Chancery before the Judicature Act for specific performance of a contract. He then amended his bill, claiming damages against one of the defendants for alleged misrepresentation of authority, and set his cause down at the associates' office for trial by judge and jury:—Held, that the plaintiff had no absolute right in such a case to a trial by jury; and directions were given under Ord. XXXVI. r. 26, that the issues of law and fact

should be tried in court without a jury. *Pilley* v. *Baylis*, 46 L. J., Ch. 847 ; 5 Ch. D. 241 ; 36 L. T. 296.

In an action for the specific performance of an agreement by the incumbent and patron of a church to give up a portion of his district to form a part of a district for another church, an application by the plaintiff, under r. 26, Ord. XXXVI., that the action might be tried by a judge without a jury, was granted, although the defendant had given notice under r. 3 of the same order, for the trial of the issues of fact by a jury. *Usil* v. *Whelpton*, 50 L. J., Ch. 511 ; 45 L. T. 39 ; 29 W. R. 799.

When parties agree that the evidence shall be taken by affidavit, and numerous affidavits are filed and the evidence is closed, it is the duty of a judge in the exercise of his judicial discretion under Ord. XXXVI. r. 26, to direct that the action shall be tried before a judge without a jury. *Brooke* v. *Wigg*, 47 L. J., Ch. 749 ; 8 Ch. D. 510 ; 38 L. T. 732 ; 26 W. R. 729—C. A.

In such a case an application that the action may be tried before a judge and jury can only be entertained if the applicant comes to the court soon after the agreement, and then only upon the terms that he pays, as between solicitor and client, all costs, charges, and expenses that have been incurred in taking the evidence by affidavit up to that date. *Ib.*

In an action commenced in the Chancery Division the issue raised by the pleadings was whether certain lands acquired by the defendants for the purpose of constructing a railway had become "superfluous lands" within s. 127 of the Lands Clauses Act, 1845. The plaintiffs gave notice of trial before a judge and a special jury at the assizes. On a motion by the defendants that the action might be tried without a jury :—Held, that the question in the action being one of mixed law and fact, it could be more conveniently tried without a jury under Ord. XXXVI. r. 26. *Smith* v. *North Staffordshire Ry.*, 44 L. T. 85.

The issues of fact in an action to restrain the publication of a trade libel may be tried before a judge alone. *Thomas* v. *Williams*, 49 L. J., Ch. 605 ; 14 Ch. D. 864 ; 43 L. T. 91 ; 28 W. R. 983.

An action to restrain the use of a trade-name involved, besides the usual trade-mark issues, the special question, whether the name had not become the name of a specific machine. Upon motion by defendant for transfer of the action to a common law division and entry for trial, and for the settlement of issues to be tried by judge and jury :—Held, under Rules of Court, 1875, Ord. XXXVI. rr. 3, 26, that the action was unfit for a jury, and motion refused. *Singer Manufacturing Co.* v. *Loog*, 48 L. J., Ch. 647 ; 11 Ch. D. 656 ; 40 L. T. 747 ; 27 W. R. 903.

A defendant in an action in the Chancery Division for infringement of a trade-mark is not entitled as of right, under Rules of Court, 1875, Ord. XXXVI., to have the action tried before a judge and jury, but only, subject to the discretion given to the court by r. 26, to a trial by jury of issues of fact in the action ; and such discretion of refusing a trial by jury will be exercised where the issue of fact fit to be tried by a jury is of minor importance as compared with the main questions involved in the action. *Spratt's Patent* v. *Ward*, 48 L. J., Ch. 645 ; 11 Ch. D. 240 ; 40 L. T. 250 ; 27 W. R. 470.

Ord. XXXVI. r. 26, gives the court a discretion in all cases of fraud, or such as raise questions which, before the Judicature Act came into force, were properly within the jurisdiction of the Court of Chancery, to order them to be tried without a jury, and the court is not bound in such a case to allow a jury at the instance of a defendant. *Back* v. *Hay*, 5 Ch. D. 235 ; 36 L. T. 295 ; 25 W. R. 392.

In an action relating to the ownership of land and to the obstruction of a right of way in the country, the defendants having given notice under Rules of Court, 1875, Ord. XXXVI. r. 3, for the trial of issues of fact by a jury, on motion by the plaintiff that the action might be tried by a judge without a jury :—Held, that, as it appeared that the question in the action was mainly one of title depending on certain conveyances, plans, and photographs, it could be more conveniently tried without a jury under Ord. XXXVI. r. 26. *Wedderburn* v. *Pickering*, 13 Ch. D. 769 ; 41 L. T. 523 ; 28 W. R. 239.

Interfering with the Discretion of the Judge.] —A plaintiff who had commenced an action in the Chancery Division for nuisance, applied for and obtained an order transferring it to the Queen's Bench Division, that it might be tried by a judge with a jury :—Held, the Court of Appeal ought not to interfere with the exercise of discretion, there being no reason for expecting a failure of justice from the action being tried in the way directed. *Jenkins* v. *Bushby* ([1891] 1 Ch. 484) explained. *Mangan* v. *Metropolitan Electric Supply Co.*, [1891] 2 Ch. 551; 65 L. T. 202—C. A.

The plaintiffs brought an action in the Chancery Division to set aside an agreement on the ground that they had been induced to enter into it by the fraudulent representations of the defendant. The pleadings having been closed the plaintiffs gave notice of trial by jury. Malins, V.-C., ordered on the defendant's motion that the action be tried by the judge without a jury : —Held, on appeal, that the discretion of a judge as to the mode in which an action attached to his branch of the court can be most conveniently tried will not be interfered with except in a very strong case, and that the order of the vice-chancellor must be affirmed. *Ruston* v. *Tobin*, 10 Ch. D. 558 ; 40 L. T. 111 ; 27 W. R. 588—C. A.

Either party to an action has an absolute right under Ord. XXXVI. r. 3, to have the action or the issues tried before a jury, without assigning any reasons, unless it shall appear to the judge that there are special grounds rendering it desirable to try the action before a judge without a jury ; the onus in such cases being on the party who desires it not to be tried before a jury. Bacon, V.-C., having made an order under Ord. XXXVI. r. 26, that the issues in an action should be tried before himself without a jury, on the ground that no sufficient reason had been shewn for its being tried by a jury :—Held, on appeal, that the judge having placed the onus of proof on the wrong party, had not exercised his discretion in accordance with the rule, and the court overruled his decision. *Martin, In re, Hunt* v. *Chambers*, 51 L. J., Ch. 683 ; 20 Ch. D. 365 ; 46 L. T. 399 ; 30 W. R. 527—C. A.

Semble, even if the judge exercises his discretion in accordance with the rule his decision is subject to appeal, though the court will not interfere with his discretion except in a very strong case. *Ib.*

A vice-chancellor, on the hearing of a cause

and cross cause, directed a trial by jury before himself. Neither party requested the adoption of this course, and it was alleged by one of them to be inconvenient:—Held, to be a matter resting wholly in the discretion of the court, and one which could not be the subject of an appeal. *Schneider* v. *Shrubsole*, 4 De G. F. & J. 52.

Exercise of Option.]—A plaintiff who has set down his action before a judge of the Chancery Division has thereby exercised his option as to the mode of trial, and is not entitled to apply under Ord. XXXVI. r. 6, for the trial of an issue before a jury. *Dent* v. *Sovereign Life Assurance Co.*, 27 W. R. 379.

And, having regard to such statutory right, it is a sufficient reason to be stated (as required by Ord. XXXVI. r. 29a), on the order directing a trial at the assizes, and not in the Chancery Division, that the defendant desires a trial by jury, and that the court sees no reason to the contrary. *Ib.*

When the parties to an action agree that the evidence shall be taken by affidavit, it is implied that the hearing shall be before a judge without a jury, and the court will not grant a jury in such a case on the application of the plaintiff or defendant, after the evidence has been taken by affidavit, although the action is one peculiarly fitted for a trial before a jury. *Brooke* v. *Wigg*, 47 L. J., Ch. 749; 8 Ch. D. 510; 38 L. T. 732; 26 W. R. 729—C. A.

The hearing of a motion for an injunction was (with the consent of the defendants) ordered to stand over to the hearing, with liberty to either party to apply to expedite the trial:—Held, that the defendants by consenting to such order were not deprived of their option to have the issues of fact tried by a jury, although the effect might be to prevent the plaintiffs from having the trial expedited. *Clarke* v. *Skipper*, 51 L. J., Ch. 519; 21 Ch. D. 134; 46 L. T. 811; 30 W. R. 465.

By 17 & 18 Vict. c. 125, s. 1, the parties to any cause may, by consent in writing, signed, &c., leave the decision of any issue in fact to the court, provided that the court, upon a rule to shew cause, or a judge on summons, shall in their or his discretion think fit to allow such trial. A cause having, by consent of plaintiff and defendant, given viva voce in court, been tried at nisi prius by the judge without a jury:—Held, that the trial was binding on the parties, so that neither could object to a want of jurisdiction in the judge to try according to the statute; for though there had been no summons, nor any consent in writing, the trial was under and by virtue of the statute, and the parties were bound by all the restrictions of the statute. *Andrews* v. *Elliott*, 5 El. & Bl. 502; 25 L. J., Q. B. 1; 1 Jur. (N.S.) 1046. Affirmed, 6 El. & Bl. 338; 25 L. J., Q. B. 336; 2 Jur. (N.S.) 663; 4 W. R. 527—Ex. Ch.

Trial by Jury of Actions commenced in Chancery Division.]—Actions in the Chancery Division for trial with a jury are to be set down in Middlesex, unless in the statement of claim, or under Ord. XXXVI. r. 1, the place or county is named. *Clarke* v. *Cookson*, 45 L. J., Ch. 752; 2 Ch. D. 746; 34 L. T. 646; 24 W. R. 535.

Under Ord. XXXVI. rr. 27 and 29, a judge of the Chancery Division can in any case direct issues to be tried by a judge with a jury at the assizes, or at the sittings in London or Middlesex. *Ib.*

A judge of the Chancery Division cannot, having regard to the Judicature Act, ss. 29, 30, 37 and 42, try a case with a jury. *Ib.*

A trial by jury cannot be heard before a judge of the Chancery Division. Actions commenced in the Chancery Division, if they are to be tried by a jury must be set down in the general list, to be tried by one of the judges of the common law divisions. *Warner* v. *Murdoch*, 46 L. J., Ch. 121; 4 Ch. D. 750; 35 L. T. 748; 25 W. R. 207—C. A.

The provisions of r. 4 of the orders of December, 1876 (amending Ord. XXXVI. r. 29), which require an order directing the trial of an action in the Chancery Division, or of any issue therein, at the assizes, or at the London or Middlesex sittings of any other division, to state the reasons for the order, apply only to cases where a special order for such a trial is made, under Ord. XXXVI. rr. 1 or 29, and not in the ordinary case where the action goes into the list without any order. *Ib.*

Ord. XXXVI. r. 29a, does not apply to cases where a defendant gives notice under Ord. XXXVI. r. 3, that he desires a trial before a judge and jury. *Hunt* v. *City of London Real Property Co.*, 47 L. J., Q. B. 42; 3 Q. B. D. 19; 37 L. T. 344; 26 W. R. 37—C. A.

In an action attached to the Chancery Division, tried by a jury before a judge of one of the common law divisions, application for a new trial must be made to a divisional court. *Ib.*

There is no necessity for an order from the judge stating the reason for its being tried before a jury. *Ib.*

Where the whole case is a proper one to be tried by a jury, it is the more convenient practice to transfer the action altogether to the Queen's Bench Division. *Martin, In re, Hunt* v. *Chambers*, 51 L. J., Ch. 683; 20 Ch. D. 365; 46 L. T. 399; 30 W. R. 527—C. A.

—— **Application to remit to County Court.**]—A plaintiff had entered his action, being an action for specific performance of a contract, for trial in the associates' book for Middlesex. Motion by the defendant to have it struck out and entered in the chancery registrar's book allowed. Motion by the plaintiff to have the action transferred to the county court at Bradford, so as to avoid the expense of bringing up witnesses to London, refused, although the purchase-money being under 500*l.*, the action was within the county court jurisdiction. *Sykes* v. *Firth*, 46 L. J., Ch. 627.

—— **In Equity—Before Judicature Act.**]—When a suit in equity involved charges of perjury and forgery, the court, on the application of the defendant, which was opposed by the plaintiff, directed an issue for a jury, on the terms that the defendant should advance 100*l.* towards the plaintiff's costs, to be dealt with subsequently as the court should direct. *Wilson* v. *Thornbury*, 30 L. T. 667; 22 W. R. 669—L.JJ.

The Court of Chancery has jurisdiction, upon motion for that purpose by a defendant at any stage of a cause, to direct issues to be tried by a jury. *Roskell* v. *Whitworth*, 39 L. J., Ch. 765; L. R. 5 Ch. 459; 23 L. T. 179; 18 W. R. 682.

But, as a general rule, such an application ought to be made either upon a motion for an injunction, or upon a motion to dissolve an injunction, or at the hearing. *Ib.*

If made at any other stage of the cause the

defendant is bound to shew almost to demonstration, that the cause is one which the court itself cannot try. *Ib.*

The power of the court to make a decree in favour of a party against whom a verdict is found by a jury on the matter in question, only applies to verdicts found in issues directed by it, or in trials before it, and not to verdicts found at law when leave is granted to bring an action, and relief in equity is made dependent on its success. *M'Rea* v. *Holdsworth*, 18 W. R. 489.

At the same time the court is not bound by the amount of damages awarded by the jury, but will give the full relief, to which the plaintiff is entitled in equity. *Ib.*

When an issue, so stated as to exhaust the questions of fact raised by the pleadings, is directed to be tried by a jury, and a new trial is refused on the finding of the jury thereon, such finding must be taken at the hearing on further directions, as furnishing the whole facts upon which it is competent to the court to base its decision. *Browne* v. *M'Clintock*, L. R. 6 H. L. 434; 22 W. R. 521.

An issue involving the question of fraud may in the discretion of the court be so stated as to throw upon the party charged with fraud the onus of establishing bona fides. *Ib.*

If the party on whom rests the affirmative of issues directed to be tried by a jury before the court does not proceed to trial in the time directed by the order, the proper course is to move to have the issues taken pro confesso. *Underwood* v. *Darracott*, Ir. R. 8 Eq. 345.

Directions as to Mode of Trial on Third Party being brought in.]—*See* ante, col. 241.

Trial by Jury in Bankruptcy Cases.]—*See* BANKRUPTCY.

2. Trial at Bar.

When Granted.]—It is entirely in the discretion of the court whether they will grant a trial at bar or not, and must depend upon the particular circumstances of the case. *Rex* v. *Amery*, 1 Term Rep. 363; 1 R. R. 306.

The grounds for granting the trial are, great value, probable length, and probable difficulties, on the trial. *Holmes* d. *Brown* v. *Brown*, 2 Dougl. 437.

It will be granted on the ex-officio application of the attorney-general, where the interests of the King as Duke of Lancaster may come into question. *Brown* v. *Grenville* (*Lord*), 1 H. & W. 270.

Where the crown is interested, the attorney-general may, as a matter of right, demand a trial. *Rowe* v. *Brenton*, 8 B. & C. 737; 3 M. & Ry. 133; 5 L. J. (O.S.) K. B. 137.

The crown may forbid the issuing of a writ of nisi prius in any action in which it is interested. *Paddock* v. *Forester*, 1 Man. & G. 583; 1 Scott (N.R.) 391; 8 D. P. C. 834; 9 L. J., C. P. 342.

A suggestion ore tenus by the attorney-general, that the crown is interested in a suit depending between subject and subject, is a sufficient ground for ordering a trial at bar. *Ib.*

In an action for breaking and entering the plaintiff's chase, and killing his deer, the Court of Common Pleas would not grant a trial at bar, although the question to be tried was, to ascertain the boundaries of such chase, and although ancient and documentary evidence, as well as considerable living testimony, was necessary to fix such boundaries, on the ground that a case involving similar rights had been lately brought by the same plaintiff against another defendant, in which the latter had obtained a verdict, and which the Court of King's Bench, after argument, had refused to set aside, or grant a new trial. *Rivers* (*Lord*) v. *Pratt*, 3 Moore, 582; 1 Br. & B. 265; 21 R. R. 595.

The court refused to grant a trial at bar on the motion of the plaintiff on either of the three following grounds: first, that the defendant was Lord Chancellor; secondly, that the plaintiff was an attorney of the court in which the action was brought; and thirdly, that a question would arise in the cause whether the Lord Chancellor could hear and determine a suit in favour of a corporation of which he was a member, and in which suit he had a pecuniary interest. *Dimes* v. *Cottenham* (*Lord*), 1 L. M. & P. 318; 5 Ex. 311; 19 L. J., Ex. 290.

The Queen's Bench in Dublin, in Hilary Term, made an order for a trial at bar in that term; and another order, declaring, that, in case the trial should not terminate before the end of the term, the next and every succeeding day until the first day of the following term, or so many days as should be necessary, should be appointed for the continuation of such trial, and that every day so appointed should be deemed a part of Hilary Term:—Held, that this order was properly made, under the authority of 1 & 2 Will. 4, c. 31, s. 3, and had the effect of duly continuing the trial during the days appointed. *O'Connell* v. *Reg.*, 11 Cl. & F. 155; 9 Jur. 25.

Practice Thereon.]—On the trial, each of the presiding judges makes such observations to the jury upon the whole case, by way of direction, as he considers to be requisite. *Rowe* v. *Brenton*, 3 M. & Ry. 364; 8 B. & C. 737.

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 7, if a trial at bar shall be directed by any of the superior courts, it shall be competent for the judges of such courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term. A trial at bar having been ordered in an indictment for perjury, the Court of Queen's Bench, in Hilary Term, appointed for the trial the 23rd of April, 1873, and every day up to and inclusive of the 1st day of November, 1873, and further ordered that, in case the trial should not terminate on or before the 1st day of November, 1873, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the court should then direct. The court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. The court afterwards, in Michaelmas Term, 1873, made a second order, appointing every day in Michaelmas Term, 1873, and every day up to Michaelmas Term, 1874, for the trial. On the 28th of February, 1874, a day in vacation after Hilary Term, the defendant was found guilty, and the court immediately passed sentence on him:—Held, that the court had, under the above enactment, power to appoint such days as they should think fit for the trial, and that it was not necessary that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the

term in which the order was made. *Reg.* v. *Castro*, 43 L. J., Q. B. 105; L. R. 9 Q. B. 350; 30 L. T. 320; 22 W. R. 187; 12 Cox, C. C. 454.

Held, also, that, as an incident to the trial at bar, the court had power to adjourn from time to time. *Ib.*

Held, also, that a sentence, passed out of term, but on one of the days which, by virtue of the above enactment, are, "for the purposes of the trial, to be taken as part of the preceding term," was good, passing sentence being part of the trial. *Ib.*

3. Preliminary Issues.

Question of Law.]—Where the form of admission of facts leaves it open to the defendant to raise other defences on the facts which might make the decision of the point of law raised unnecessary, or prevent its disposing of the action, the court will not exercise the discretion given to it by Ord. XXXIV. r. 2, by allowing the question of law to be tried before the issues of fact. *Grosvenor* v. *White*, 61 L. T. 663; 38 W. R. 201.

Ord. XXXIV. r. 2, under which, in any action involving questions both of law and of fact, the court may direct the question of law to be raised for its opinion before trying the question of fact, has reference only to a case where the action has not yet come on for trial; but, by analogy to that rule, the court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact. *Pooley* v. *Driver*, 46 L. J., Ch. 466; 5 Ch. D. 458; 36 L. T. 791.

—— **Trial of Issues of Fact.**]—When a preliminary point of law is ordered by the judge to be tried before the trial of issues of fact, the trial of those issues will not take place until the final determination of the preliminary point of law. "*Maori King*" v. *Hughes*, [1895] 2 Q. B. 550; 14 R. 646; 73 L. T. 141; 44 W. R. 2—C. A.

Trial of Preliminary Issues.]—In an action against several defendants involving various issues, the plaintiffs having applied under Ord. XXXVI. r. 6, for an order for two simple issues to be tried as between themselves and two of the defendants before the rest of the action, the court made the order on the plaintiff's undertaking not to seek relief against the said two defendants in respect of any cause of action other than that covered by the issues so to be tried, and also discontinuing such portion of the action as the court should direct. *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918; 40 L. T. 804.

Ord. XL. r. 8, of the Judicature Act, is intended to enable the trial of such issues of fact only as must sooner or later have to be decided. *Bolivia Republic* v. *National Bolivian Navigation Co.*, 24 W. R. 361.

An application to have one issue in an action tried before another can only be granted on very special grounds. *Piercy* v. *Young*, 15 Ch. D. 475; 42 L. T. 292.

Where a defendant in a partnership action set up by counter-claim an agreement by the plaintiff for sale to the defendant of his (the plaintiff's) interest in the partnership at a stated price:—Held, that the defendant was not entitled under Ord. XXXVI. r. 6, to have the issue raised by his counter-claim tried before the plaintiff's issues in the action. *Ib.*

Emma Silver Mining Co. v. *Grant*, supra, explained in reference to the exceptional cases in which the court will accede to applications under Ord. XXXVI. r. 6. *Ib.*

In an action against a principal and sureties, the latter claimed to be discharged by reason of an alteration in the contract:—Held, that no order should be made under Ord. XXXVI. r. 6, for the trial of the question as to the sureties' liability before the other questions in the action, as if the principal's liability was not established the sureties would be discharged. *Tasmanian Main Line Ry.* v. *Clark*, 27 W. R. 677.

Ord. XXXVI. r. 6, is not confined to questions of fact, but applies also to mixed questions of law and fact. *Ib.*

An action had been brought to determine questions of disputed accounts in respect of the joint local and continental traffic of two railways. The validity of an agreement was disputed by the pleadings. The plaintiffs now moved under Ord. XXV. r. 2, that the points of law raised by the pleadings might be set down for hearing forthwith, and be disposed of before the trial of the action:—Held, that the application would be granted, as the case was a proper one for exercising the jurisdiction conferred upon the court by Ord. XXV. r. 2. *L., C. & D. Ry.* v. *S. E. Ry.*, 53 L. T. 109.

Where a plaintiff brought three actions against three several defendants for different parts which they took in the same transaction; one against the speaker of the house of commons, who justified under a warrant issued by him under the order of the house for arresting and committing to the Tower a member of the house, for a breach of privilege, in publishing a libel upon the house; to which plea the plaintiff demurred: another against the serjeant-at-arms, who pleaded not guilty, and also justified under the authority of the speaker's warrant; to which the plaintiff replied, an excess in the manner of executing it by a military force, and with improper and unnecessary violence; on which issue was joined: and the third against the constable of the Tower, who received and detained the plaintiff as a prisoner; and who also justified under a warrant from the speaker for that purpose; on which issue was also taken on several facts stated in such justification: and notice of trial was given in the last two causes (which stood for trial at bar on a day fixed); but the plaintiff, though still within time by the practice of the court, had not set down his demurrer in the first cause for argument: the court, on motion of the attorney-general on behalf of the sergeant-at-arms, and of the constable of the Tower, postponed the trial of the issues in those cases until after the argument on the demurrer in the cause against the speaker: because the right, just and distinct consideration of the question which arose, on the issues of fact, and on the true measure of damages on the causes against the sergeant-at-arms and the constable of the Tower, depended mainly upon the decisions of the issues in law joined in the other action against the speaker: and though the same question of law might ultimately be raised on motion in the two former actions, yet it could not be considered so conveniently to the court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer which presented the question

of law distinct from the question of fact. *Burdett* v. *Colman*, 12 East, 27; 12 R. R. 478.

Where there are issues both in fact and in law in an action, although a plaintiff has an option to try either first, that is subject to the discretion of the court; and the court will, in general, direct the issues in law to be determined first, since the cause may be decided thereby, and the trial become unnecessary. *Crucknell* v. *Trueman*, 9 M. & W. 684; 2 D. (N.S.) 276; 12 L. J., Ex. 31.

The court refused to interfere, by directing issues in law to be argued before the trial of issues in fact, it not appearing that the decision of the former would have any bearing on the latter. *Roberts* v. *Taylor*, 7 Man. & G. 659; 8 Scott (N.R.) 399; 13 L. J., C. P. 188; 8 Jur. 985.

A defendant obtained leave to plead and demur to a declaration. On an application to postpone the trial of the issues in fact till the issue in law had been finally disposed of in a court of error: —Held, that the court had no power to make such an order, inasmuch as the judgment on the demurrer had disposed of the issue in law finally, as far as regarded the Court of Queen's Bench. *Lumley* v. *Gye*, 2 El. & Bl. 216; 22 L. J., Q. B. 463.

An order directing the trial of issues in fact refused, as it did not appear that the trial would determine all the questions between the parties. *Turner* v. *Barnes*, 2 F. & F. 256.

"Point of Law"—Dismissal of Action with Costs.]—An action having been by the consent of the parties set down for hearing under Rules of Supreme Court, Ord. XXV. r. 2, upon a "point of law" raised by the defence, and the point having been decided in favour of the defendant, the judge, as the decision substantially disposed of the whole action, dismissed the action under r. 3, and with costs, by analogy to the former practice on demurrer. *O'Brien* v. *Tyssen*, 54 L. J., Ch. 284; 28 Ch. D. 372; 51 L. T. 814; 33 W. R. 428. S. P., *Percival* v. *Dunn*, 54 L. J., Ch. 570; 29 Ch. D. 128; 52 L. T. 320.

Precedence over other Actions.]—Where, by consent of parties, an action has been set down for hearing under Ord. XXV. r. 2, before the trial, on a point of law, the decision of which will substantially dispose of the whole action, it is not entitled to precedence over other non-witness actions, but must take its place in the general list. *Thorniley, In re, Woolley* v. *Thorniley*, 53 L. J., Ch. 499; 32 W. R. 539.

Time for Application.]—A plaintiff who had set down an action for trial before a judge of the Chancery Division, applied to have a preliminary issue of fact tried at Chester, and the trial of the action postponed. His application was refused on the ground of delay. *Lloyd* v. *Jones*, 47 L. J., Ch. 470; 7 Ch. D. 390; 26 W. R. 262.

Trial of one Question before the other—Liability—Damages.]—Where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Ord. XXXVI. r. 8, to order the question of liability to be tried, and the question of damages to be postponed until afterwards. *Smith* v. *Hargrove*, 16 Q. B. D. 183; 34 W. R. 294.

4. Hearing in Camerâ.

In what Cases.]—The court has no power to hear any case in private, even with the consent of the parties, except cases which relate to lunatics or to wards of court, and cases in which the whole object would be defeated by a trial in public, and cases in which the practice of the ecclesiastical courts is preserved under s. 22 of the Divorce Act (20 & 21 Vict. c. 85). *Nagle-Gilman* v. *Christopher*, 46 L. J., Ch. 60; 4 Ch. D. 173.

An appeal from an injunction to restrain the defendant from disclosing confidential information was ordered to be heard in private without the consent of the defendant, the plaintiff stating that a public hearing would defeat the object of the action, and make success on the appeal useless to him. *Mellor* v. *Thompson*, 55 L. J., Ch. 942; 31 Ch. D. 55; 54 L. T. 219—C. A.

It is contrary to the practice of the court to hear causes in private without the consent of both parties, except in cases which affect lunatics or wards of court. *Andrew* v. *Raeburn*, L. R. 9 Ch. 522; 31 L. T. 73; 22 W. R. 564.

The court will direct a case to be heard in private upon an assurance by counsel that in his opinion it is a proper case to be so heard, notwithstanding the objection of other parties, *Andrew* v. *Raeburn*, 30 L. T. 153; 22 W. R. 512.

A judge has power to try a case in camerâ, where the parties consent to such mode of trial. *Malan* v. *Young*, 53 J. P. 822.

The consent of both parties is not necessary to a private hearing. *Ogle* v. *Brandling*, 2 Russ. & M. 688.

Private hearing always on the consent of both parties. *Portsmouth* (*Lord*), *In re*, Coop. 106.

5. In other Cases.

Claim and Counter-claim.]—Whether the issues raised by a claim and counter-claim shall be tried together or separately is a matter of convenience. *Woodfine, In re, Thompson* v. *Woodfine*, 47 L. J., Ch. 832; 38 L. T. 753; 26 W. R. 678. See *Piercy* v. *Young*, supra.

Exercise of Option—Trial by Official Referee—Time.]—In a suit to ascertain boundaries the plaintiff gave notice of trial before a judge and obtained an order that the evidence should be taken vivâ voce at the trial. Five weeks afterwards he applied that the suit might be referred to an official referee, on the ground of saving expense, and that a local investigation was necessary:—Held, that the application was out of time. *Lacelles* v. *Butt*, 2 Ch. D. 588; 35 L. T. 122.

Held, also, that the plaintiff, having already selected the mode in which his action should be tried, could not afterwards resort to another mode of trial. *Ib.*

Assessors — Scientific Investigation.] — By Ord. XXXVI. r. 5, a judge may direct the trial without a jury of any cause, matter, or issue requiring any scientific investigation which in his opinion cannot conveniently be made with a jury. The plaintiff's ship was sunk in the defendants' docks while being moved by their tugs from one berth to another. As she was without cargo or ballast, compensation booms were attached to her to keep her upright while

being moved. The operation of moving her was carried out in such a way that the tugs pulled the ship over, and she sank. The judge at chambers held that there was an issue in the action requiring scientific investigation, and he ordered the action to be tried before a judge with two assessors:—Held, that there was in the action an issue requiring scientific investigation, and that therefore the judge at chambers had jurisdiction to make the order. *Swyny* v. *North Eastern Ry.*, 74 L. T. 88; 8 Asp. M. C. 132—C. A.

c. Notice of Trial.

See R. S. C., 1883, Ord. XXXVI. rr. 11—21.

1. Necessity, of, &c.

Day Fixed.]—Notice is necessary, though the trial is fixed for a certain day. *Ellis* v. *Trusler*, 2 W. Bl. 798.

Fresh Notice.]—Where a cause is made a remanet to the next sittings or assizes by an order of nisi prius, no fresh notice of trial is requisite; but it is otherwise if postponed by a rule of court. *Shepherd* v. *Butler*, 1 D. & R. 15. S. P., *Jachs* v. *Mayer*, 8 Term Rep. 245.

If a cause is made a remanet at the assizes, a new notice is necessary if the plaintiff intends to try the cause at the following assizes. *Gains* v. *Bilson*, 1 M. & P. 87; 4 Bing. 414; 6 L. J. (O.S.) C. P. 33.

On a new trial a fresh notice is necessary. *Bingley* v. *Mallison*, 3 Dougl. 402.

When a cause set down for trial in London or Middlesex is stayed by injunction, the plaintiff is at liberty to try upon the injunction being dissolved without any fresh notice of trial, although several terms have elapsed since the day on which the cause would otherwise have been tried. *Stockton and Darlington Ry.* v. *Fox*, 6 Ex. 127; 2 L. M. & P. 141; 20 L. J., Ex. 96.

A cause stood for trial at the sittings after Trinity Term. The defendant obtained an order for a commission to examine witnesses abroad, the commission to be returnable on the 30th of November, and the trial being postponed until the sittings after Michaelmas Term. No fresh notice was given, and the cause was taken as an undefended cause:—The court set aside the trial. *Cawley* v. *Knowles*, 16 C. B. (N.S.) 107.

When the trial of a town cause is postponed by order of a judge from one sittings to another on the application of the defendant, a fresh notice is not necessary. *Claudet* v. *Prince*, 8 B. & S. 360; 36 L. J., Q. B. 196; L. R. 2 Q. B. 406; 16 L. T. 397; 15 W. R. 794.

The plaintiff had given notice of trial, and the cause, after standing over for more than a year, had been struck out under Ord. XVII. r. 10, of the Rules of 1883. It was subsequently re-entered by the plaintiff in the cause-book on the payment of 2*l.*, as required by the scale of fees; but, as he had given no fresh notice of trial, the defendant now submitted that the re-entry was erroneous, and ought to be struck out:—Held, that, where a cause has been struck out under Ord. XVII. r. 10, the notice of trial is no longer in force, and that consequently another must be given before the plaintiff can re-enter the cause for trial. *Le Blond* v. *Curtis*, 52 L. T. 574; 33 W. R. 561.

As to Part of Claim—Validity of.]—To a declaration containing two counts, the defendant pleaded three pleas to the first count, and a fourth plea to the second. Issue was joined on the pleas to the first count; and there was a special replication to the fourth plea. Notice of trial was given, and the defendant obtained a rule for a special jury, and the jury was duly nominated, reduced, and summoned; but, when the cause came on for trial, it was discovered that no issue had been joined on the replication to the fourth plea. Before the jury was sworn the judge, upon the application of the plaintiff (without summons), amended the record by striking out the second count; and, the defendant declining to appear, the plaintiff obtained a verdict. Upon a motion to set aside the verdict for irregularity, on the ground that there had been no sufficient notice of trial, and that there had been a discontinuance:—Held, that the notice of trial was effectual as to the first count, and the trial valid; that the defendant had waived any irregularity in the notice; and that there was no discontinuance. *Beresford* v. *Geddes*, 36 L. J., C. P. 115; L. R. 2 C. P. 285; 15 L. T. 617; 15 W. R. 567.

Previous Notice Invalid.]—A notice of trial in due time according to the practice of the court is regular, although a previous notice has been given, which is void, and has not been countermanded. *Fell* v. *Tyne*, 4 D. P. C. 246; 2 H. & W. 299.

Rule to Set aside Proceedings in Default of.]—After notice of trial, given to the defendant's attorney, for the first sittings in Michaelmas Term, the defendant's attorney, on the 9th of October, died. The cause was tried pursuant to the notice on the 3rd of November, and a verdict found for the plaintiff; and notice of taxation of costs was left by the plaintiff at the office of the defendant's deceased attorney on the 8th of November, the plaintiff's attorney not being aware of the death. On the 9th of November the plaintiff signed judgment for the debt and costs. In March, 1850, the defendant being in prison, the plaintiff lodged a detainer against him. The defendant having obtained a rule nisi to set aside all the proceedings since the 9th of October, deposing that he did not know of any notice of trial having been given, and believed that none had been given, and that he had had no notice of any proceedings subsequently to the plea, until he found that the detainer had been lodged, but not stating when he first knew that his attorney was dead, the court discharged the rule. *Ashley* v. *Brown*, 1 L. M. & P. 451; 19 L. J., Q. B. 477.

2. By whom Given.

Notice of trial given by one who has ceased to be an attorney is irregular. *Patterson* v. *Powell*, 9 Bing. 620; 2 M. & Scott, 773; 2 L. J., C. P. 68.

3. Form.

See R. S. C. 1883, Ord. XXXVI. r. 13.

In a notice of trial in an action which has been set down in the Chancery Division, it is not necessary to state the name of the judge by whom the action will be tried, but the notice will be sufficient if it states that the trial will take place before a judge in Middlesex. *Harris* v. *Gamble*, 47 L. J., Ch. 344; 7 Ch. D. 877; 38 L. T. 253; 26 W. R. 350.

There is no particular form requisite for a notice of trial, so that it unequivocally conveys to the party to whom given the intention of the plaintiff to try at a particular time and place. *Ginger* v. *Pycroft*, 2 B. C. Rep. 254; 5 D. & L. 554; 17 L. J., Q. B. 182; 12 Jur. 898.

Where a notice stated incorrectly that the cause was made a remanet from the last sittings in the previous term, but was correct in other respects:—Held, a good notice. *Ib.*

A notice at "Guildhall, Westminster," the court not sitting there, is defective, if the defendant swears that he was misled by it. *Cross* v. *Lang*, 1 D. P. C. 342.

A notice, dated the 18th April, 1856, "for the second sittings in next Easter term" in London, is a sufficient notice for the second sittings in Easter Term, 1856, inasmuch as it gives information to that effect which any reasonable man would act upon. *Fenn* v. *Green*, 6 El. & Bl. 656; 25 L. J., Q. B. 353; 2 Jur. (N.S.) 591.

A notice for the sittings after term, in London, should, in strictness, specify whether the cause is intended to be tried at the first day of such sittings or at the adjournment day. But the omission so to do is an irregularity waived by a defendant who, knowing that the cause has been entered for the adjournment day, takes steps shewing that he considers the notice to refer to such entry. *Yonge* v. *Fisher*, 5 Scott (N.R.) 893; 2 D. (N.S.) 637; 4 Man. & G. 814; 12 L. J., C. P. 95.

4. When may be Given.

See R. S. C., 1883, Ord. XXXVI. r. 11.

No Reply delivered.]—A plaintiff who has not delivered a reply cannot give notice of trial until the expiration of twenty-one days after delivery of the defence. *Robinson* v. *Caldwell*, 62 L. J., Q. B. 252; [1893] 1 Q. B. 519; 5 R. 320; 68 L. T. 218; 41 W. R. 364.

Right of Defendant to give—Abridgment of Time.]—Ord. XXXVI. r. 12, provides that, if the plaintiff does not, within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or a judge to dismiss the action for want of prosecution. Ord. LXIV. r. 7, provides that the court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require:—Held, that the period of six weeks mentioned in Ord. XXXVI. r. 12, is not a time appointed for doing any act or taking any proceeding within Ord. LXIV. r. 7, and consequently that the court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings. *Saunders* v. *Pawley*, 54 L. J., Q. B. 199; 14 Q. B. D. 234; 51 L. T. 903; 33 W. R. 277.

Under Rules of 1875.]—By Ord. XXXVI. r. 3, a plaintiff is entitled as of right to give notice of trial with his reply, even though the reply may not formally close the pleadings. *Asquith* v. *Molineaux*, 49 L. J., Q. B. 800.

The defendants delivered a defence and counter-claim; the plaintiffs replied, their reply not closing the pleadings, and at the same time gave notice of trial. Next day they entered the action for trial:—Held, that the action must be struck out of the cause list, on the ground (per Kelly, C.B.) that the entry for trial was irregular, and (per Stephen, J.) that the notice of trial, and consequently the entry, were irregular. *Metropolitan Inner Circle Ry.* v. *Metropolitan Ry.*, 49 L. J., Ex. 505; 5 Ex. D. 196; 28 W. R. 510.

A plaintiff is not entitled to serve notice of trial before the close of the pleadings; and it is irregular to do so with the reply, except in cases where the reply is a mere joinder of issue, and of itself closes the pleadings. *Warnock* v. *Harvey*, 6 L. R., Ir. 339.

Plaintiffs joined issue on the defence, and replied to the defendants' counter-claim. After the delivery of the reply, but before joinder of issue thereon, they served notice of trial, and the court, on the application of the defendants, set aside the notice of trial as irregular. *Newry Gas Consumers' Co.* v. *Newry Town Commissioners* 6 L. R., Ir. 337.

5. Length of Notice—Short Notice.

See R. S. C., 1883, Ord. XXXVI. r. 14.

Length of Notice—Change of Venue by order.]—By Ord. XXXVI. r. 1, where no place of trial is named in a statement of claim, the place of trial shall be Middlesex, unless otherwise ordered by the court or a judge. The plaintiff commenced an action in the Liverpool District Registry, and delivered a statement of claim in which no place of trial was named. No order as to the place of trial was applied for. On the 16th March, 1892, the plaintiff gave the defendant notice of trial at Liverpool Assizes, the commission day for which was fixed for the 26th March. Upon a summons for directions taken out by the plaintiff, the district registrar, on the 19th March, made an order for the trial of the action by a jury, and that the plaintiff's notice of trial at Liverpool should stand:—Held, that the notice of trial for Liverpool was a nullity, and although the registrar had jurisdiction to change the venue from Middlesex to Liverpool, he had no power thereby to deprive the defendant of his right to ten days' notice of trial, or to put him under terms to take short notice. *Laskier* v. *Tekeian*, 67 L. T. 121.

Short Notice.]—When a defendant obtains an order for extension of the time to plead upon the terms of taking short notice of trial "if necessary," the condition applies only to the first sittings at which the plaintiff may in due course, and by using proper diligence, have a trial. *O'Keefe* v. *Cullen*, Ir. R. 6 C. L. 452.

When a defendant is under terms to take short notice of trial "if necessary," the plaintiff is entitled to give such notice if he cannot, using reasonable diligence, give full notice, although the regular course of pleading was not such as to render short notice necessary. *Pretty* v. *Nanscawen*, 43 L. J., Ex. 3; L. R. 9 Ex. 42; 29 L. T. 579; 22 W. R. 222.

A defendant is not bound to take short notice, if he delivers a plea sufficiently early to enable the plaintiff to give full notice. *Nicholl* v. *Forshall*, 15 L. J., Q. B. 203.

But it lies upon the plaintiff to shew the

necessity of a shorter notice than the ordinary one. *Drake* v. *Pickford*, 15 M. & W. 607; 15 L. J., Ex. 346.

A defendant, who is under terms to take short notice, is not bound to take short notice of inquiry. *Stevens* v. *Pell*, 2 D. P. C. 355; 2 C. & M. 421; 4 Tyr. 6; 3 L. J., Ex. 83.

Where a defendant is under terms to accept short notice for the sittings in term, and the plaintiff, without any default on the part of the defendant, is unable to reply, so as to give such notice, a short notice of trial for the second sittings is irregular. *White* v. *Clark*, 8 D. P. C. 730.

Where a defendant has obtained time to plead, on condition of taking short notice for the sittings in or after a particular term, he is not thereby obliged to take short notice of trial for the sittings in or after any subsequent term. *Slatter* v. *Painter*, 8 M. & W. 672; 1 D. (N.S.) 35; 10 L. J., Ex. 476; 5 Jur. 636.

When a defendant agrees to take short notice, if necessary, that means, if such notice shall be rendered necessary in consequence of the grace given. If, in short, the indulgence granted to a defendant disables the plaintiff from giving full notice, then the defendant must take short notice. *Woolley* v. *Aldritt*, 17 L. T. 120.

6. Waiver of Irregular Notice.

Retaining an irregular notice is no waiver of the irregularity. *Dignam* v. *Ibbotson*, 3 M. & W. 431. S. P., *Dignam* v. *Mostyn*, 6 D. P. C. 547.

A defendant is not bound to return an irregular notice of trial, though made aware, by a notice to produce, that the plaintiff is proceeding thereon. *Wood* v. *Harding*, 3 C. B. 968.

A defect in a notice is waived by the defendant's taking out a summons to set aside the notice, and insisting on the hearing, on a different objection only, which is overruled by the judge. *Farmer* v. *Mountfort*, 9 M. & W. 100; 1 D. (N.S.) 366; 11 L. J., Ex. 13.

If a defendant served with a notice of trial by continuance where no issue has been delivered, and no original notice of trial has been served, omits to return the notice of trial by continuance, and gives no intimation to the plaintiff of the irregularity for an unreasonable time, and until it is too late to correct it in time to go to trial at the same sittings, the irregularity is waived. *Brown* v. *Wildbore*, 1 Scott (N.R.) 159; 1 Man. & G. 276; 8 D. P. C. 592. See also *Berresford* v. *Geddes*, ante, col. 448.

7. Setting Aside.

A defendant who has become a bankrupt, and obtained his certificate after trial and verdict against him, has a right to set it aside for the want of a sufficient notice of trial, although his estate is insolvent, and his assignees are no parties to the application. *Shepherd* or *Shepheard* v. *Thompson*, 9 M. & W. 110; 1 D. (N.S.) 345; 11 L. J., Ex. 64.

d. Entry for Trial of Causes.

See R. S. C., 1883, Ord. XXXVI. r. 15.

Time for.]—A cause cannot be entered for trial under Ord. XXXVI. before the pleadings are closed. *Metropolitan Inner Circle Ry.* v. *Metropolitan Ry.*, 49 L. J., Ex. 505; 5 Ex. D. 196; 28 W. R. 510. *See* Ord. XXXVI. r. 15.

Cause not Entered—Motion to Dismiss for Want of Prosecution.]—A plaintiff gave notice of trial (in Middlesex) within the six weeks limited by r. 12 of Ord. XXXVI., but did not, as required by r. 16, enter the trial within six days after the notice of trial was given. The trial not having been entered:—Held, that the defendant was entitled to move to dismiss for want of prosecution, and an order dismissing the action was accordingly made. *Crick* v. *Hewlett*, 53 L. J., Ch. 1110; 27 Ch. D. 354; 51 L. T. 428; 32 W. R. 922.

e. Neglecting to Proceed to Trial.

Notice of Trial—Postponement of Trial on Application of Plaintiff.]—An abortive notice of trial does not preclude the dismissal of the action under Ord. XXXV. rr. 2, 4. Where the time mentioned in Ord. XXXV. r. 2, had elapsed, the court dismissed the action for want of prosecution, though notice of trial had been served, the trial having been postponed on the application of the plaintiffs, and no further proceedings having been taken by them to bring the case to trial. *Hibernian Bank* v. *Hughes*, 10 L. R., Ir. 15.

Default in Proceeding to trial after Verdict set Aside—Trial by Proviso.]—An action, in which the place of trial was out of Dublin, was tried at the Spring Assizes, 1883, when a verdict was directed for the defendant. This verdict was set aside on the ground of misdirection, and a second trial took place at the Spring Assizes, 1884, resulting in a verdict directed for the plaintiff, which was also set aside, and a third trial ordered in the Michaelmas Sittings, 1884. The plaintiff not having served notice of trial for the next ensuing assizes, the defendant moved to dismiss the action for want of prosecution, contending that the case fell within Ord. XXXV. rr. 2, 4:—The court refused the motion. Semble, the only remedy open to a defendant under such circumstances is trial by proviso under the old practice. *Foott* v. *Benn*, 16 L. R., Ir. 247.

Where, after a disagreement of the jury, the plaintiff does not proceed to a second trial, the defendant's proper course is to have a trial by proviso, under s. 107 of the Common Law Procedure Act, 1853, and not to move to dismiss for want of prosecution under Ord. XXXV. r. 4. *Joyce* v. *Boyle*, 24 L. R., Ir. 455—C. A.

Extension of Time.]—The power of a judge to extend the time for proceeding to trial may be exercised after the expiration of the time limited by s. 101 of 15 & 16 Vict. c. 76, for proceeding to trial. *Nosotti* v. *Hudson*, 37 L. J., C. P. 135; L. R. 3 C. P. 293; 17 L. T. 479; 16 W. R. 315.

Where a defendant has given twenty days' notice to proceed to trial, the plaintiff may come to the court, and, on satisfactorily explaining the delay in not going to trial, obtain an extension of time. *Farthing* v. *Castles*, 1 B. C. C. 142; 22 L. J., Q. B. 167; 17 Jur. 139.

It is not necessary that the rule should specify the particular period for which an extension of the time is required. *Ib.*

The plaintiff need not wait until the expiration of the twenty days, nor until the defendant has entered a suggestion, before applying to the court or a judge. *Ib.*

On the defendant's insolvency, an application to enlarge the time for the plaintiff's proceeding

to trial must be made within the twenty days. *Horner* v. *Spencer*, 1 F. & F. 412.

Signing Judgment.]—A defendant is entitled to enter a suggestion and sign judgment for his costs under s. 101 of 15 & 16 Vict. c. 76, where a plaintiff neglects to try a cause at the time mentioned in that section, and to proceed to trial at the assizes or sittings occurring immediately after the expiration of the twenty days' notice to try, given by the defendant. *Judkins* v. *Atherton*, 3 El. & Bl. 387; 23 L. J., Q. B. 335; 18 Jur. 813; 2 W. R. 563.

Notice of trial was given for the summer assizes, and the plaintiff at the assizes withdrew the record. On the 21st February following the defendant gave notice requiring the plaintiff to bring on to trial the issue joined, at the next assizes, the commission day of which was the 21st March. The plaintiff did not proceed to trial as required by the notice, and the defendant on the 5th of May entered a suggestion on the record and signed judgment for his costs:—Held, that he had properly entered the suggestion and signed judgment. *Ib.*

A suggestion having been entered, the court refused to let in the plaintiff to try upon a peremptory undertaking without an affidavit of merits. *Ib.*

Where a plaintiff has proceeded at law and in equity, and elected to proceed in equity after issue joined in the action, the defendant may give notice to the plaintiff to bring the issue on to be tried; and if the plaintiff neglects to do so, the defendant may enter a suggestion on the record, and sign judgment for his costs. *Mortimore* v. *Soares*, 1 El. & El. 399; 28 L. J., Q. B. 133; 5 Jur. (N.S.) 574.

Where no proceedings have been taken in a cause for a year the defendant must, before signing judgment, give a month's notice of his intention to proceed, although he has given twenty days' notice to the plaintiff to proceed to trial. *Metcalf* v. *Hetherington*, 3 H. & N. 755; 28 L. J., Ex. 155.

By one of Several Defendants.] — Judgment as in case of a nonsuit, under the former practice, might be moved for by one of several defendants, though other defendants had moved for costs of the day for not proceeding to trial. *Bridgeford* v. *Wiseman*, 16 M. & W. 439.

So, in an action of tort against two, one of whom had suffered judgment by default, the other, who had pleaded to issue, might have judgment against the plaintiff for not proceeding to trial against him. *Hadrick* v. *Haslop*, 12 Q. B. 267; 16 L. J., Q. B. 442; 11 Jur. 1012. S. P., *Chapman* v. *Heslop*, 12 Q. B. 928.

In an action against four, issue was joined against two; the third died after having pleaded, but before issue joined as against him; the fourth died not having pleaded at all:—Held, that the surviving defendants were not in the situation to move to enter up judgment as in case of a nonsuit. *Pinkus* v. *Sturch*, 5 C. B. 474; 5 D. & L. 515; 17 L. J., C. P. 120; 12 Jur. 121.

Where several defendants appeared, by separate attorneys, each might move. *Rhodes* v. *Thomas*, 2 D. & L. 531.

Where one of several defendants moved, the rule was to shew cause why the judgment should not be entered generally for the defendants. *Sawyer* v. *Hodges*, 1 D. (N.S.) 16.

f. MOTIONS RESPECTING THE TRIAL.

1. To whom Made.

Motions to regulate the trial must be made, not to the court, but to the judge who presides at nisi prius; as, a motion to try a cause at a sittings in term, notwithstanding a special jury obtained by the opposite party for delay. *Johnson* v. *Gas Light and Coke Co.*, 7 Taunt. 386.

A judge sitting at nisi prius in Westminster cannot upon motion make an order in a cause entered for trial in London. *Atkinson* v. *Dickinson*, 3 Camp. 41.

2. To Advance Hearing.

Matter of Discretion.]—After a cause is set down for hearing, it may be advanced at the discretion of the court. *Hoyle* v. *Livesey*, 1 Mer. 381.

The court has a right to advance, at its discretion, any cause which is ripe for hearing. Semble, the Lord Chancellor has no jurisdiction to discharge or vary an order made for that purpose by the Master of the Rolls. *Hutchinson* v. *Stephens*, 2 Myl. & C. 452; 1 Keen, 658; 6 L. J., Ch. 296; 1 Jur. 524.

In what Cases.]—Principle upon which causes are advanced. *Rawson* v. *Samuel*, Cr. & Ph. 161; 10 L. J., Ch. 214; 3 Jur. 947.

A cause may be advanced for the purpose of taking the bill pro confesso. *Barwick* v. *Ward*, 5 Sim. 676; 4 L. J., Ch. 58. S. P., *Hart* v. *Ashton*, 1 Madd. 175.

Cause not in the paper not called on to prove a will under the circumstances. *Anon.*, 4 Madd. 271.

In a suit for specific performance of an agreement to let a house for a short term, the plaintiff should apply to have the cause advanced so that it may be heard before the term has expired. *De Brassac* v. *Martyn*, 9 L. T. 287; 11 W. R. 1020.

Special case advanced and heard on a short cause day where it was important that it should be heard quickly. *Wood* v. *Wood*, 19 W. R. 972.

An appeal from an order overruling a demurrer will generally be advanced, if the right to an injunction is involved, but there is no rule that it should be advanced in other cases. *L., C. & D. Ry.* v. *Imperial Mercantile Credit Association*, L. R. 3 Ch. 231.

An application was made on the part of a plaintiff to have a cause taken out of its turn, in order that it might be tried during the existing sittings, on the ground that the defendant had died since the commencement of such sittings. The application was opposed on behalf of the defendant's executors, and refused after time taken to consider. *Izard* v. *Milner*, 4 Car. & P. 285.

Where parties are very numerous, it is a ground for taking a cause out of its turn to prevent abatement. *Eyre* v. *Marsden*, 7 L. J., Ch. 194.

Court will set down cause pro formâ, and put it at the head of the paper, in order to enable witness, attending from public office in country to prove document, to return. *Swift* v. *Grace*, 9 Price, 146.

Court will not order a cause set down for hearing to be advanced in the paper on ground that subject-matter of suit is an arbitration of matters of account, and that if award should be

set aside, the applicant would, on going into account again, lose the advantage of a witness not expected to live. *Dalzell* v. *Bailey*, 3 Price, 2.

Where two suits involve the same subject-matter, and the same parties, and a decree is made in one of them, the court will in some instances direct the hearing of the other suit to stand over until that in which the decree is made is heard on further directions. *Cumming* v. *Slater*, 1 Y. & Coll. C. C. 484.

Cross cause advanced so as to be heard at same time as cause first in order for trial. *Roberts* v. *West*, 11 Price, 514.

Where there are two suits relating to the same estate in different branches of the court, one suit will not be advanced out of its turn. *Worsley* v. *Street*, 3 W. R. 192.

The Application.]—An application to advance the hearing of exceptions should be made on notice and not ex parte. *Marshall* v. *Mellersh*, 5 Beav. 496.

The court does not upon motion by the plaintiff, without notice of the defendant, order a cause to be advanced for hearing; and where a cause had been advanced by order obtained without such notice, the cause was remitted to its place, and the plaintiff ordered to pay the costs of the day. *Powell* v. *Calloway*, 11 Sim. 51; 9 L. J., Ch. 337; 4 Jur. 859.

The court will not order a foreclosure suit to be advanced and heard as a short cause, without the defendant's consent. *Lewin* v. *Moline*, 1 Beav. 99; 8 L. J., Ch. 96.

Motion by plaintiff to advance demurrer to bill for injunction and receiver, refused on account of delay in filing bill. *Jones* v. *Taylor*, 2 Madd. 181.

3. To Postpone or Adjourn Hearing.

a. *In what Cases.*

See R. S. C., 1883, Ord. XXXVI. r. 34.

Other Proceedings Pending.]—The court will not delay the trial of an action until after the trial of an indictment for perjury, in a matter relating to the cause. *Johnson* v. *Wardle*, 3 D. P. C. 550; 1 H. & W. 219.

In an action brought by trustees against a party who had received moneys belonging to the cestui que trust, under a power of attorney which had previously been countermanded by the plaintiffs, the defendant applied to have the trial postponed, on the ground that a bill in equity had been filed by him against the plaintiffs with respect to the subject-matter of the suit, and that he was advised and believed that an injunction would be granted, as soon as by the practice of the courts of equity the application for one could come to be heard, and offered, in the meantime, to bring into court the money in dispute:—Held, that the court had power to postpone the trial on those grounds. *Vandersteegen* v. *Witham*, 6 M. & W. 457; 8 D. P. C. 369; 9 L. J., Ex. 174.

Absence of Witnesses.]—A motion to put off a trial in London or Middlesex, on account of the absence of a witness, cannot be made when there is not time to shew cause within the term, if the party applying had it in his power to come earlier. *Anon.*, 3 Taunt. 315.

Where a material witness for the plaintiff is prevented from attending by the fraud and practice of the defendant's attorney, the plaintiff ought to apply to the judge to put off the trial, or he ought to withdraw the record. *Turquand* v. *Dawson*, 1 C. M. & R. 709; 5 Tyr. 418.

The judge at the assizes will not postpone the trial at the instance of the plaintiff, on the ground of the illness of a material witness, as the plaintiff can withdraw his record. *Maspero* v. *Strachan*, 5 Car. & P. 514.

It is the practice to accede to an application to postpone a cause even on the day on which it stands for trial, on the ground of the absence of a material witness, when the application appears reasonable. *Stevens* v. *Esling*, 2 F. & F. 136.

A master mariner, having gone abroad, in the course of his business, after the commencement of the action, and after time obtained to plead, but before issue joined, the court refused to postpone the trial until his return to England, on the ground that his evidence was material and necessary to make out his defence. *Solomon* v. *Howard*, 12 C. B. 463.

A judge may, in his discretion, refuse to postpone the trial notwithstanding the application to postpone is supported by an affidavit of the absence of a material witness. *Turner* v. *Merywether*, 7 C. B. 251; 18 L. J., C. P. 155; 13 Jur. 683.

—— **Diligence used to obtain Attendance.**]—The court will not, at the instance of a defendant, postpone the trial of a cause on the ground of the absence of a material and necessary witness, where the witness is a captain in the service of the defendant, and the defendant has been guilty of laches in abstaining from securing the testimony of the witness when within his power. *Wright* v. *M'Guffie*, 4 C. B. (N.S.) 441.

In an action on a bill of exchange against the drawer and indorser, the only plea being a denial of the indorsement, an application on his part to postpone the trial on account of the absence of the acceptor, sworn to be a material witness and to be absent in Scotland, was refused, as it did not appear that any endeavour had been made to obtain his evidence under 17 & 18 Vict. c. 34, or otherwise. *Ward* v. *Wilkinson*, 2 F. & F. 173.

The court ought not to grant to a plaintiff the indulgence of postponing the trial unless he has used due diligence and has good and strong reason for seeking a postponement, more especially if the defendant offers some accommodation to him in the matter. *Steuart* v. *Gladstone*, 47 L. J., Ch. 154; 7 Ch. D. 394; 37 L. T. 575; 26 W. R. 277.

Motion for postponement in the present case refused, the plaintiff being in India. *Ib.*

The court will not put off a trial on the ground of the absence of a material witness, when it appears that no application has been made to the witness to know whether he will attend. *Worsley* v. *Bassett*, 3 Dougl. 58.

The court refused to put off a trial on an affidavit that the parties had been endeavouring to find a witness but could not do so. *Anon.*, Lofft, 653.

A defendant cannot be presumed to know what evidence will be required until after issue joined; and, therefore, where it appeared that between that time and the first day of the assizes due diligence had been used to procure the attendance of a material and necessary witness, but

without effect, the judge ordered the trial to be put off, on the defendant bringing the money into court and paying costs. *Dale* v. *Heald*, 1 Car. & K. 314.

——**After Postponement on former occasion.**]—Where a trial has been postponed on account of the absence of a material witness beyond seas, the court will again postpone it if satisfied that there is a reasonable prospect of his return to this country, although already postponed for a year and it is not certain when the witness will return. *Thompson* v. *Lewis*, 2 C. L. R. 707. See *Noble* v. *Lindsay*, 2 W. R. 19.

On an application to postpone a trial for the second time for several months on account of the absence of a witness, a condition that security be given to the satisfaction of the master can be properly imposed. *Campbell* v. *Read*, 4 Jur. (N.S.) 1111.

Absence of Documents.]—Where copies of a correspondence material to the issue were produced on the part of the defendant, having only been discovered and obtained the day before (the originals being at Seville and Liverpool), and too late to give notice to produce the originals, and the reception of the originals was objected to by the plaintiff, the judge adjourned the trial upon terms, the case being re-tried before the same judge and jury. *Cahill* v. *Dawson*, 1 F. & F. 291.

In the statement of the case on the part of the plaintiff, a document in the hands of a third party appearing to be material, and he having declined to produce it, an adjournment was allowed for the purpose of serving a subpœna duces tecum. *Higginson* v. *Bank of England*, 1 F. & F. 450.

Absence of Counsel.]—The probable absence of counsel is a sufficient ground for postponing the trial of an issue. *Bearblock* v. *Tyler*, 1 Jac. & Walk. 225.

To make Person a Party.]—Cause adjourned in order to make a person a party who had agreed with plaintiffs to advance the expenses of the suit upon condition of sharing the benefits. *Chameau* v. *Riley*, C. P. Coop. 336.

Jury influenced.]—A motion to postpone the new trial of an issue in a tithe suit from the summer to the spring assizes, on the ground that a report of the application for the new trial, and the decision of the judge granting it, in which he observed that the verdict in the first trial was against the opinion of himself and the judge who tried it, had been recently published in the newspapers, and would influence the minds of the jury, especially as the issue would be tried before the same judge, was refused with costs. *Willis* v. *Farrer*, 3 Y. & J. 381. See the application for the new trial, 3 Y. & J. 264.

b. *Practice.*

Affidavits—Form and Contents.]—A motion to postpone a trial, on account of the absence of a material witness, need not be supported by an affidavit of merits. *Hill* v. *Prosser*, 3 D. P. C. 704.

The court will put off the trial on an affidavit of the defendant's attorney that a material witness is kept out of the way by the plaintiff. *Duberly* v. *Gunning*, Peake, 97; 3 R. R. 664.

But the court will not receive the affidavit of an attorney's clerk, unless it is stated that he is particularly acquainted with the circumstances of the cause, and has the management of it. *Sullivan* v. *Magill*, 1 H. Bl. 637.

The affidavit to postpone a trial, on the ground of the absence of a witness, need not state the name of such witness, though it was suggested to be material and necessary. *Smith* v. *Dobson*, 2 D. & R. 420. S. P., *Buckingham* v. *Banks*, 4 D. & R. 832.

Payment of Costs.]—Upon a motion to postpone a trial, notice of the intended application omitting to offer the costs of the postponement, the court made the rule absolute, as well on payment of those costs as of the costs of the motion, though cause was shewn in the first instance. *Ward* v. *Ducker*, 6 Scott (N.R.) 45; 5 Man. & G. 377.

Where a defendant obtains an order to postpone a trial on payment of costs, he should serve an appointment to tax with the order; and where he omitted to do so, and the plaintiff treated the order as a nullity and proceeded to trial, the court refused to set aside the verdict so obtained, except upon payment of costs by the defendant. *Waller* v. *Joy*, 4 D. & L. 338; 16 M. & W. 60; 16 L. J., Ex. 17.

When the hearing of an action is adjourned in order to allow parties to be added, the party who applies for adjournment must pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day. *Lydall* v. *Martinson*, 5 Ch. D. 780; 37 L. T. 69; 25 W. R. 866.

Application, when made.]—An application to postpone the hearing of a cause should be made before the case comes into the paper for the day. *Hodges* v. *Patrick*, 22 W. R. 390.

Cause standing in the paper of the day, and being about to come on to be heard at the sittings, the court, nevertheless, granted a motion for transferring it to a future day. *Roberts* v. *West*, 11 Price, 514.

g. Conduct of the Cause.

Party in Person.]—A party, conducting his own cause at the trial, has a right to address the jury as an advocate, without waiving his right to give evidence as a witness in his own behalf. *Cobbett* v. *Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488; 1 W. R. 54.

The wife of a plaintiff has no right to appear and conduct the cause of her husband at nisi prius. *Cobbett* v. *Hudson*, 15 Q. B. 988; 14 Jur. 982.

A party appearing in person must examine the witnesses as well as address the jury. *Shuttleworth* v. *Nicholson*, 1 M. & Rob. 254.

Counsel can only be heard to assist him on legal objections. *Ib.*

Where a party conducts his own case, and examines his own witnesses, counsel are not allowed to argue points of law for him. *Moscati* v. *Lawson*, 1 M. & Rob. 454.

Where counsel regularly retained appear for the plaintiff in a penal action, and claim to proceed, the plaintiff himself cannot appear and

claim to be nonsuited. *Marks* v. *Benjamin*, 2 M. & Rob. 225.

By Counsel.]—Where there are several counsel the leader may, in his discretion, interpose and take the examination out of the hands of his junior. *Doe* v. *Roe*, 2 Camp. 280 ; 11 R. R. 711.

Counsel has no right to open facts which he is not in a condition to prove. *Stevens* v. *Webb*, 7 Car. & P. 60.

If one of two plaintiffs appears in person, the other cannot be heard by counsel ; for co-plaintiffs cannot sever, nor can the same party be heard both in person and by counsel. *Newton* v. *Ricketts*, 2 Ph. 624 ; 16 L. J., Ch. 372, n. ; 12 Jur. 106, 238.

When the court is sitting as a jury, the practice as to hearing counsel is the same as at common law, but, on points of law occurring, counsel will be heard according to the ordinary practice of the court. *Daw* v. *Eley*, 11 Jur. (N.S.) 923 ; 14 W. R. 48.

A plaintiff seeking alternative inconsistent relief against different defendants has a right to have the first alternative tried out. In such actions counsel for the second defendant may address the court against and cross-examine the witnesses of his co-defendant. *Child* v. *Stenning*, 47 L. J., Ch. 371 ; 7 Ch. D. 413 ; 38 L. T. 232 ; 26 W. R. 265.

One counsel only will be heard on each side upon the trial of a question of fact. *Conington* v. *Gilliatt*, 45 L. J., Ch. 273 ; 1 Ch. D. 694 ; 34 L. T. 123 ; 24 W. R. 269.

Production of Animal.]—If in an action for seizing and detaining a dog the defendant refuses to produce the dog (under notice) during the examination of the plaintiff's witnesses, he will not be allowed to produce it afterwards for the purpose of invalidating the testimony of those witnesses. *Lewis* v. *Hartley*, 7 Car. & P. 405.

Objections—Sufficiency of Proof.]—The defendant having closed his evidence in support of certain items in a particular of a set-off, and the judge having begun to sum up to the jury :—Held, that it was too late for the plaintiff's counsel to object to the sufficiency of proof of one of such items. *Abbott* v. *Parsons*, 5 M. & P. 521 ; 7 Bing. 563.

—— **Plaintiff in Contempt.**]—A defendant cannot object to a cause being heard on the ground that the plaintiff is in contempt. *Ricketts* v. *Mornington*, 7 Sim. 200 ; 4 L. J., Ch. 21.

—— **When taken.**]—An objection on a point of law may be taken at any time before verdict returned, even if the point is raised during the trial and the counsel of the objector intimates that he does not rely upon it. *Martin* v. *G. N. Ry.* (16 C. B. 179) distinguished. *Foundation* v. *Keatinge*, Ir. R. 9 C. L. 278.

If one party at a trial deliberately elects to fight one question on which he is beaten, he cannot afterwards on an appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence. *Martin* v. *G. N. Ry.* (16 C. B. 179) approved. *Browne* v. *Dunn*, 6 R. 67—H. L. (E.)

An objection to the plaintiff's title not noticed in the answer, but appearing from the plaintiff's own evidence, relied on at the hearing. *O'Connell* v. *O'Callaghan*, 7 Ir. Eq. R. 596.

An objection on account of the insolvency of the next friend of a female plaintiff, cannot be taken at the hearing of the cause, although the benefit of the objection has been claimed by the answer. *Monday* v. *Waghorn*, 21 L. J., Ch. 353 ; 16 Jur. 787.

Persons having Conduct of Cause.]—*See* supra, PARTIES, col. 118.

Amicus curiæ.]—As amicus curiæ any person may make suggestions to the court. *Tollemache* v. *Tollemache*, 30 L. J., Mat. 115.

h. RIGHT OF BEGINNING.

Party on whom Burden of Proof lies.]—Wherever, from the state of the record, there is anything to be proved by the plaintiff, he is entitled to begin. *Mercer* v. *Whall*, 5 Q. B. 447 ; 14 L. J., Q. B. 267 ; 9 Jur. 576.

The rule is the same in actions of tort. *Ib.*

The test to determine the order of beginning is to consider which party would be entitled to the verdict supposing no evidence given on either side ; as the burden of proof must lie on his adversary. *Leete* v. *Gresham Life Insurance Society*, 15 Jur. 1161. S. P., *Belcher* v. *McIntosh*, 8 Car. & P. 720.

Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he is entitled to begin. *Rawlins* v. *Desborough*, 2 M. & Rob. 328.

In an action for work and labour, the defendant pleaded that the "promise was made to the plaintiff and S., and not to the plaintiff alone." Replication, that the promise was made to the plaintiff alone, and not to the plaintiff and S. :—Held, that the plaintiff ought to begin. *Davies* v. *Evans*, 6 Car. & P. 619.

By a life policy of assurance it was stipulated, that it should be void if anything stated by the assured in his declaration to the directors should be untrue. In his declaration he stated, that "he was at that time in good health, and not afflicted with any disorder, nor addicted to any habit tending to shorten life ; that he had not at any time been afflicted with insanity, rupture, gout, fits, &c. ; that he had not had any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs ; and that A. was at that time his usual medical attendant." The plaintiffs averred in their declaration the truth of the statement of the assured. The first five pleas alleged, that the declaration of the assured was untrue in this, that he had spitting of blood, consumptive symptoms, an asthma of the lungs, an affection of the liver, and a cough of an inflammatory and dangerous nature ; sixthly, that he was afflicted with a disorder tending to shorten life ; seventhly, that he was not at that time in good health ; and, eighthly, that he had falsely averred that A. was his usual medical attendant :—Held, that plaintiff was entitled to begin at the trial, the issue on the seventh plea being upon him ; and, semble, that the issue on the other pleas also lay upon him. *Geach* v. *Ingall*, 14 M. & W. 95 ; 15 L. J., Ex. 37 ; 9 Jur. 691. S. P., *Craig* v. *Fenn*, Car. & M. 43 ; *Ashby* v. *Bates*, 15 M. & W. 589 ; 4 D. & L. 33 ; 15 L. J., Ex. 349.

In an action on a life policy, to be cancelled in case of suicide, by return of the premiums, on a plea that the deceased died by suicide, and that the premiums were ready to be returned, the

defendant is entitled to begin, the onus being upon him of proving that the death was by suicide. *Stormont* v. *Waterloo Life and Casualty Assurance Co.*, 1 F. & F. 22.

—— **Admissions at Trial.**]—In an action on a bill of exchange by indorsee against acceptor, he pleaded pleas denying the acceptance and indorsement, and also pleas of payment, upon all which issue was joined. The defendant's counsel, at the trial, offered to admit the acceptance and indorsement, and wished to begin :—Held, that this admission of all the facts, the proof of which was on the plaintiff, did not entitle the defendant to begin. *Pontifex* v. *Jolly*, 9 Car. & P. 202. S. P., *Doe* d. *Warren* v. *Bray*, Moo. & M. 166.

Where Damages are the Substantial Object of Suit.] — Where it can be collected from the pleadings and statements of counsel that substantial damages are the object of an action, the plaintiff has the right to begin, though all the issues are on the defendant. *Hoggett* v. *Oxley*, 9 Car. & P. 324 ; 2 M. & Rob. 251.

The plaintiff is entitled to begin, where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record is with the defendant. *Carter* v. *Jones*, 1 M. & Rob. 281. S. P., *Doe* d. *Worcester (Trustees)* v. *Rowlands*, 9 Car. & P. 734 ; 5 Jur. 177. But see *Wootton* v. *Barton*, 1 M. & Rob. 518 ; *Lewis* v. *Wells*, 7 Car. & P. 221 ; *Reeve* v. *Underhill*, 6 Car. & P. 773 ; *Cooper* v. *Wakley*, 3 Car. & P. 474 ; Moo. & M. 248.

Where the substantial question to be tried is the existence of a custom affirmed by the defendant, he is entitled to begin, although the plaintiff's counsel alleges that he seeks to recover real damages. *Bastard* v. *Smith*, 2 M. & Rob. 129.

Where real damages are not the object of the action, the party on whom the affirmative issues lie is entitled to begin. *Burrell* v. *Nicholson*, 1 M. & Rob. 304 ; 6 Car. & P. 202.

Accord and Satisfaction.]—In an action for negligence, the only plea being accord and satisfaction, the plaintiff is entitled to begin. *Pim* v. *Eastern Counties Ry.*, 2 F. & F. 133.

Actions on Bills, Notes, and Cheques.]—If in an action on bills of exchange, with a count upon an account stated, the defendant pleads payment to the counts on the bills, and non assumpsit to the account stated :— Held, that the defendant is entitled to begin, unless the plaintiff's counsel has evidence to give on the count upon an account stated. *Smart* v. *Rayner*, 6 Car. & P. 721.

In an action on a bill of exchange by indorsee against acceptor ; the only plea was that the bill had been altered after acceptance :—Held, that the defendant's counsel had the right to begin, and that, upon his calling for the bill, the plaintiff's counsel ought to produce it without notice. *Barker* v. *Malcolm*, 7 Car. & P. 101.

A party gave a cheque for the amount of a deposit on a sale by auction, which sale was void. In an action on the cheque, he pleaded that there was no consideration for the cheque, and the plaintiff replied that there was consideration :— Held, that the defendant must begin. *Mills* v. *Oddy*, 6 Car. & P. 728.

A declaration stated that the defendant drew his cheque on W. & Co., and delivered it to L., who transferred it to the plaintiff. The defendant pleaded, first, that the cheque was given to L. as the nominal value of counters to play at an unlawful game, as L. knew, and that before the plaintiff took the cheque he had notice of the premises ; and second, a similar plea, in which, instead of an averment of notice, it was averred that the plaintiff gave no value for the cheque. Replication, denying the notice, and stating that the plaintiff gave a good consideration for the cheque :—Held, that the defendant must begin. *Bingham* v. *Stanley*, 9 Car. & P. 374.

In an action for goods sold, the defendant pleaded as to all but 171*l.* 7*s.* 6*d.* non assumpsit, and as to that sum, that he gave the plaintiff a bill of exchange for that amount, which was not due at the time the action was brought. This was denied by the replication, and by the particulars the demand was limited to 171*l.* 7*s.* 6*d.* :— Held, that the defendant was entitled to begin. *Edge* v. *Hillary*, 3 Car. & K. 43.

In an action by indorsee against maker of a promissory note, he pleaded that the note was in the hand of V., and that while it was so, the claim of V. on it was, by an order, referred to an arbitrator, and that, before any award was made, the note was, in violation of good faith, delivered to the plaintiff ; and that he, at the time he took the note, had knowledge of all the premises. Replication, that he had not any knowledge of the premises :—Held, that the defendant must begin, as the plaintiff's knowledge of the other facts was an essential part of the defence. *Smith* v. *Martin*, Car. & M. 58 ; 9 M. & W. 304 ; 1 D. (N.S.) 418 ; 11 L. J., Ex. 129.

Actions for Breach of Promise to Marry.]—To an action for breach of promise of marriage, the defendant did not plead the general issue, but only that the plaintiff, after the promise, conducted herself in a lewd, unchaste, and improper manner :—Held, that the plaintiff had the right to begin. *Harrison* v. *Gould*, 8 Car. & P. 580.

If the defendant pleads that, before any breach of the promise, the parties mutually agreed to exonerate each other from their promises, and this is denied by the replication, the defendant is entitled to begin. *Stanton* v. *Paton*, 1 Car. & K. 148.

Actions for Breach of other Contracts.]—A declaration stated that the defendant agreed to build houses according to a specification. Breach, that he did not build according to the specification. Plea, that the defendant did build according to the specification :—Held, that the plaintiff must begin, and prove that the defendant had not built according to the specification. *Smith* v. *Davies*, 7 Car. & P. 307.

To a declaration on an agreement for not repairing premises in a reasonable time, the defendant pleaded that he did repair within a reasonable time :—Held, that the plaintiff should begin, for if no evidence was offered on either side, the defendant would succeed. *Belcher* v. *M'Intosh*, 8 Car. & P. 720.

To an action to recover damages for the non-performance of several contracts, by which the defendant undertook to deliver divers quantities of spelter within specified times, he pleaded, first, that the plaintiff induced him to enter into the contracts by fraud, covin, and misrepresentation ; and secondly, that he would have delivered the spelter within the time specified, but was hindered from doing so by the fraud of the plaintiff :—Held, that the defendant had the

right to begin. *Steinkeller* v. *Newton*, 9 Car. & P. 313.

In an action on the warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound, and the defendant only pleaded that it was, upon which plea issue was joined :—Held, that the plaintiff had the right to begin. *Osborn* v. *Thompson*, 9 Car. & P. 337 ; 2 M. & Rob. 254.

In an action for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a plea justifying the dismissal, upon which issue was taken :—Held, that the defendant was entitled to begin. *Harnett* v. *Johnson*, 9 Car. & P. 206.

Actions on Bonds.]—In an action on a bond, the only plea being solvit ad diem, the execution of the bond is admitted, and it being an affirmative issue, the defendant must begin. *Sandford* v. *Hunt*, 1 Car. & P. 118.

In an action on a bond, the conditions not being set out in the declaration, and the making of it being admitted by the pleas, which were in confession and avoidance, but breaches being suggested and admitted by the defendant's attorney before trial, the admission not being accepted at the trial, the plaintiff is entitled to begin. *Brooks* v. *Clarke*, 4 F. & F. 484.

Actions on Covenants.]—In actions on covenants, where the affirmative of the issues is on the defendant he is entitled to begin, though the damages are unascertained. *Wootton* v. *Barton*, 1 M. & Rob. 518. S. P., *Lewis* v. *Wells*, 7 Car. & P. 221.

Where the breach was, that the defendant did not repair, but suffered the premises to be ruinous. Plea, that he did repair, and did not suffer the premises to become ruinous :—Held, that the plaintiff must begin. *Soward* v. *Leggatt*, 7 Car. & P. 613.

In an action to recover damages for the non-performance of an agreement under seal, if the defendant pleads only that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, his counsel has a right to begin although the damages are uncertain, and evidence is requisite to guide the jury in forming their estimate of them. *Reeve* v. *Underhill*, 6 Car. & P. 773.

In actions in form ex contractu the plaintiff is entitled to begin, if the substantial question is the assessment of damages, though the affirmative of the issue is on the defendant. *Doe* d. *Worcester* (*Trustees*) v. *Rowlands*, 9 Car. & P. 734 ; 5 Jur. 177.

Therefore, in an action on an indenture of lease, suggesting breaches, that the defendant did not use and occupy the premises demised in a good and proper manner, and did not well and sufficiently repair the same ; pleas that he did use and occupy the premises in a good and proper manner, and did well and sufficiently repair the same :—Held, that the plaintiff was entitled to begin. *Ib.*

In an action on a covenant for repayment of money, the only plea being that the deed was a mortgage deed, given to secure money lost by gambling, if the defendant admits the amount of claim, he is entitled to begin, even although the claim, in a technical view, is partly for liquidated damages. *Hill* v. *Fox*, 1 F. & F. 136. S. P., *Overbury* v. *Muggridge*, 1 F. & F. 137, n.

Actions for Defamation.]—In libel, when there is no general issue, but a justification is pleaded as to part, and judgment is suffered by default as to the residue, the plaintiff is entitled to begin. *Wood* v. *Pringle*, 1 M. & Rob. 277.

If a defendant pleads a justification, without pleading the general issue, and the affirmative of the issue is on him, he is entitled to begin, and the plaintiff has not, in such case, a right to begin with a view of proving the amount of his damages. *Cooper* v. *Wakley*, 3 Car. & P. 474 ; M. & M. 248.

In Ejectment.]—In ejectment by the heir-at-law, the defendant is not entitled to begin by admitting the heirship and seisin of the ancestor, unless defeated by a conveyance made by the ancestor, under which the defendant claims. *Doe* d. *Tucker* v. *Tucker*, M. & M. 536.

To entitle the defendant to begin, the plaintiff's whole primâ facie case must be admitted. *Ib.*

Where a plaintiff claims as heir-at-law, and the defendant as devisee, if the heirship is admitted, the defendant is entitled to begin, though the plaintiff professes to set up an outstanding title as to part of the property. *Doe* d. *Smith* v. *Smart*, 1 M. & Rob. 476.

Where each party claimed as heir-at-law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate, he proposed to admit that, unless he was legitimate, the lessor of the plaintiff was the heir-at-law :—Held, that this admission did not give him the right of beginning. *Doe* d. *Warren* v. *Bray*, M. & M. 166.

In ejectment by lessors, claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin. *Doe* d. *Wollaston* v. *Barnes*, 1 M. & Rob. 386.

The plaintiff claimed as devisee under a will of S. At the trial the defendant admitted the seisin of S. and the due execution of that will, and that the plaintiff was primâ facie entitled under it, and proposed to set up a subsequent will, revoking the first will. The defendant was permitted to begin :—Held, that the plaintiff should have been permitted to begin. *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655 ; 17 L. J., C. P. 127.

In ejectment by heir against devisee, he admitting the heirship begins. *Martin* v. *Johnston*, 1 F. & F. 122. S. P., *Sutton* v. *Sadler*, 3 C. B. (N.S.) 87.

Actions for Trespass.] — In trespass with a plea of liberum tenementum, and no general issue, the defendant is entitled to begin. *Pearson* v. *Coles*, 1 M. & Rob. 206.

Where there are special pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage. *Fish* v. *Travers*, 3 Car. & P. 578.

In an action for assault and battery, and a plea of justification only, and issue thereon, the defendant's counsel has a right to begin, the affirmative of the issue being on him. *Bedell* v. *Russell*, R. & M. 293 ; 27 R. R. 749.

To an action for breaking and entering the plaintiff's close the defendant pleaded not guilty as to the force, and justified as to the residue under a public right of way :—Held, that there being in fact but one issue, the affirmative of

which lay on the defendant, his counsel was entitled to begin. *Jackson* v. *Hesketh*, 2 Stark. 518. S. P., *Hodges* v. *Holder*, 3 Camp. 366.

In an action for taking goods, where the affirmative of the issues is on the defendant, and there is no allegation of special damage, the defendant has the right to begin. *Aston* v. *Perkes*, 9 Car. & P. 231.

To a declaration for a trespass, the defendant pleaded a justification, setting up an affirmative right in himself, which right the replication traversed. The plaintiff's counsel claimed the right to begin. The judge asked whether he would undertake to proceed for substantial damages, and, on his declining so to undertake, allowed the defendant to begin:—Held, correct. *Chapman* v. *Rawson*, 8 Q. B. 673; 15 L. J., Q. B. 225; 10 Jur. 287.

In Issues.]—In an issue under the Interpleader Act, the plaintiffs averred in the declaration that certain goods were not the property of the plaintiffs or either of them. Plea, that the goods were the property of the plaintiffs, or one of them:—Held, that the defendant had the right to begin. *Hudson* v. *Brown*, 8 Car. & P. 774.

On an issue from the Court of Chancery to try whether A. was at a certain time of sound mind, the plaintiff affirming the soundness is entitled to begin. *Frank* v. *Frank*, 2 M. & Rob. 314.

And on the trial of an issue as to the validity of a devise is entitled to begin. *Handley* v. *Stacey*, 1 F. & F. 253.

To reverse Outlawry.]—If a plaintiff, in a writ of error to reverse an outlawry, has assigned as error that he was beyond sea when the exigent was awarded, and the defendant in error pleads, "that he left the realm of his fraud and covin, and to defeat him of his just debt, and for the purpose of avoiding the outlawry;" and on this plea issue is taken; at the trial the defendant in error begins. *Byron* v. *Wagstaffe*, 2 Car. & P. 125; 8 D. & R. 208; 5 B. & C. 314; R. & M. 329.

False Return to Mandamus.]—To a mandamus to a rector to restore a parish clerk, the rector returned, that the clerk was guilty of acts of intoxication, and therefore he dismissed him. The clerk brought an action for a false return, and in his declaration recited the return and negatived the allegations contained in it. The rector by his plea repeated the charges contained in the return:—Held, that the defendant had the right to begin. *Bowles* v. *Neale*, 7 Car. & P. 262.

Order to admit Case.]—The plaintiff's counsel has a right to begin and state the facts, although by a rule of court the defendant is under obligation to admit the plaintiff's case. *Thwaites* v. *Sainsbury*, 5 Car. & P. 69.

If a court of equity directs an action of trover to be brought, and orders that the defendant shall admit the finding and conversion of the goods, this does not give the defendant the right to begin. *Turberville* v. *Patrick*, 4 Car. & P. 557.

On Pleas of Payment, Set-off, and Discharge.]—In an action on a promissory note, the defendant pleaded several pleas as to part, the proof of which lay on him, and also payment of money into court as to the residue, to which the plaintiff replied damages ultra:—Held, that he was entitled to begin. *Booth* v. *Millns*, 4 D. & L. 52; 15 M. & W. 669; 15 L. J., Ex. 354.

A declaration was for goods sold, and on an account stated; the particulars were for a balance; but in the particulars no credits were given or dates specified. The defendant pleaded payment:—Held, that he must begin. *Birt* v. *Leigh*, 1 Car. & K. 611. S. P., *Richardson* v. *Fell*, 4 D. P. C. 10.

A defendant pleaded as to 20*l.* payment, and as to the residue a set-off:—Held, that the defendant must begin. *Coxhead* v. *Huish*, 7 Car. & P. 63.

If a defendant pleads his discharge under the Insolvent Debtors Act, and no other plea, and the plaintiff denies the plea, the defendant must begin. *Lambert* v. *Hall*, 9 Car. & P. 506.

On Pleas of Coverture.]—Where to an action for goods sold and delivered the defendant pleads coverture, if the plaintiff elects to begin, he must go into the whole case relating to the coverture; but if the defendant admits the whole debt to be due on which the action is founded, she is entitled to begin. *Lacon* v. *Higgins*, 3 Stark. 178; 25 R. R. 779. And see *Penson* v. *Lee*, 2 Bos. & P. 331; 5 R. R. 614.

In an action on a promissory note, in which the defendant pleads coverture, and the plaintiff takes issue on that plea, the defendant has the right to begin, although, as the note did not bear interest on the face of it, the plaintiff claimed interest in the shape of damages. *Cannan* v. *Farmer*, 2 Car. & K. 746; 3 Ex. 698. S. P., *Woodgate* v. *Potts*, 2 Car. & K. 457.

On New Assignments.]—In trespass to land, the defendant pleaded not guilty, and a right of way. The plaintiff replied de injuriâ to the plea of the right of way, and newly assigned that the trespasses were committed on other and different occasions than that in the plea mentioned. The defendant pleaded to the new assignment payment of money into court, and by this plea relinquished and abandoned so much of the general issue "as traverses or denies, or can be deemed or construed to traverse or deny, the trespasses newly assigned or any part thereof." Replication to this plea, accepting the sum paid into court "in full satisfaction and discharge of the several trespasses newly assigned":—Held, that, as the plea of not guilty was not entirely withdrawn, the plaintiff had the right to begin; and that if the defendant wished to begin, he should have taken out a summons to withdraw the general issue entirely from the record. *Price* v. *Seaward*, Car. & M. 23.

Arguing as to Right to begin.]—Only one counsel on each side is to be heard on the right to begin, and the counsel for the defendant has the right to reply. *Rawlins* v. *Desborough*, 2 M. & Rob. 70.

Misdirection as to Right to begin.]—When injury has resulted from an erroneous decision of a judge relative to the order of beginning, the court will, in its discretion, grant a new trial. *Geach* v. *Ingall*, 14 M. & W. 95; 15 L. J., Ex. 37; 9 Jur. 691. S. P., *Hickman* v. *Fernie*, 3 M. & W. 505.

The court will not set aside a verdict on the ground that a wrong party was allowed to begin at the trial unless it is manifest that some injustice or injury has resulted from the error.

Edwards v. *Matthews*, 4 D. & L. 721 ; 16 L. J., Ex. 291. S. P., *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655 ; 17 L. J., C. P. 127.

A new trial will not be granted because a judge has wrongly ruled as to which party must begin, unless such ruling did clear and manifest injustice. *Bradford* v. *Freeman*, 5 Ex. 734 ; 20 L. J., Ex. 36 ; 14 Jur. 987. S. P., *Booth* v. *Millns*, 4 D. & L. 52 ; 15 M. & W. 669 ; 15 L. J., Ex. 354.

i. ADDRESSING JURY AND COURT.

See R. S. C., 1883, Ord. XXXVI. r. 36.

Number of Counsel.]—One counsel only will be heard on each side upon the trial of a question of fact. *Conington* v. *Gilliatt*, 45 L. J., Ch. 273 ; 1 Ch. D. 694 ; 34 L. T. 123 ; 24 W. R. 269.

On the argument of a case in the Court of Appeal two counsel will be heard on either side. *Sneesby* v. *Lancashire and Yorkshire Ry.*, 45 L. J., Q. B. 1 ; 1 Q. B. D. 42—C. A. S. P., *Robb* v. *Connor*, Ir. R. 9 Eq. 373.

So in a divisional court of appeal, if the case is of sufficient magnitude. *Le Blanch* v. *Reuter's Telegraph Co.*, 34 L. T. 691.

As a rule the court will hear only one counsel on each side upon appeals from inferior courts. *Hawes* v. *Peake*, 33 L. T. 818 ; 24 W. R. 407.

Upon the argument of a special case only one counsel is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the court upon an order nisi to quash, and there all the counsel instructed on both sides may be heard. *Spurling* v. *Bantoft*, 60 L. J., Q. B. 745 ; [1891] 2 Q. B. 384 ; 65 L. T. 584 ; 40 W. R. 157 ; 17 Cox, C. C. 372 ; 56 J. P. 132.

There is no rule that only one counsel on each side shall be heard in long vacation causes. *Henry* v. *G. N. Ry.*, 3 Jur. (N.S.) 1117.

Summing up.]—The right of the party who begins to sum up the evidence at the trial is confined to the case where the judge holds that there is evidence to go to the jury. *Hodges* v. *Ancrum*, 11 Ex. 214 ; 24 L. J., Ex. 257 ; 1 Jur. (N.S.) 547 ; 3 W. R. 518.

In actions with witnesses the practice in Malins's, V.-C., court was for the leading counsel for the plaintiff to open the case and put in evidence, and then for the leading counsel or junior to sum up the evidence, but so that only one counsel shall be heard after the evidence is put in. The same rule is to apply as to the defendant's case. *Metzler* v. *Wood*, 47 L. J., Ch. 139 ; 37 L. T. 523 ; 26 W. R. 125.

No Intention to adduce Evidence.]—A counsel who has not announced his intention to adduce evidence, in consequence of which the party who began sums up his case, cannot be permitted afterwards to alter his mind and adduce evidence. *Darby* v. *Ouseley*, 1 H. & N. 1 ; 25 L. J., Ex. 227 ; 2 Jur. (N.S.) 497.

Third Party.]—Where, on the trial of an issue out of chancery, it is ordered that a third party should attend the trial, the counsel for such party will not be permitted to call witnesses, nor to address the jury. *Wright* v. *Wright*, 7 Bing. 459, n. ; 5 M. & P. 319, n. ; 4 Car. & P. 389.

Counsel for a trustee of property for the separate use of a married woman, who appears by counsel, cannot be heard. *Crawford* v. *O'Sullivan*, 2 Con. & L. 410.

Address—Contents of.]—In an action for a conspiracy, the defendants pleaded the general issue, and a plea of justification, which plea was demurred to, and held bad by the court, who gave judgment on it for the plaintiff, and the award of the venire was as well to try the issue joined "as to inquire what damages the plaintiff had sustained on occasion of the premises whereof the court hath given judgment for the plaintiff :" —Held, that the defendants' counsel, in addressing the jury, had a right to refer to the allegations contained in the plea, and to comment upon them. *Gregory* v. *Brunswick* (*Duke*), 1 Car. & K. 24 ; 1 D. & L. 803 ; 13 L. J., C. P. 34 ; 8 Jur. 148.

Several Defendants.]—It is in the discretion of the judge to say in what order the counsel for different defendants, having different interests, shall cross-examine and address the jury. *Fletcher* v. *Crosbie*, 2 M. & Rob. 417.

The order of seniority is not imperative. *Ib.*

Where several defendants appear by separate attorneys and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence was joint. *Chippendale* v. *Masson*, 4 Camp. 174. S. P., *Mason* v. *Ditchbourne*, 1 M. & Rob. 462, n.

In ejectment, where the defendants defend in the same right, but by different counsel, only one counsel can address the jury. *Doe* d. *Hogg* v. *Tindal*, 3 Car. & P. 565 ; M. & M. 314.

In trover, where two defendants defend by the same attorney, and in the same interest, but one appears by counsel and the other in person, the counsel only is entitled to address the jury ; but both he and the defendant appearing in person may cross-examine witnesses. *Perrin* v. *Tucker*, M. & M. 391 ; 4 Car. & P. 70.

The order in which the speeches of counsel on the trial of an action with witnesses are to be made prescribed. *Kino* v. *Rudkin*, 6 Ch. D. 160 ; 38 L. T. 461.

Where two defendants appear by different attorneys and counsel, and have pleaded separately the general issue, and several special pleas verbatim the same, the issues on each set of pleas being exactly the same, the judge will only allow one counsel to address the jury for the defendants. *Sparkes* v. *Barrett*, 8 Car. & P. 442.

Where several defendants appear by different attorneys and counsel, the latter are entitled to cross-examine the witnesses, and address the jury separately. *Ridgeway* v. *Philip*, 1 C., M. & R. 415 ; 3 D. P. C. 154 ; 5 Tyr. 131 ; 4 L. J., Ex. 14.

j. RIGHT OF REPLY.

Opening Facts for Defence—No Witnesses.]—Where the counsel for the defendant opens facts to the jury, and calls no witnesses to prove them, it is in the discretion of the judge to allow the plaintiff's counsel to reply. *Crerer* v. *Sodo*, M. & M. 85.

Where counsel for a defendant opens facts to the jury, but does not go into any evidence, the

counsel for the plaintiff has not an absolute right to reply, but it is in the discretion of the judge; the object of allowing a reply in such a case being that injustice should not be done by facts being improperly opened when the defendant's counsel has no intention of proving them. *Naish* v. *Brown*, 2 Car. & K. 219.

Legal Objection.]—Where a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply. *Arden* v. *Tucker*, 1 M. & Rob. 191.

Citing Case.]—If counsel for a defendant, in his address to the jury, cites a case, but calls no witness, the plaintiff's counsel has a right to observe on the case cited. *Power* v. *Barham*, 7 Car. & P. 356.

General Reply.]—A defendant is entitled to the general reply where the plaintiff, claiming by descent, proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff. *Goodtitle* d. *Revett* v. *Braham*, 4 Term Rep. 497.

Where, in an action between subjects, the crown interfered pro interesse suo, and undertook the defence of the cause, and witnesses were called on both sides, the plaintiff was allowed the general reply. *Rowe* v. *Brenton*, 3 M. & Ry. 305; 8 B. & C. 737.

The crown has, in all cases in the Exchequer, a right to a general reply. *Buckingham* (*Duke*) v. *Inland Revenue Commissioners*, 2 L., M. & P. 311.

k. DUTY AND POWERS OF JUDGE.

Direction to Jury.]—When there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of a judge is to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go. *Prudential Assurance Co.* v. *Edmonds*, 2 App. Cas. 487—H. L. (E.)

Whether Evidence to go to Jury.]—The question in all actions against infants for necessaries is one of mixed law and fact, the preliminary question being (as in all other cases) whether there is any evidence on which the jury could properly find for the party on whom the onus of proof lies. The judge (who must be supposed to know as well as a jury can know without evidence what is the usual and normal state of things, and whether any particular article is of such a description that it may be a necessary under such usual state of things) must determine, first, whether the case is such as to cast on the plaintiff the onus of proving that the articles in question are necessaries, and then whether there is any sufficient evidence for the jury to satisfy that onus; and if there is not, he ought to direct a nonsuit. *Ryder* v. *Wombwell*, 38 L. J., Ex. 8; L. R. 4 Ex. 32; 19 L. T. 491; 17 W. R. 167—Ex. Ch. S. P., *Ferrand* v. *Bingley Local Board*, 56 J. P. 277—C. A.

A nonsuit is proper, although there may be evidence to go to the jury, if the proof is such that the jury could not reasonably give a verdict for the plaintiff. *Hiddle* v. *National Fire Insurance Co. of New Zealand*, 65 L. J., P. C. 24; [1896] A. C. 372; 74 L. T. 204—P. C.

The modern rule as to a nonsuit is that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the onus of proof is imposed. *Giblin* v. *McMullen*, 5 Moore, P. C. (N.S.) 434; 38 L. J., P. C. 25; L. R. 2 P. C. 317; 21 L. T. 214; 17 W. R. 445.

If there is any evidence to support any count in a declaration, the judge will not nonsuit. *Harman* v. *Johnson*, 3 Car. & K. 272.

When a plaintiff has closed his evidence, and the judge is of opinion that there is no case to go to the jury, he ought to direct accordingly, giving leave, if necessary, for the plaintiff to move to enter a verdict in his favour. But it is erroneous under such circumstances to take a formal verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him should the court (to whom power is reserved to draw inferences of fact) be of opinion that on the facts the verdict ought to be so entered. *Daniel* v. *Metropolitan Ry.*, 40 L. J., C. P. 121; L. R. 5 H. L. 45; 24 L. T. 815; 20 W. R. 37.

Nonsuit on Plaintiff's Opening.]—A judge has no power to nonsuit a plaintiff on the opening statement of his counsel without his consent. *Fletcher* v. *L. & N. W. Ry.*, 61 L. J., Q. B. 24; [1892] 1 Q. B. 122; 65 L. T. 605; 40 W. R. 182—C. A. See *Edger* v. *Knapp*, 5 Man. & G. 753; 6 Scott (N.R.) 707; 1 D. & L. 73; 7 Jur. 583.

Nonsuit where Felony disclosed.]—When at a trial for a civil injury a plaintiff proves facts which may amount to a felony, it is nevertheless not the duty of the judge to nonsuit the plaintiff or to direct the jury that if they find that a felony has been committed by the defendant they must find against the plaintiff. *Wells* v. *Abrahams*, 41 L. J., Q. B. 306; L. R. 7 Q. B. 554; 26 L. T. 326; 20 W. R. 659.

In an action by a woman for assault, it appeared from her evidence that the assault amounted to a rape. The judge stated that he should direct a verdict for the defendant, on the ground either that a rape had been committed for which he had not been prosecuted, or that if the plaintiff had consented no assault had been committed. The plaintiff thereupon elected to be nonsuited:—Held, that the nonsuit was right. *Welloch* v. *Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur. (N.S.) 232; 7 L. T. 751. Cp. *Cases* sub tit. CRIMINAL LAW (FELONY).

Time for Nonsuit.]—A nonsuit may be directed even after the defendant has entered on his case, and evidence given by the latter may be used for the purpose of a nonsuit. *Giblin* v. *McMullen*, supra.

—— **Onus on Defendant.**]—When at the trial the issue was on the defendant, who accordingly began, the plaintiff, at the end of the defendant's case, claimed a verdict on the ground that there was not evidence to support the issue for the defendant. The judge refused to direct a verdict, but gave the plaintiff leave to move to enter one. The plaintiff then adduced evidence; and on the evidence which followed, the issue for the defendant was proved:—Held, that the plaintiff was

not entitled to enter a verdict, on the ground that there was no proof for the defendant at the close of his original case. *Allen* v. *Cary*, 7 El. & Bl. 463; 3 Jur. (N.S.) 1146.

Order in which Causes taken.]—Every cause in the list of the day should be considered by the parties as the first cause, it being within the jurisdiction of the presiding judge to take the causes in any order he may think most convenient. *Cottam* v. *Banks*, 1 B. C. Rep. 302; 11 Jur. 148. See *Fourdrinier* v. *Bradbury*, 3 B. & Ald. 328.

Hearing Defendant when Plaintiff's Case has failed.]—It is not the duty of a judge of first instance when the plaintiff's case has broken down to hear the defendant's case merely in order to put the defendant in a better position before the Court of Appeal. *Hammerton* v. *Honey*, 24 W. R. 603.

Note of Arrangement.]—A judge's note is conclusive evidence of an arrangement at nisi prius. *Bikker* v. *Beeston*, 29 L. J., Ex. 121.

Explaining Finding.]—When by agreement the jury was discharged, and the cause submitted to the decision of the judge:—Held, that on a motion for a new trial or to take a verdict for the plaintiff it was competent for the judge to explain to the court the reasons and precise meaning of his finding. *Chatterton* v. *Cave*, 47 L. J., C. P. 545; 3 App. Cas. 483; 38 L. T. 397; 26 W. R. 498—H. L. (E.)

Discharging Jury.]—*See* infra, col. 481.

Evidence and Witnesses.]—*See* EVIDENCE.

Advancing or Postponing Hearing.] — *See* supra, cols. 454 et seq.

l. THE JURY.

1. In Civil Cases.

a. *Exemptions.*

By 7 Will. 4 & 1 Vict. c. 34, s. 12, any officer in the service of the Post-office is exempt from serving on juries. *Atkinson, Ex parte*, 10 Bing. 399; 4 M. & Scott, 160; 2 D. P. C. 773; 3 L. J., C. P. 152.

The exemptions in the schedule to the Juries Act, 1870, apply to jurors summoned to serve upon coroners' inquests. *Reg.* v. *Dutton* or *Dutton, In re*, 61 L. J., Q. B. 190; [1892] 1 Q. B. 486; 66 L. T. 324; 40 W. R. 270; 56 J. P. 455.

b. *Jury Lists.*

Signing.]—A churchwarden, whose year of office has expired, continues in office where his successor has been elected, but has not been sworn, nor has made the substituted declaration, nor has done any act which would make him churchwarden de facto; and such churchwarden is therefore bound to sign the jury lists under 7 Geo. 4, c. 50, ss. 8, 9, and is liable to penalties under s. 45 for not having done so. *Bray* v. *Somer*, 2 B. & S. 374; 31 L. J., M. C. 135; 8 Jur. (N.S.) 716; 6 L. T. 49; 10 W. R. 354.

Improper Lists.]—The 6 Geo. 4, c. 50, s. 46, imposes penalties upon the sheriff or under-sheriff for an improper insertion or omission of names from the special jury list. In an action for such penalties, the declaration describing the defendant as being the acting under-sheriff, it was proved that he was the person who, in the county, acted as under-sheriff so far as receiving writs, making returns, and appearing in public; but that a Mr. T. was the appointed under-sheriff, pursuant to 3 & 4 Will. 4, c. 90, s. 5. The defendant on one occasion signed his name as under-sheriff, although he stated, at the same time, that he was not the under-sheriff, but that Mr. T. was, and in an affidavit had stated himself to be the acting under-sheriff:—Held, that there was no evidence of the defendant's liability, and that the plaintiff was properly nonsuited. *Williams* v. *Thomas*, 7 D. & L. 177; 4 Ex. 479; 19 L. J., Ex. 50.

Costs—Making out Jury Lists.]—A poor-law auditor was disallowed from overseers' accounts 4*s.* 6*d.* charged to the poor-rates for fees paid to a justices' clerk for notices and oath upon verification of the jury lists. These fees were allowed in the table of justices' clerks' fees sanctioned for the county by the Home Secretary under 11 & 12 Vict. c. 43, s. 30:—Held, that the overseers' duties in respect of the jury lists under 6 Geo. 4, c. 50, and 25 & 26 Vict. c. 107, were concluded upon the production at petty sessions; that these fees for the subsequent verification were not costs properly incurred by the officers of the parish in preparing and collecting the lists under 7 & 8 Vict. c. 101, s. 60; that the justices' clerk was not entitled to demand this amount; and that the disallowance was right. *Reg.* v. *Haslingfield*, 43 L. J., Q. B. 38; L. R. 9 Q. B. 203; 29 L. T. 801; 22 W. R. 260.

c. *Special Jury.*

i. How Obtained.

See Common Law Procedure Act, 1852, ss. 109, 110, and R. S. C., 1883, Ord. XXXVI. r. 7.

Before Common Law Procedure Act.]—Where a defendant cannot, without special application to a judge, have a rule for a special jury before issue joined, although being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for the special jury a sufficient number of days before trial. *Sayer* v. *Ducroix*, 9 Q. B. 800; 16 L. J., Q. B. 120.

The court has no power to grant a rule for a special jury before issue joined, even where, in consequence of the defendant's being under terms to take short notice of the trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial. *Dresser* v. *Norman*, 6 C. B. (N.S.) 427; 5 Jur. (N.S.) 1083.

The subject's right to try a case by a special jury is not affected by any suggestion of the attorney-general or solicitor-general, without affidavit that the crown is interested in the defendant's estate, though that suggestion would be sufficient to obtain a trial at bar. *Dunn* v. *Coe*, 16 M. & W. 439.

A defendant, upon certain terms favourable to the plaintiff, was allowed to have a special jury after the cause had stood for trial by a common jury during a whole sittings and had been twice postponed at the instance of the defendant. *Thorne* v. *Londonderry (Marquis)*, 8 Bing. 26; 1 M. & Scott, 62; 1 L. J., C. P. 46.

Discretion of Judge.]—The usual rule having been obtained for a special jury by the defendant, a judge at chambers, upon the statement of the plaintiff's attorney, without affidavit, ordered a special jury to be struck next day. The court refused to set aside that order as being irregular. *Joseph* v. *Perry*, 3 D. P. C. 699.

A judge having refused to grant a special jury at the instance of the defendant, though there had been no laches on his part, the court, in the absence of special grounds for so doing, declined to interfere with his discretion. *Smith* v. *London and St. Katharine Dock Co.*, L. R. 2 C. P. 630.

By whom summoned.]—Before 15 & 16 Vict. c. 76, s. 113, when a special jury had been moved for by a defendant, and struck and reduced, the plaintiff must have summoned the special jury, if they were not summoned by the defendant. *Montague* v. *Smith*, 17 Q. B. 688; 21 L. J., Q. B. 73.

Terms.]—In a scire facias by the trustees of a banking company, they having obtained a rule for a special jury, the court made them undertake to strike out of the list any who might be shareholders in the company. *Esdaile* v. *Lund*, 12 M. & W. 734; 1 D. & L. 990; 13 L. J., Ex. 191; 8 Jur. 385.

ii. Summoning and Non-attendance.

Sheriff's Fees.]—A sheriff is not entitled to fees from the party giving notice that a cause is to be tried by special jury, although the alteration of the system as to special juries has deprived the sheriff of the fees by which he formerly was remunerated by the party for summoning the special jurors. *Bennett* v. *Thompson*, 6 El. & Bl. 683; 2 Jur. (N.S.) 613; 4 W. R. 614.

Bribery as to Summoning.]—A summoning officer was fined 200*l.* for receiving money to excuse persons from serving on juries, and for too often summoning those who refused to pay. *Rex* v. *Whitaker*, Cowp. 752.

By whom summoned when Sheriff interested.]—Where, in a special jury case, upon a challenge to the array for unindifferency in the sheriff, the jury panel was quashed:—Held, that the proper course to obtain a trial of the cause was to direct new jury process to the coroner of the county at the instance of the prosecutor, but not without applying to the court specially for that purpose. *Rex* v. *Dolby*, 1 D. & R. 145, 311; 2 B. & C. 104; 24 R. R. 645, 647.

Trial by Common Jury.]—Before 15 & 16 Vict. c. 76, s. 113, a defendant obtained a rule for a special jury, which was struck and reduced, but the jurors were not summoned. Neither the defendant nor the jurors appearing when the cause was called on, it was tried as an undefended cause by a common jury:—Held, that the trial was irregular. *Haldane* v. *Beauclerk*, 6 D. & L. 642; 3 Ex. 658; 18 L. J., Ex. 227; 13 Jur. 326.

And when a cause was entered as a special jury cause, but was taken in the defendant's absence and tried by a common jury as an undefended cause, the court set aside the trial and verdict with costs. *Hague* v. *Hall*, 5 Man. & G. 693; 6 Scott (N.R.) 705.

Where a common jury panel was returned together with a special jury panel, and no special juryman appearing, the cause was tried by a common jury, the trial was set aside. *Holt* v. *Meddowcroft*, 4 M. & S. 467.

Where a defendant obtains a rule for a special jury (in a town cause), but omits to give notice to the sheriff that the cause is to be tried by a special jury, in the absence of a special jury the cause may be tried by a common jury. *Cawley* v. *Knowles*, 16 C. B. (N.S.) 107.

Fining for Non-attendance.]—*See* infra, col. 479.

iii. Effect of Delay.

Before 15 & 16 Vict. c. 76, s. 111, when a rule for a special jury (obtained in due time) had been obtained for delay, the proper application to the court was for a rule to shew cause why the cause should not be tried by a special jury, in its order, at the sitting for which the notice was given, if the defendant should then have one in attendance, and, in default thereof, then that the cause be tried by a common jury. *Gray* v. *Knight*, 16 C. B. 143.

The court will discharge a rule for a special jury where it has not been duly acted on, and appears to have been obtained for the purpose of delay. *Stanbury* v. *Gillett*, 9 Bing. 319; 2 M. & Scott, 397.

Or that the defendant has no real defence. *Bull* v. *Pinkus*, 5 Scott, 617; 2 Jur. 256.

If a defendant, for the purpose of delay, obtains a rule for a special jury, the court will permit him to have it tried by such jury, but will compel him to try it in its order, pursuant to the notice of trial, although on a day when the usual practice is not to take special juries. *Bush* v. *Pring*, 9 D. P. C. 188.

Where a defendant has admitted his liability as acceptor of a bill, but obtained a rule for a special jury, the court will order the cause to be tried in its ordinary course if it does not come on at the special jury sittings. *De Vere* v. *Wickers*, 11 Jur. 543.

Where after notice of trial the defendant obtained a rule for a special jury for the purpose of delay, and nominated but did not reduce the special jury, the court refused a rule nisi to discharge the rule for a special jury. *White* v. *Eastern Union Ry.*, 11 C. B. 875; 21 L. J., C. P. 112.

Where a cause was set down for trial at the first sittings in term, and a special jury rule was obtained by the defendant for the purpose of delay, the court granted a rule calling on him to shew cause, on the third day before the sittings, why the special jury rule should not be set aside on that day, unless he had previously nominated the jury. *Devanage* v. *Borthwick*, 2 L., M. & P. 277.

iv. Striking a Special Jury.

Mode of Striking.]—In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's book, but is to make a selection; and where he had made such selection impartially, the court refused to cancel the list of persons so selected. *Rex* v. *Wooler* 1 B. & Ald. 193; 18 R. R. 460.

Where a plaintiff moved to set aside a special jury panel, on the ground that twenty-six of the persons named therein were retail tradesmen,

and therefore not entitled to the addition of esquires, the court refused to interfere, as the affidavit did not negative the qualification of the jurors excepted to. *Fairman* v. *Ives*, 1 Chit. 85 ; 1 D. & R. 252 ; 5 B. & Ald. 642 ; 24 R. R. 514.

It is no ground of error either in fact or in law that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a tales prayed before 10 a.m., the time for which the special jurors were summoned, it not being competent to the party to aver anything that is inconsistent with the record. *Irwin* v. *Grey*, 19 C. B. (N.S.) 585 ; 34 L. J., C. P. 313 ; 11 Jur. (N.S.) 860 ; 12 L. T. 847 ; 13 W. R. 1043. Affirmed, 1 H. & R. 25 ; 35 L. J., C. P. 43 ; L. R. 1 C. P. 171 ; 12 Jur. (N.S.) 193 ; 13 L. T. 409 ; 14 W. R. 208—Ex. Ch. and in Dom. Proc. 36 L. J., C. P. 148 ; L. R. 2 H. L. 20 ; 16 L. T. 74 ; 15 W. R. 593.

v. Default of Jurors.

Tales.]—In a special jury cause, the plaintiff may have a tales without the consent of the defendant. *Gatliff* v. *Bourne*, 2 M. & Rob. 100.

A rule had been granted for a trial at bar, on the 6th December, 1847, by a special jury of the county of Middlesex. On the day appointed for trial only ten of the persons on the special jury panel appearing, the cause was adjourned until the next day, when only eleven appeared, and the cause remained untried for want of a jury. The plaintiff then moved for a writ of octo vel decem tales. The court granted the rule. *Buron* v. *Denman*, 1 Ex. 769 ; 12 Jur. 82.

On the trial of an action to recover a penalty for bribery, alleged to have been committed at the election of members of parliament for a borough, which was to be tried by a special jury, the attorney on each side had given to the associate a list of the names of certain common jurors whom he did not wish to be called if a tales was prayed, with the omission of which jurors and those who did not appear, there were not sufficient common jurors to make up a full jury when a tales had been prayed :—Held, that the case should not stand over, but that all the common jurors should be called over in the usual way, and that no challenge could be allowed except for cause. *Marsh* v. *Coppock*, 9 Car. & P. 480.

If an issue is directed by the Court of Chancery, to be tried by a special jury, and a full special jury does not attend, quære whether either party is entitled to pray a tales without the consent of the other party. *Wood* v. *Thompson*, Car. & M. 171 ; 5 Jur. 708.

If, after a special jury has been struck, the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed. *Rex* v. *Perry*, 5 Term Rep. 453. S. P., *Rex* v. *Franklin*, 5 Term Rep. 454, n.

vi. Costs—Certificate.

In what Cases Judge may grant.]—A defendant, who applied for a special jury, was not entitled to the costs of that jury where the judge who tried the cause nonsuited the plaintiff on his opening. *Wood* v. *Grimwood*, 10 B. & C. 689.

To an action of trespass, in which the declaration contained five counts, the defendant pleaded not guilty and not possessed, upon which issues were joined ; the plaintiff obtained a rule for a special jury. The defendant before the trial withdrew the pleas to the two last counts, and suffered judgment by default upon them. The cause was tried by a special jury, and the plaintiff obtained a verdict upon the general issue, but the defendant on the plea of not possessed to the three first counts ; and the damages were assessed at 40*s.* on the other counts. The judge certified for a special jury :—Held, that the plaintiff was not entitled to the costs of the special jury. *Walters* v. *Howells*, 8 Ex. 244 ; 22 L. J., Ex. 96 ; 1 W. R. 56.

But by 3 & 4 Will. 4, c. 42, s. 35, *the provision of the 6 Geo. 4, c. 50, and everything therein contained, is to apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him.*

The 24 Geo. 2, c. 18, s. 1, did not extend to a case where the record was withdrawn. *Clements* v. *George*, 11 Moore, 510 ; 4 L. J. (O.S.) C. P. 192.

When Judge must certify.]—An indictment removed into K. B. by the defendant, and made a special jury cause by the prosecutor, came on to be tried, and was immediately referred. The order of reference stated, that, if the arbitrator should be of opinion that the defendant was guilty and the prosecutor entitled to costs, the defendant agreed to pay the costs. The arbitrator did so find :—Held, that the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs, and the order of reference did not expressly give a power of doing so to the arbitrator. *Rex* v. *Moate*, 3 B. & Ad. 237 ; 1 L. J., K. B. 78.

In an action for infringement of a patent, the plaintiff after giving notice of trial abandoned the action. The defendant had obtained a rule for a special jury :—Held, that he was not entitled to the costs of the rule for a special jury, inasmuch as the 6 Geo. 4, c. 50, s. 34, makes the certificate of the judge universally a condition to entitle the party to those costs. *Greaves* v. *Eastern Counties Ry.*, 1 El. & El. 961 ; 28 L. J., Q. B. 290 ; 5 Jur. (N.S.) 733 ; 7 W. R. 453.

Where a special jury is summoned on the defendant's process, the plaintiff, if he succeeds, is entitled to the costs of it, without a certificate from the judge. *Jones* v. *Tobin*, 5 Scott, 440 ; 4 Bing. (N.C.) 123 ; 6 D. P. C. 251.

When Judge will certify.]—If a case is not gone into, the judge will not certify that it was a fit cause to be tried by a special jury merely because the declaration is for penalties to a very large amount, and because persons of considerable rank are called upon their subpœnas. *Orme* v. *Crockford*, 1 Car. & P. 537 ; 27 R. R. 719.

Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the judge refused to certify for a special jury. *Wemys* v. *Greenwood*, 2 Car. & P. 483.

Under 5 & 6 Will. 4, c. 50, s. 98, the court before whom an indictment for the non-repair of a highway is tried may certify for the costs of a special jury. *Reg.* v. *Pembridge*, 3 G. & D. 603 ; 3 Q. B. 901 ; 12 L. J., Q. B. 47.

The judge who tries a criminal proceeding may certify for the costs of a special jury under 6 Geo. 4, c. 50, ss. 30, 34. *Ib.*

In an action for calls, there was a plea that the calls were made for the purpose of raising capital for an illegal amalgamation, and the defendant

not appearing, the judge certified for a special jury, as the plea might have raised difficult questions of fact, fit for a special jury to try. *London Bank of Scotland* v. *Marshall*, 4 F. & F. 1046.

But where, to a similar action, the plea was only never indebted, a certificate for a special jury was refused. *Humber Iron Co.* v. *Jones*, 4 F. & F. 1047.

When Certificate must be given.]—The words in 6 Geo. 4, c. 50, s. 34, that the party who applies for a special jury shall pay the costs occasioned by it, unless the judge before whom the cause is tried "shall, immediately after the verdict, certify that the cause was a proper one to be tried by a special jury," must be understood to mean that the judge may give the certificate either at the conclusion of the trial, or within a reasonable time after it. *Christie* v. *Richardson*, 2 D. (N.S.) 503; 10 M. & W. 688; 12 L. J., Ex. 86; 6 Jur. 1069.

The judge cannot certify for the costs of a special jury on the day after the trial. *Waggett* v. *Shaw*, 3 Camp. 316.

At the trial of a probate action in January, 1890, the plaintiff obtained a verdict on every issue, including that of forgery. The judge had left the building at the time the verdict was given, and the following morning, upon the application of the plaintiff's counsel, he gave judgment in accordance with the findings of the jury, but counsel omitted to ask for a certificate for a special jury. Upon application, in April, 1890, for the certificate:—Held, that the application must be refused. *Webster* v. *Appleton*, 62 L. T. 704.

If the application is made on a day subsequent to the trial it is too late. *Dillon* v. *Caffrey*, Ir. R. 6 Eq. 363.

Where a judge, during the absence of the jury to consider their verdict, intimated his intention of certifying for a special jury, but, in consequence of the delivery of the verdict taking place while the judge was engaged with another cause, his signature to the indorsement made by the officer of the court was not then applied for, and was supplied some weeks afterwards:—Held, that this was not a "certifying under the judge's hand immediately after the verdict." *Grace* v. *Clinch*, 3 G. & D. 591; 4 Q. B. 606; 12 L. J., Q. B. 273; 7 Jur. 576.

At the trial of a cause in March, the jury returned a verdict for the defendant, and the judge, on application to him, stated his intention to certify for a special jury, but did not indorse on the record a certificate for that purpose. In Easter term a rule was obtained for a new trial, and in the next term the verdict was changed to a nonsuit. On the 15th August, the judge, by whom the cause was tried, indorsed on the record a certificate for a special jury:—Held, that this was too late, and the court set aside the certificate. *Leech* v. *Lamb*, 11 Ex. 437; 25 L. J., Ex. 17; 1 Jur. (N.S.) 1175; 4 W. R. 99.

An application for a certificate of the costs of a special jury ought to be made immediately after the verdict has been given. *Skipper* v. *Bodkin*, 2 Sw. & Tr. 1; 29 L. J., P. 133; 2 L. T. 636; 8 W. R. 589.

A cause came on for trial before Wilde, C.J., on the 13th December, 1848, when a verdict was taken for the plaintiff, subject to a special case. Upon the argument of the special case on the 11th June, 1850 (which was after the chief-justice had ceased to be a judge), the court directed a nonsuit. On the 12th September, the following indorsements were made upon the nisi prius record: "I certify that this was a fit and proper cause to be tried by a special jury. T. W."; "It was assented to at nisi prius, that, in the event of judgment being for the defendants, I should certify for the special jury, which I have accordingly done nunc pro tunc. Truro." The court refused to set aside the certificate, as being informal or too late. *Serrell* v. *Derbyshire Ry.*, 10 C. B. 910.

A cause having been set down for trial in Middlesex, and a rule obtained for a special jury, the parties agreed that the venue should be changed to London, and the cause tried by a special jury there, and that all costs occasioned by that arrangement should be costs in the cause. The cause came on for trial in London, and was referred to arbitration, the arbitrator to have the same power to certify as a judge at nisi prius. The award was made on the 6th August; and after the first four days of the following term, the arbitrator certified for a special jury:—Held, that the certificate was given too late. *Geeve* or *Geeves* v. *Gorton*, 3 D. & L. 481; 15 M. & W. 186; 15 L. J., Ex. 169; 10 Jur. 272.

Certificate—Construction of.]—If a defendant in replevin, which is made a special-jury cause, withdraws his avowries, and the judge directs him to pay "all costs," that will not include the costs of the special jury. *Bell* v. *Tainthorp*, 2 D. P. C. 518.

By whom Paid.]—Special jurors are to be paid by the party who moved for the special jury, though (to ensure a trial) the other party may have summoned them. *Wilson* v. *Butler*, 2 M. & Rob. 78.

Amount of Costs.]—Where the judge who tries a cause by a special jury certifies that it was a proper case for a special jury, the master must allow the full costs of the jury where the verdict is found for the defendant. *Broadrick* v. *Clark*, 12 Price, 154.

Where the judge certifies that the cause is proper for a special jury, the party is only entitled to the costs actually paid to the jury attending in court. *Cursum* v. *Durham*, 2 Chit. 154.

On Refusal to pray a Tales.]—A defendant obtained an order for a special jury, but when the trial came on sufficient special jurors were not present, and neither party prayed a tales. When the trial came on a second time, the defendant obtained a verdict. The practice under these circumstances is to allow the costs of the first trial to the successful party on the second. *Holmes* v. *Albright*, 25 L. T. 747.

d. *Challenge.*

Right of.]—The right of challenge against a juryman is a common law right, which cannot be taken away except by the express terms of a statute. *Barrett* v. *Long*, 3 H. L. Cas. 395.

Peremptorily.]—The right to challenge the jury, whether it is a common or a special jury, peremptorily and without cause, does not exist in civil actions. *Creed* v. *Fisher*, 9 Ex. 472; 23 L. J., Ex. 143; 18 Jur. 228; 2 W. R. 196.

Practice on.]—A challenge to the array, or to the polls, ought to be propounded in such a way at the trial as that it may be then put upon the nisi prius record, so that the other party may either demur or counter-plead, or deny the matter of challenge; and unless the challenges are so put on the record, the party is not in a condition as a matter of right to insist upon them. *Carmarthen Corporation* v. *Evans*, 10 M. & W. 274; 2 D. (N.S.) 296; 11 L. J., Ex. 394.

A challenge to the array must be formally tendered before the jury is sworn. *Brunskill* v. *Giles*, 2 M. & Scott, 41; 9 Bing. 13; 1 L. J., C. P. 143.

"Cause"—What is.]—On the trial of an action to recover a penalty for bribery alleged to have been committed at the election of members of parliament for a borough:—Held, that it was no cause of challenge that a juror was a tenant of a nobleman whose interest in the borough was supposed to be affected, or that he had been foreman of another jury which had tried another action between other parties for bribery alleged to have been committed at the same election. *Marsh* v. *Coppock*, 9 Car. & P. 480.

If alienage is a ground of challenge to a juror, the party who has an opportunity of making his challenge, and neglects it, cannot afterwards make the objection. *Rex* v. *Despard*, 2 M. & Ry. 406; 8 B. & C. 417; 6 L. J. (O.S.) M. C. 102.

Semble, that, since the 6 Geo. 4, c. 50, s. 27, alienage is not a ground even of challenge to a special juror. *Ib.*

In an action against an insurance office on a life policy, it is no objection to a special juror being sworn that he is a director of another insurance office, unless that office has granted a policy on the life in question, and the amount of that policy is unpaid. *Craig* v. *Fenn*, Car. & M. 43.

A juror cannot be challenged without cause; and it is no cause of challenge that, in a previous case, the juror has shewn some dissatisfaction with the law as laid down by the judge in favour of the party challenging. *Pearse* v. *Rogers*, 2 F. & F. 137.

e. *Fining.*

In what Cases.]—Where an issue was directed by a court of equity to be tried at bar by a special jury of a county in which the cause did not arise, the court fined those special jurors who did not attend, it being proved that they were duly summoned. *Layburn* v. *Crisp*, 8 Car. & P. 397.

Application to remit.]—The court will not hear counsel for a juryman who has been fined for contempt. *Carne* v. *Nicol*, 3 D. P. C. 115.

When remitted.]—A fine for not attending as a special juror at the Court of Common Pleas at Westminster having been imposed upon a gentleman having a house in London and in Brighthelmstone, but who had resided the twelve months preceding at Brighthelmstone, the court refused to remit it. *Clarges, Ex parte*, 1 Y. & J. 399; 30 R. R. 811.

But where the party summoned had let his house, and was abroad, which fact was communicated to the summoning officer, the court remitted the fine. *Ford, Ex parte*, 1 Y. & J. 401; 30 R. R. 812.

So likewise, where the summons had by mistake been left at a wrong house, the court remitted the fine, but required the affidavit of the summoning officer to that fact. *Brown, Ex parte*, 1 Y. & J. 401; 30 R. R. 812.

f. *View.*

In what Cases.]—The court cannot, even by consent, order a view in one county by a sheriff of another, neither can the court compel a jury to go out of the limits of a county for such a purpose. *Malins* v. *Dunraven (Lord)*, 9 Jur. 690.

An action for work and labour as a bricklayer before the Common Law Procedure Act, 1852, was not a case in which a side-bar rule for a view could be granted. *Stones* v. *Menhem*, 2 Ex. 382; 17 L. J., Ex. 215.

Effect of Trial before Jury—When viewed by Others.]—The defendants had obtained a rule for a view, which was accordingly had, but upon the trial coming on at the assizes all the viewers were impanelled and engaged in trying a cause in another court. As this, however, was the last cause on the list, the judge (against the consent of the defendant) determined upon trying it, and other jurors were impanelled instead of the viewers, and a verdict was returned for the plaintiff:—Held, that this was a mis-trial, and a rule for a new trial was accordingly made absolute. *Kingston Union* v. *Landed Estates Co.*, 28 L. T. 644.

Costs.]—The costs of a view cannot be allowed, unless the writ contains the name of a shewer appointed by the defendant as well as by the plaintiff. *Taylor* v. *Thompson*, 7 Bing. 403; 5 M. & P. 255; 1 D. P. C. 218; 9 L. J. (O.S.) C. P. 104.

g. *Withdrawing a Juror.*

Effect of.]—The withdrawing a juror by consent of the parties is no bar to a future suit on the same cause of action. *Sanderson* v. *Nestor*, R. & M. 402.

If a juror is withdrawn under the advice of counsel, and a second action brought for the same cause, the court will stay the proceedings, notwithstanding the belief of the attorneys on each side that such withdrawal would not operate as a termination of the suit. *Gibbs* v. *Ralph*, 14 M. & W. 804; 15 L. J., Ex. 7.

Withdrawing a juror does not necessarily put an end to the suit; whether it does so or not depends on the arrangement between the parties in the particular instance. *Bentley* v. *Dawes*, 10 Ex. 347; 23 L. J., Ex. 279; 18 Jur. 837. S. P., *Harries* v. *Thomas*, 2 M. & W. 32; 6 L. J., Ex. 58.

Agreement to withdraw Juror—Breach of Terms.]—At the trial of a cause the parties agreed that a juror should be withdrawn, and that the judge, instead of trying the issues, should examine the subject-matter of the dispute, and say what ought to be done by both or either party. A juror was accordingly withdrawn, and the judge undertook the matter, and was about to carry out the rest of the arrangement when the defendant refused to be bound by it:—Held, that the effect of such refusal was to set aside the arrangement, and to give the court therefore power to order the cause to be tried notwithstanding there had been such

withdrawal of a juror with the consent of both parties and without fraud on the part of the defendant. *Norburn* v. *Hilliam*, 39 L. J., C. P. 183; L. R. 5 C. P. 129; 22 L. T. 67; 18 W. R. 602.

The withdrawal of a juror upon terms is not necessarily the final determination of an action; and if there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the court before whom the case came for trial has jurisdiction to retry the action. *Thomas* v. *Exeter Flying Post Co.*, 56 L. J., Q. B. 313; 18 Q. B. D. 822; 56 L. T. 361; 35 W. R. 594.

h. *Discharge of Jury.*

Power of Judge.]—Judges may of their own authority discharge a jury, without any consent of the parties, either from finding any verdict at all, or from finding a verdict on any particular issues. *Powell* v. *Sonnett*, 1 Dow (N.S.), 56; 1 Bligh (N.S.) 545; 3 Bing. 381; 11 Moore, 330.

As where the jury cannot agree. *Ib.*

Where a jury cannot agree they may be discharged, if circumstances render it improper that they should continue to deliberate. *Dewar* v. *Purday*, 4 N. & M. 633; 2 A. & E. 166; 1 H. & W. 227; 4 L. J., K. B. 164.

Where the jury have found their verdict on all the material issues joined, the judge who tries the cause may, without the consent of the parties, discharge the jury from returning any verdict on issues that in his opinion are immaterial. *Rex* v. *Johnson*, 1 Macl. & R. 1; 6 N. & M. 870.

A court has power to discharge by consent a jury from giving a verdict upon any of the issues in an action. *Scott* v. *Bennett*, L. R. 5 H. L. 234; 20 W. R. 686.

If on the trial of an issue out of chancery the jury is locked up for many hours, and is not likely to agree when the judge is about to leave the town, the judge will discharge them of his own authority, if the parties decline consenting to their discharge; but if a jury is under such circumstances in a cause depending between party and party, semble, the judge would order the jury to follow him a cart. *Morris* v. *Davies*, 3 Car. & P. 427.

If the same special jurymen are struck to try several causes on the same question, and the court, being dissatisfied with the verdict in the first, directs it to abide the event of another cause, the court will also, on motion, discharge the same special jurymen from trying the second cause. *Doncaster Corporation* v. *Coe*, 3 Taunt. 404.

—— **Where several Issues, and Jury agree on some only.**]—Where there are several distinct issues to be tried in one action, it is competent to the judge, in his discretion, and without the consent of the parties, to accept the verdict of the jury upon those issues on which they are able to agree, and discharge them upon the others without invalidating the trial, leaving the parties, if they think fit, to take down the undecided issues to a new trial; and the court will give judgment on the decided issues, and has power, if asked, to send down the undecided issues to a new trial. *Marsh* v. *Isaacs*, 45 L. J., C. P. 505.

Effect of Discharge by Consent.]—Discharging a jury by consent does not terminate the suit, but is the same, in this respect, as withdrawing a juror; and where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the court stayed the proceedings, but would not grant the defendant his costs of the latter suit. *Everett* v. *Youells*, 3 B. & Ad. 349.

Presumption that Record correct.]—In the proceedings of a superior court everything is to be presumed in favour of the judgment of the court, and when, therefore, a jury has been discharged and the cause referred, and the record is silent as to consent, it must be assumed that the discharge took place by proper authority. *Scott* v. *Bennett*, L. R. 5 H. L. 234; 20 W. R. 686.

i. *Trial with or without Jury—See* supra, cols. 429 et seq.

j. *New Trial in case of Misconduct—See* infra col. 528.

k. *Costs of Actions tried by Jury—See* COSTS.

l. *Other Points.*

Affirmation.]—A special juror objected to being sworn, and stated that he was of the persuasion of a Quaker, but not a member of the Society of Friends. He was allowed to affirm. *Emmett* v. *Norton*, 8 Car. & P. 516.

Juryman giving Evidence.]—On the trial of an action on a bill of exchange, where the cause was undefended, one of the jury said that the stamp was a forgery, and called the attention of the judge to the fact:—Held, that the juryman must be sworn as a witness to give evidence to his brother-jurors, before they could act upon his opinion, and on his declining to be sworn, the judge directed the jury to find for the plaintiff. *Manley* v. *Shaw*, Car. & M. 361.

Entry in List.]—A cause being entered on the list at the assizes as a special jury case, and the special jury panel being annexed to the record, will be tried as a special jury case; at all events, if due notice has been given. *Mose* v. *St. Leonard's Gas Co.*, 4 F. & F. 324.

Maintaining a Jury.]—A private act, which provides for the expense of maintaining a jury, does not extend to a dinner given to them at a tavern, after they had delivered their verdict. *Forster* v. *Taylor*, 3 Camp. 49; 13 R. R. 748.

Too many Jurymen.]—At the trial of a cause by a special jury, it having been discovered during the examination of the first witness that there were thirteen jurors in the box, the judge offered to dismiss one, but the defendant's counsel refusing to consent, and it being impossible to ascertain which one of the jurors was sworn last, he discharged the jury, directed the special jurymen to be called over again, and tried the cause by the first twelve that answered:—Held, regular. *Muirhead* v. *Evans*, 2 L., M. & P. 294; 6 Ex. 447; 20 L. J., Ex. 211; 15 Jur. 385.

m. THE VERDICT.

See R. S. C. 1883, Ord. XXXVI. r. 41.

Finding of Jury conclusive.]—Where there is no appeal from the refusal of a new trial, the finding of the jury on the issues is conclusive.

Butters, Ex parte, Harrison, In re, 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876—C. A.

When a question of fact has been tried by a jury, the court cannot set aside or disregard the verdict, unless either there was no evidence to go to the jury or by reason of some matter of law or of some new fact the verdict has become immaterial to the decision of the case. *Morgan, Ex parte, Simpson, In re*, 45 L. J., Bk. 36; 2 Ch. D. 72; 34 L. T. 329; 24 W. R. 414.

Judgment given contrary to Finding.]—Under the Rules of the Supreme Court, 1875, the judge, after leaving a question to the jury, had no power to give judgment contrary to the finding of the jury on a question so left to them; where, therefore, this course had been adopted the court of appeal ordered a new trial. *Perkins* v. *Dangerfield*, 51 L. T. 535—C. A.

—— **Appeal.**]—Upon the trial of an action with a jury, at the conclusion of the plaintiff's case it was contended for the defendant that there was no evidence to go to the jury; the judge, however, left the case to the jury, and asked them to assess the damages. The jury found a verdict for the plaintiff, and assessed the damages. Upon further consideration the judge directed judgment to be entered for the defendant, on the ground that there was no evidence to go to the jury:—Held, that an appeal against the judgment must be brought to a divisional court, and not to the court of appeal. *Rocke* v. *McKerrow*, 59 L. J., Q. B. 146; 24 Q. B. D. 463; 62 L. T. 556; 38 W. R. 342—C. A. *But see now* 53 & 54 Vict. c. 44.

Contingent.]—Where a verdict is found for a defendant upon an issue which bars the action, the jury cannot assess contingent damages for the plaintiff without the assent of the defendant. *Newton* v. *Harland*, 1 Man. & G. 645.

Grounds of Verdict.]—The jury cannot be asked the grounds of their verdict. *Brown* v. *Bristol and Exeter Ry.*, 4 L. T. 830; 9 W. R. 872.

The judge will refuse to hear the grounds of a verdict, though the jury may desire to state them. *Horner* v. *Watson*, 6 Car. & P. 680.

If the jury state the particular evidence on which they find a fact, this is only surplusage, and will not vitiate the verdict. *Plunket* v. *Kingsland (Lord)*, 7 Bro. P. C. 404.

Entry of.]—The jury being directed that the evidence upon the first count was conflicting, but that upon the second count the plaintiff was entitled to a verdict, with at least 1*s.* damages, gave a verdict for 1*s.*, which the associate entered upon the postea as a general verdict. A question arising as to the taxation of costs in the third term after the trial:—Held, that the judge who presided might at any time direct the verdict to be entered according to the plain intention of the jury. *Ernest* v. *Browne*, 4 Bing. (N.C.) 162; 5 Scott, 491; 1 Arn. 2; 7 L. J., C. P. 145; 2 Jur. 34.

When it appears at the close of a plaintiff's case that there is no evidence against one or two or more defendants, it is entirely within the discretion of the judge whether he will then direct a verdict in his favour, or will wait till the whole evidence in the cause closes. *Purnell* v. *G. W. Ry.*, 34 L. T. 126.

If the plaintiff has evidently sustained some damages, and the jury being unable to ascertain the amount, finds a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages. *Feize* v. *Thompson*, 1 Taunt. 121.

Amendment of.]—Semble, English courts have no inherent power to amend the verdict of a jury, but they have to correct an erroneous entry of a verdict. And they have statutory powers to amend the postea. *Morgan* v. *Morris*, 6 W. R. 776.

—— **Erroneous Calculation.**]—Where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the court will not interfere to alter the amount of the verdict, on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation. *Hilton* v. *Fowler*, 5 D. P. C. 312.

In an undefended action on a mortgage deed, the plaintiff's counsel inadvertently took a verdict for the principal only, omitting to include the interest. The court refused to increase the verdict. *Baker* v. *Brown*, 2 M. & W. 199; 5 D. P. C. 313; 2 Gale, 223; 6 L. J., Ex. 11.

—— **Contrary to Evidence.**]—Upon the execution of a writ of inquiry in an action for dilapidations, two surveyors were called on each side; those called for the plaintiff estimated the dilapidations, the one at 119*l.* the other at 124*l.*; those called for the defendant estimated them, the one at 63*l.* 15*s.* the other at 68*l.*; the jury returned a verdict for 36*l.* 10*s.* The court ordered that the inquisition be set aside without costs, unless the defendant would consent to the verdict being entered for 63*l.* 15*s.* *Weeding* v. *Mason*, 2 C. B. (N.S.) 382.

Motion to Vary—Form of Order.]—On a motion to reduce damages, the court, on the application of the plaintiffs, made it part of the rule that the plaintiffs should be at liberty to sign judgment and issue execution for the whole amount of the damages, but they were not to levy more than the sum not objected to, and costs, until the court should order further. *Davey* v. *Phelps*, 2 Man. & G. 300; 2 Scott (N.R.) 564.

Where a rule nisi for reducing the damages is granted, execution should be stayed only in respect of the amount mentioned in the rule. *Bate* v. *Pane*, 13 Jur. 609.

A rule nisi having been granted to reduce the damages, the court allowed the plaintiff to enter up judgment and issue execution, for that part of the damages which was not objected to, on his electing to forego the rest. *Hellings* v. *Young*, 3 Scott, 170.

Duty of Solicitor when Jury retires.]—When the jury retires to consider their verdict, the attorneys of the parties ought to remain in court to hear it delivered. *Dauntley* v. *Hyde*, 6 Jur. 133.

Special Verdict.]—Upon a special verdict, the court of error cannot draw, from other statements contained therein, any inferences of facts necessary to the determination of the case; such facts must be expressly found one way or the other. *Tancred* v. *Christy*, 12 M. & W. 316.

Where a special case is reserved, the court cannot turn the special case into a special verdict,

unless there is a power expressly reserved for that purpose. *Canterbury (Archbishop)* v. *Robertson*, 2 D. P. C. 78.

The indorsement of the special finding of the jury made by the officer of the court on the back of the nisi prius record will not be treated by the court as the postea on the motion for a new trial, no application to have the facts found specially, and the finding stated on the record, having been made at the trial until after the jury had delivered their verdict. *Baird* v. *Hodges*, 18 L. J., Ex. 435.

—— **Form.**]—Direction as to the form of a special verdict. *Reg.* v. *Saddlers' Co.*, 30 L. J., Q. B. 186; 7 Jur. (N.S.) 138; 4 L. T. 54; 9 W. R. 281—Ex. Ch.

A special verdict must find the facts, and not consist of a mere statement of evidence. *Fryer* v. *Roe*, 12 C. B. 437. S. P., *Hubbard* v. *Johnstone*, 3 Taunt. 209.

In a special verdict, where it concludes generally, the whole case must appear upon the record. *Rex* v. *Aire and Calder Navigation*, 2 Term Rep. 666; 1 R. R. 579.

General Verdict—Power to give.]—It is the privilege of a jury to decline finding any other than a general verdict, though the judge requests them to give a special verdict. *Devizes Corporation* v. *Clark*, 3 A. & E. 506.

Postea Certificate or Record—Delivery of.]—Where goods have been taken under a fi. fa., and an issue is directed to try whether the goods were those of a third person, and the jury at the assizes finds for such person, who is plaintiff in the issue, the practice is for the associate to keep the nisi prius record till after the fourth day of the next term, unless the judge orders it to be immediately delivered up to the plaintiff's attorney, upon an application in the nature of an application for speedy execution. *Abbott* v. *Clarke*, 2 Car. & K. 209.

The plaintiff's attorney obtained the postea from the associate on the morning of the quarto die post, under the pretence of having it stamped, but instead thereof signed judgment immediately, and issued execution thereon: the court set aside the judgment and execution, and ordered that the associate should not in future deliver over the postea until the morning after the quarto die post. *Blanchenay* v. *Vandenbergh*, 3 Moore, 643.

—— **Who entitled to.**]—If a plaintiff recovers on any part of the record he is entitled to the postea. *Smith* v. *Edwards*, 4 D. P. C. 621.

In an action for injuring the plaintiff's house by removing the support of the defendant's, the latter pleaded, first, not guilty; secondly, a denial of the right to support; thirdly, payment of money into court and no damages ultra. The first issue was found for the plaintiff without damages, the last for the defendant, and the jury was discharged from any finding on the second:—Held, that as the record stood, the defendant was entitled to the postea, and that unless the judge amended it by inserting nominal damages on the first issue, a venire de novo must issue. *Grout* v. *Glasier*, 1 D. (N.S.) 58.

—— **Power of Court or Judge to amend.**]—At the trial of an action the jury found certain issues in favour of the plaintiff, and the judge reserved judgment. The verdict was entered as a general verdict for the plaintiff, but the judge notwithstanding the verdict gave judgment for the defendant. On an appeal by the plaintiff from the judgment, the court of appeal amended the record by entering the verdict for the plaintiff on the issues only, and affirmed the judgment. *Clack* v. *Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

To an action for 5*l.* 15*s.* 1¼*d.*, the defendant pleaded never indebted as to all but 3*l.* 10*s.*, and as to that sum a tender; the verdict was entered on the postea as a general verdict for 5*l.* 15*s.* 1¼d., and though apprised of the informality, the plaintiff signed judgment and taxed costs. The court allowed the postea to be amended, after writ of error brought, on payment of the costs as well of the application as of the writ of error. *Wallis* v. *Goddard*, 3 Scott (N.R.) 295; 2 Man. & G. 912.

The court has no jurisdiction to alter the entering of the verdict on the postea, where the judge who presided at the trial declines, on summons, so to do. *Newton* v. *Harland*, 1 Scott (N.R.) 503; 1 Man. & G. 958; 9 D. P. C. 65.

Where a party complains of an erroneous entry of a verdict on the postea, the proper course is to apply to the judge who tried the cause to amend the entry by his notes. *Ib.*

A judge may amend the entry of a verdict from memory, although he has no note either of the evidence or of his summing up to the jury. *Marianski* v. *Cairns*, 1 Macq. H. L. 212, 766.

But the Court of Queen's Bench refused to amend a verdict from the recollection of the judge who tried the cause. *Reg.* v. *Virrier*, 12 A. & E. 317; 4 P. & D. 161; 9 L. J., M. C. 120; 4 Jur. 628.

A party cannot introduce a new averment into a postea. The judge before whom a cause has been tried may direct a modification of the language of a postea, but the court will not interfere. *Doe* d. *Haxby* v. *Preston*, 5 D. & L. 7; 16 L. J., Q. B. 337.

A judge's direction as to the amendment of a postea cannot be questioned in a court of error, for there is no power to compel the production of his notes of the trial. *Sandford* v. *Allcock*, 10 M. & W. 689; 12 L. J., Ex. 40.

The court has no power to amend the postea, or review an amendment thereof made by the judge who tried the cause. *Daintry* v. *Brocklehurst*, 3 Ex. 691; 18 L. J., Ex. 347.

A general verdict was returned for the defendant. It was entered by order of the judge by mistake for the plaintiff. After the jury had been discharged they were recalled, the judge recollected what their verdict was, and from their statement found that a mistake had been made. The judge directed the postea to be amended:—Held, that he had power to order the amendment. *Baker* v. *Lawrence*, 22 L. T. 813; 18 W. R. 835.

When a plaintiff, pending demurrers to the declaration, takes the case down to trial, and obtains a general verdict, subject to leave to move to enter it for the defendant, and the court directs the verdict to be entered for the defendant on the counts demurred to, and also holds them bad, it is for the judge who tried the cause to settle the postea in accordance with the judgment of the court on the rule to enter the verdict. *Oxenham* v. *Smythe*, 3 F. & F. 85.

The plaintiff recovered one farthing damages,

by verdict on one of two counts; the defendant had a verdict on the second. In order that judgment might be pleaded puis darrein continuance in another action by the same plaintiff against a third party (suggested to be for an assault which was the subject of the first action), the defendant took out a summons to shew cause why the plaintiff should not sign judgment, or the defendant have the postea for the purpose of signing it. The plaintiff opposed the summons, and it was ordered that the postea should be delivered to the defendant. The defendant then signed judgment for the plaintiff on the first count, with a farthing damages, and for himself on the second count, with a remittance of his own costs. The court discharged a rule to shew cause why the judgment should not be set aside. *Taylor* v. *Nesfield*, 4 El. & Bl. 462; 24 L. J., Q. B. 126; 1 Jur. (N.S.) 309; 3 W. R. 163.

The court would not amend the entry of a verdict according to the notes of an arbitrator, on the ground that they had no power to compel such notes to be brought before them. *Scougall* v. *Campbell*, 1 Chit. 283.

By an order of reference, in an action for an injury to the plaintiff's reversion, by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim 500*l*., costs 40*s*., subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper, the arbitrator to have all the powers of the court or judge sitting at nisi prius, and the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator found all the issues in the action in favour of the plaintiff except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to one farthing; and he further ordered the defendant to pay the plaintiff 5*l*.:—Held, that the plaintiff was not, in the absence of a certificate under 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause, and the postea having been erroneously made up with the following assessment of damages and costs, "and the jury assess the claim of the plaintiff over and above his costs of suit to one farthing, *and for those costs* to 40*s*.," the court allowed it to be amended by striking out the words in italics. *Cooper* v. *Pegg*, 16 C. B. 264, 454; 24 L. J., C. P. 167; 3 W. R. 456.

Where the finding of the jury on two breaches of covenant is manifestly inconsistent, as appears by the postea, the judge who tried the case may amend the postea from his recollection or his notes after judgment has been entered up and error brought and argument thereon. *Bowers* v. *Nixon*, 12 Q. B. 546; 18 L. J., Q. B. 41; 13 Jur. 334—Ex. Ch.

A declaration contained a count for 139*l*., stated to be due on a judgment and account for 180*l*. rent. On the first count the pleadings led to an issue in law. To the second the defendant pleaded part payment, and issue being joined thereon, a jury was impannelled to try it, and to assess contingent damages on the issue in law. On the second issue there appeared to be a balance of 106*l*. due to the plaintiff. The jury found a general verdict for 139*l*. Afterwards the issue in law was decided in favour of the defendant:—Held, that the judge might amend the verdict by his notes, and direct it to be entered for the plaintiff, on the second count only, for 106*l*. *Ferguson* v. *Mahon*, 11 A. & E. 179; 3 P. & D. 143.

Where a verdict has been obtained in ejectment against A. and B., who defended for different parts of the premises in the declaration, the court, after setting aside the verdict as to A., refused to amend the postea, by confirming the verdict as against B. to those premises for which B. specifically defended. *Roe* d. *Blair* v. *Street*, 1 N. & M. 42; 2 A. & E. 329; 4 L. J., K. B. 67.

Where a general verdict has been given on two counts, one of which is bad, and it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only, the court will amend the verdict, by entering it on that count, though evidence was given applicable to the bad count also. *Williams* v. *Breedon*, 1 Bos. & P. 329.

Where a verdict was taken by consent on two counts, the court, on the application of the plaintiff, amended the postea by entering the verdict on one (to which the evidence applied), although the judge who presided declined to interfere. *Henley* v. *Lyme Regis Corporation*, 6 Bing. 100; 3 M. & P. 310; 7 L. J. (O.S.) C. P. 243.

Where a general verdict was given on a declaration, some of the counts of which were bad, the court amended the postea, by entering up judgment on a single count, after argument in error. *Richardson* v. *Mellish*, 3 Bing. 334; 11 Moore, 104; 4 L. J. (O.S.) C. P. 68. *S. C.*, nom. *Mellish* v. *Richardson*, 1 B. & C. 819.

Where a verdict was given, and judgment entered for a sum exceeding the damages laid, on error brought, the court allowed the plaintiff to amend the judgment and transcript in a term subsequent to that in which the judgment was signed, by entering a remittitur for the excess. *Usher* v. *Dansey*, 4 M. & S. 94.

So, the court permitted a plaintiff to enter a remittitur of the excess above the sum laid, on payment of the costs of the writ of error. *Pickwood* v. *Wright*, 1 H. Bl. 642.

Action against a sheriff for breaking into a house and taking goods. Pleas, not guilty, and a justification under a fi. fa. on a judgment recovered against the plaintiff. Replication, that after the sheriff entered and seized the goods, the plaintiff paid to the sheriff, who accepted, the amount of the moneys directed to be levied by the writ. New assignment, that the plaintiff brought his action for a trespass and seizure of his goods after such acceptance, and after the writ was so satisfied. Pleas to the new assignment, not guilty, and a denial of the sheriff's receipt of the money in satisfaction of the writ. The jury found for the plaintiff, damages 400*l*., and on the postea the damages were assessed "upon the premises aforesaid." After the case had been argued on a bill of exceptions to the ruling of the judge, he made an order that the postea should be amended by substituting in the assessment of damages the words, "on occasion of the trespasses above and within newly assigned":—Held, that the judge had jurisdiction to make the order for amending the postea. *Gregory* v. *Cotterell*, 5 El. & Bl. 581; 25 L. J., Q. B. 33; 2 Jur. (N.S.) 16; 4 W. R. 48—Ex. Ch.

—— **Application to amend.**]—An application to amend the postea should be made to the judge

who presided at nisi prius, and not to the court. *Smith* v. *Edge*, 33 L. J., Ex. 9.

—— **Time for Application.**]—The judge who presides at the trial may at any time direct the postea to be amended and the verdict to be entered according to the plain intention of the jury. *Ernest* v. *Browne*, 4 Bing. (N.C.) 162 ; 1 Arn. 2 ; 5 Scott, 491 ; 7 L. J., C. P. 145 ; 2 Jur. 34.

Even after final judgment, and a writ of error brought. *Doe* d. *Church* v. *Perkins*, 3 Term Rep. 749. S. P., *Newcomb* v. *Green*, 1 Wils. 33.

Time within which an application for rectifying the entry of a judgment upon a verdict may be applied for. *Marianski* v. *Cairns*, 1 Macq. H. L. 212, 766.

A declaration contained two counts : one upon a charter-party, the other for the hire of a ship. After the trial the judge, after hearing the parties, and referring to his notes, decided that the verdict should be entered on the postea for the plaintiff upon the first, and for the defendant upon the second count. The defendant subsequently brought error upon the first count, whereupon the Exchequer Chamber gave judgment in his favour. After such judgment, and six years having elapsed from the time of entering the verdict, the court, in their discretion, refused to allow the plaintiff to amend the postea by entering a verdict for him upon the second count, and for the defendant upon the first count. *Jackson* v. *Galloway*, 2 D. & L. 839 ; 1 C. B. 281 ; 14 L. J., C. P. 141 ; 9 Jur. 373.

—— **Grounds on which amended.**]—The court will not, at a distance of time after the trial, amend the postea by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson* v. *Williamson*, 2 Term Rep. 281.

But, in another case, a verdict which was improperly delivered by the mistake of the foreman, was set right, and the postea amended on the affidavits of the jury. *Cogan* v. *Ebden*, 1 Burr. 283 ; 2 Ld. Ken. 24.

The court refused to amend an order of nisi prius according to the terms contained in a paper signed by the counsel at the trial, the intention of the parties appearing from their subsequent acts to have been in favour of the terms of such order. *Pearman* v. *Carter*, 2 Chit. 29.

—— **Effect of, in Evidence.**]—The postea is evidence of a verdict for the sums indorsed, and is good evidence of a set-off to the extent of it. *Garland* v. *Scoones*, 2 Esp. 648.

In an action on an indemnity bond, the postea was held sufficient evidence in proof of an allegation in a replication, that the plaintiff was obliged to and did pay a sum of money, as and for the damages and costs recovered by the person against whose claims the obligor had become bound to protect the plaintiff ; where in consequence of an arrangement between the parties no judgment was ever entered up. *Harrap* v. *Bradshaw*, 9 Price, 359.

—— **Parol Evidence to explain.**]—A nisi prius record having been put in evidence, and there appearing to be two counts or distinct causes of action, and the verdict entered generally for the plaintiff, with 65*l.* damages, parol evidence is admissible to shew that the substantial damages were recovered on one count only. *Preston* v. *Peeke*, El., Bl. & El. 336 ; 27 L. J., Q. B. 424 ; 4 Jur. (N.S.) 613; 6 W. R. 591.

—— **Rule to Deliver up.**]—The court in banco did not grant a rule directing the associate to deliver up the postea in a cause, as he was an officer at nisi prius, the proper course being to take out a summons before the judge who tried the cause. *South Kensington Hotel Co.* v. *Braginton*, 14 L. T. 288.

n. NON-APPEARANCE OF PARTIES AT TRIAL.

See R. S. C. 1883, Ord. XXXVI. r. 31.

Of Plaintiff.]—When an action is called on for trial and the plaintiff does not appear, the defendant appearing is entitled to have judgment in his favour with costs, without proving that he has been served with notice of trial. *Cockle* v. *Joyce* (infra), not followed. *James* v. *Crow*, 47 L. J., Ch. 200 ; 7 Ch. D. 410 ; 37 L. T. 749 ; 26 W. R. 236.

Where the plaintiff does not appear at the trial the defendant is entitled to judgment dismissing the action with costs. *Farrell* v. *Wale*, 36 L. T. 95.

A plaintiff having become bankrupt, and no notice to the trustee having been shown, the court refused to give judgment for the defendant, and ordered the action to be struck out. *Eldridge* v. *Burgess*, 47 L. J., Ch. 342 ; 7 Ch. D. 411 ; 38 L. T. 232 ; 26 W. R. 435.

When an action is called on for trial and the plaintiff fails to appear, the defendant is entitled to have the action dismissed with costs, without proving that he has received notice of trial. *Palmer, In re, Skipper* v. *Skipper*, 49 L. T. 553 ; 32 W. R. 83.

A plaintiff not appearing at the trial the action was dismissed with costs. Subsequently, the plaintiff's counsel explaining that his absence was caused by accident, it was restored to the list. *Cockle* v. *Joyce*, 47 L. J., Ch. 543 ; 7 Ch. D. 56 ; 37 L. T. 428 ; 26 W. R. 59. *But see* supra.

—— **Judgment, Form of.**]—Where a plaintiff does not appear at the trial of an action the proper judgment to be given under Ord. XXXVI. r. 32, of the Rules of the Supreme Court, 1883, is a judgment dismissing the action, and not a judgment for the defendant. *Armour* v. *Bate*, 60 L. J., Q. B. 433 ; [1891] 2 Q. B. 233 ; 65 L. T. 137 ; 39 W. R. 546—C. A.

At the trial of an action twelve of the plaintiffs did not attend, and no evidence was given on their behalf. An adjournment was asked for but refused, as there was no evidence as to the reason of their absence. Judgment with costs was given for those who had appeared and given evidence, and the action was dismissed with costs as to those who had not attended. The latter appealed :—Held, that the judgment as to these plaintiffs must be varied by making it without prejudice to their bringing a fresh action. *Arnison* v. *Smith*, 41 Ch. D. 348 ; 61 L. T. 63 ; 37 W. R. 739—C. A.

Of Defendant.]—Where the defendant does not appear at the trial to obtain judgment the plaintiff must prove that notice of trial has been given. *Cockshott* v. *London General Cab Co.*, 47 L. J., Ch. 126 ; 26 W. R. 31.

Semble, that when a defendant does not appear at the trial, it is not necessary for the plaintiff to prove service of notice of trial. *Chorlton* v. *Dickie*, 49 L. J., Ch. 40 ; 13 Ch. D. 160 ; 41 L. T. 467 ; 28 W. R. 228.

Action to enforce specific performance by the purchaser of an open contract to purchase leaseholds. Defendant had paid a deposit and accepted the title, but failed to complete. By his pleading the defendant admitted that he was unwilling to complete. At the trial (the defendant not appearing) the plaintiff asked for judgment for rescission and forfeiture of the deposit :—Held, that the plaintiff was entitled to judgment for specific performance as claimed by his pleadings, but not for rescission and forfeiture. *Stone* v. *Smith*, 56 L. J., Ch. 871 ; 35 Ch. D. 188 ; 56 L. T. 333 ; 35 W. R. 545.

—— **Duty of Plaintiff.**]—The defendant not appearing at the hearing, the plaintiff is to take such decree as he can abide by. *Meskill* v. *Dunworth*, 4 Ir. Eq. R. 681.

Where a defendant makes default at the hearing, the plaintiff must take such decree as by the pleadings and evidence he may be entitled to. *Browne* v. *Smith*, 5 Jur. 1195.

The plaintiff filed a traversing order. The defendant afterwards made default in appearing at the hearing :—Held, first, that the plaintiff was not entitled to take, as of course, such decree as he could abide by, but must go through his case and take such decree as to the court might appear just ; and, secondly, that service of the traversing order must be proved by affidavit. *Evans* v. *Williams*, 6 Beav. 118.

On a rehearing, if the defendant does not appear the plaintiff must take such decree as he can abide by. *M'Cann* v. *O'Connor*, 2 Dr. & War. 42.

A declaration, being the act of the court, cannot be introduced into a decree taken by the plaintiff in the absence of the defendant, which decree must be such as the plaintiff can abide by at his own peril. In a creditors' suit the defendant did not appear at the hearing, and the counsel for the plaintiff introduced into the minutes of the decree a declaration that the defendant had notice of the plaintiff's bond, which was admitted by the answer. The declaration was irregular, the plaintiff being entitled only to the common decree in a creditors' suit. *Jennings* v. *Simpson*, 1 Keen, 404 ; 6 L. J., Ch. 234.

Since the 44th General Order of August, 1841, which directs that the decree against a defendant who makes default at the hearing shall be absolute in the first instance, without giving him a day to shew cause, the practice has been, notwithstanding the default of the defendant, to hear the cause, and make such a decree as the plaintiff upon the pleadings and evidence is entitled to, and not, as theretofore, to allow the plaintiff to take such a decree as he can abide by. *Hakewell* v. *Webber*, 9 Hare, 541.

The plaintiff is not entitled, as of course, to a decree for an account, when the defendant does not appear ; but he must make out his case. *Hayes* v. *Brierley*, 2 Con. & L. 153 ; 3 Dr. & War. 274.

—— **Counterclaim.**]—Solicitors brought an action against their client for the amount of their bill of costs delivered shortly before the commencement of the action. The defendant denied the retainer, alleged negligence, and counterclaimed for damages on the ground of negligence. At the trial the defendant did not appear, and the plaintiffs proved their case :—Held, that the plaintiffs were entitled to have the counterclaim dismissed with costs, and to have judgment for the amount to be certified on taxation under the Solicitors Act, 1843, with costs of the action up to and including the hearing. *Lumley* v. *Brookes*, 58 L. J., Ch. 494 ; 41 Ch. D. 323 ; 61 L. T. 172 ; 37 W. R. 454—C. A.

Of Plaintiff and Defendant—Costs.]—A defendant is not entitled to move for the costs of not proceeding to trial, in a case where, owing to the absence of both the plaintiff and the defendant at the trial, the cause was struck out ; the defendant, under those circumstances, being the party in fault. *Morgan* v. *Fernyhough*, 11 Ex. 205 ; 25 L. J., Ex. 52 ; 1 Jur. (N.S.) 688 ; 3 W. R. 551.

Judgment by Default—Appeal or Application to Rehear.]—Although the court of appeal has jurisdiction to hear a direct appeal from a judgment by default, such appeals will not be encouraged. The proper course for a party against whom judgment has been given by default is to apply to the judge who heard the cause to set aside the judgment and to rehear the cause. *Vint* v. *Hudspith*, 54 L. J., Ch. 844 ; 29 Ch. D. 322 ; 52 L. T. 741 ; 33 W. R. 738—C. A.

Application to restore to List—Time for.]—An action coming on for trial on the 30th July, was dismissed with costs in consequence of the plaintiff not appearing at the trial. On the 31st October a motion was made to discharge the previous order, and to restore the case to the paper to be heard on the merits :—Held, that the court had no power to restore the action except when the application is made within six days of the dismissal. *Walter* or *Walker* v. *James*, 53 L. T. 597 ; 34 W. R. 29.

Where an application to set aside a judgment obtained against a party on his non-appearance at the trial is made after the time limited for so doing has expired, it is not necessary to first make a substantive application for an extension of time, but the notice of motion should show that the application is out of time. Rule 21 of Ord. XXXIII. of the Chancery of Lancaster Rules, 1884, which provides that an application to set aside a judgment obtained where one party does not appear at the trial must be made "within six days after the trial, or at next sitting of the court," does not give an option to the party against whom judgment has been given to move either within the time named (whether a court sits or not), or at the next following sittings ; but means that the application is to be made within six days, if the court is then sitting, and if it does not sit within the six days, the next time it does sit. *Bradshaw* v. *Warlow*, 55 L. J., Ch. 852 ; 32 Ch. D. 403 ; 54 L. T. 438 ; 34 W. R. 557—C. A.

—— **Terms.**]—In ejectment, entered at the assizes, the defendant not appearing when the cause was called on for trial, the plaintiff's counsel at once took a verdict, immediately after which the defendant's counsel came into court, strictly in time (by the clocks of the assize town), and ready to try, which the plaintiff's attorney refused to consent to ; the court let the defendant in to try without terms. *Curtis* v. *Marsh*, 3 H. & N. 866 ; 28 L. J., Ex. 36 ; 4 Jur. (N.S.) 1112.

When a plaintiff at the assizes is compelled to

withdraw his record on account of the non-arrival of his witnesses by the time his cause is called on, a judge will allow the record to be re-entered on the arrival of the witness, unless it is shewn by affidavit for the defendant that his witnesses have been dismissed. *Lean* v. *Smith*, 2 M. & Rob. 126.

The court will, under some circumstances, restore a cause to its place in the paper, which has been tried out of its turn in the day's list under the supposition that it was undefended, it appearing that counsel had been instructed for the defendant. *Dorrien* v. *Howell*, 8 Scott, 508; 4 Jur. 195.

When a judgment obtained on default of appearance at the trial was set aside, the defaulting party was ordered to pay the costs of the day when the action was called on, and of the application to restore. *Cockle* v. *Joyce*, 47 L. J., Ch. 543; 7 Ch. D. 56; 37 L. T. 428; 26 W. R. 59.

Where a defendant had instructed a solicitor to enter appearance and defend an action, and the solicitor, after entering appearance, neglected the action and allowed it to come to trial without communicating with the defendant, or appearing, or instructing counsel to appear at the trial, and the defendant did not ascertain that the action had been tried and judgment recovered against him with costs until more than six days after the trial, he personally having been guilty of no negligence and having made an application for enlargement of the time within six days of his having heard that the trial had taken place, the court granted an extension of the time to enable him to apply to set aside the judgment. *Michell* v. *Wilson*, 25 W. R. 380.

A defendant obtained an order to set aside a judgment which had been entered against him in default, with liberty to appear and defend the action, upon terms of paying to the plaintiff all his costs of the action subsequent to delivery of the statement of claim. *Williams* v. *Brisco*, 29 W. R. 713.

When through a mere mistake or slip either party to an action does not appear on its being called on for trial, and judgment is given in default of appearance, and an application to restore the action is made within due time, it is a matter of course to restore the action on the applicant paying all the costs of the day. *Burgoine* v. *Taylor*, 47 L. J., Ch. 542; 9 Ch. D. 1; 38 L. T. 438; 26 W. R. 568—C. A.

When a plaintiff, against whom judgment by default had been given, applied to have the judgment set aside and the action restored to the trial list on the ground that his solicitor, acting under a belief that the action was some way down in the cause list, and that negotiations which were then going on would result in a settlement of the action, had deferred instructing counsel to appear:—Held, that the circumstances were sufficient to justify the court in setting aside the judgment and restoring the action to the list, on the payment by the plaintiff of the costs of the day and of the application. *Wright* v. *Clifford*, 47 L. J., Ch. 543; 26 W. R. 369.

A plaintiff, being unready to proceed with the trial of his action when it came on unexpectedly, applied for a postponement, and upon its being refused let judgment go by default. A divisional court refused to set aside the judgment; but the court of appeal, upon fresh materials offering a reasonable explanation of the plaintiff's unreadiness, set aside the judgment and ordered the action to be restored to the list on his paying the costs of the day, including all costs thrown away, and the costs of the applications both to the divisional court and to the court of appeal. *King* v. *Sandeman*, 38 L. T. 461; 26 W. R. 569—C. A.

Decree on default setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the actual rent: rehearing permitted on paying costs, not disturbing proceedings before the master to the draft of a report of what was due, but the money not to be paid into court before the report made; petition, not motion, the proper application. *Att.-Gen.* v. *Brooke*, 18 Ves. 319.

After the order, permitting the defendant to rehear the decree made on his default, setting aside the charity lease, and directing an account of the rents; he was ordered to give security for the sum reported due. *Att.-Gen.* v. *Brooke*, 18 Ves. 496.

Where the bill had been dismissed in the absence of the plaintiff's solicitor, allowed under the circumstances to be set down again to be heard, upon payment of costs by the plaintiff. *Hale* v. *Lewis*, 2 Keen, 318.

A bill having been dismissed with costs, owing to the plaintiff's solicitor having neglected to instruct counsel or deliver papers, the cause was, on motion supported by affidavit, under the circumstances ordered to be restored upon payment of costs by the plaintiff's solicitor. *Birch* v. *Williams*, 24 W. R. 700.

—— **On what Grounds.**] — Where a cause which was set down for the purpose of taking the bill pro confesso, against an absconded defendant, had been struck out on account of the absence of counsel, the court permitted it to be restored on the application of plaintiff alone. *Harvey* v. *Renon*, 12 Jur. 445.

In equity, where a party shows upon affidavit that he was surprised by a cause being in the paper on a particular day, and being disposed of in his absence, the court, upon motion, will restore it to the paper to be heard, and a petition is not necessary for that purpose. *Rowley* v. *Carter*, 1 Y. & J. 511.

Plaintiff, an executor, did not appear at the hearing; and upon proof of service of the subpœna to hear judgment the bill was dismissed with costs. An application to restore the cause to the paper, on the ground that the plaintiff had, seven months previously, become bankrupt, and believed that his rights passed to the assignees, which was not the fact, refused with costs. *Frost* v. *Hilton*, 15 Beav. 432.

A decree was taken by default in consequence of the negligence of the clerk of the defendant's solicitor. The court refused to restore the cause. *Flower* v. *Gedge*, 23 Beav. 449.

Cause set down again for hearing on further directions, on the petition of defendants out of the jurisdiction at the first hearing, who subsequently appeared, in order to enable them to appeal from the decree. *Prendergast* v. *Lushington*, 5 Hare, 177. *And see Cases* supra.

o. Short Cause.

1. In General.

See R. S. C. 1883, Ord. XL. r. 1.

A motion for a decree in a fit case may be set down for hearing as a short cause. *Ames* v. *Ames*, 10 Hare (App.) lxxv. See also *Drew* v. *Long*, 17 Jur. 173.

A cause ought not to be set down as a short cause if it will take more than ten minutes. *Anon.*, 17 Jur. 435.

A cause ought not to be transferred from the long to the short cause list, when it involves a decision of any point requiring argument. *Kane* v. *Johnson*, 1 Ir. Eq. R. 279.

Where a cause has been set down as a short cause without the order of the court, and is afterwards struck out, the defendants will have the costs, unless they had concurred in its being so set down. *Mellish* v. *Brooks*, C. P. Coop. 474.

Where, in a suit for foreclosure of an estate charged with an original loan to the mortgagee, and as a further security on a mortgage of other lands, the court considered that it might have been set down as a short cause, the plaintiff held entitled to the costs of the motion. *Aldworth* v. *Robinson*, 2 Beav. 287.

In an administration suit pending at the commencement of the judicature acts, the defendant had put in his answer, but no further proceedings had been taken. It was desired by the plaintiff and defendant that the cause should be heard as short. The acts make no express provision for hearing of short causes. The court directed that the plaintiff should set down the cause on motion for judgment in the same way as provided by the Judicature Act, Ord. XXIX. r. 10, when the defendant had made default in delivering his defence. *Palin* v. *Brookes*, 33 L. T. 322; 24 W. R. 20.

A plaintiff, upon the defendant dispensing with a statement of claim, set down his action as a short cause, and moved for judgment according to prepared minutes. Upon the defendant objecting that the action must be brought to trial, it was ordered that the action be placed in the general non-witness list. *Wilmott* v. *Young*, 44 L. T. 331; 29 W. R. 413.

Delivery of Statement of Claim.]—When an action by cestuis que trustent under a will against executors and devisees in trust, for administration of the real and personal estate of the testator, was to be heard as a short cause, the court considered it unnecessary for the plaintiff to deliver a statement of claim. *Green* v. *Coleby*, 45 L. J., Ch. 303; 1 Ch. D. 693; 24 W. R. 246.

When an action is brought by a legatee for the administration of the estate of his testator, and it is desired to take judgment short in the first instance, a statement of claim should be delivered. *Breton* v. *Mockett*, 33 L. T. 684.

Cause List.]—Under the chancery regulations made in 1876, motions for judgments in actions are entered in the cause-book, and if marked "short" will be placed in the paper "on the first short cause day after the day for which notice has been given":—Held, that this means "the first short cause day available after the giving of the notice." *Green* v. *Moore*, 39 W. R. 421.

Motion for a decree under the 15 & 16 Vict. c. 86, must take its turn in the cause list. *Drew* v. *Long*, 17 Jur. 173; 1 W. R. 207.

2. Consent or Certificate of Counsel.

Bill of foreclosure cannot be set down as a short cause, except by consent. *Rashleigh* v. *Dayman*, 2 Madd. 147.

The court will not order a foreclosure suit to be advanced and heard as a short cause, without the defendant's consent. *Lewin* v. *Moline*, 1 Beav. 99; 8 L. J., Ch. 96.

Cause may be set down to be heard as a short cause, without motion, on consent; but, if the defendant do not consent, a motion, with certificate of counsel that the cause is proper to be set down, is necessary. *Rankin* v. *Moore*, 1 Jur. 525.

The court will not order a cause to be heard as a short cause, although the plaintiff and all the defendants but one consent to its being so heard. *Ker* v. *Cusac*, 7 Sim. 521; 6 L. J., Ch. 326; 1 Jur. 494.

A plaintiff setting down his cause as short, without the consent of the defendant, is bound to give notice to the defendant that he has done so; and in the absence of proof of such notice a decree cannot be made in a short cause against a defendant who does not appear. *Molesworth* v. *Snead*, 2 N. R. 512; 32 L. J., Ch. 709; 11 W. R. 934.

A cause, upon the counsel for the plaintiff undertaking to certify that it was proper to be heard as a short cause, was directed to be put in the next paper of short causes without the concurrence of the defendant's solicitor. Inexpediency of the rule requiring such concurrence, where it is withheld merely for the purpose of delaying the taking of accounts to the master's office. *Mountford* v. *Cooper*, 1 Keen, 464.

When on a motion to hear a cause as a short cause, on the certificate of counsel, the opposite counsel certifies that it is not a proper cause to hear as a short cause, the court will not permit any discussion on the point, but will at once refuse the application. *Reeves* v. *Gill*, 2 Keen, 671; 6 L. J., Ch. 302.

The practice at the rolls as to short causes is this, that when a cause is ready for hearing it may be set down as a short cause on the certificate of the plaintiff's counsel, and the consent of the defendant's solicitor. A cause may also be set down as a short cause, on the motion either of the plaintiff or defendant, on his counsel's certificate of its propriety, provided the counsel for the opposite party declines to state that he considers the cause not to be a short cause. *Hutchinson* v. *Stephens*, 1 Keen, 659; 2 Myl. & C. 452; 6 L. J., Ch. 296; 1 Jur. 524.

A different practice prevails in the vice-chancellor's court, where a cause can only be set down as a short cause on the certificate of the plaintiff's counsel and the consent of the defendant's solicitor. *Ib.*

A cause cannot be set down to be heard as a short cause on certificate merely, if the defendant object to its being set down. In such a case, the proper course is to have it set down by order. *Turner* v. *Turner*, 2 Jur. 127.

The court will, under circumstances, dispense with the usual certificate of counsel that a cause is proper to be heard as a short cause *Hargraves* v. *White*, 22 L. J., Ch. 640; 17 Jur. 436.

The court will advance a special case to be heard on a short cause day, on the statement by counsel of facts shewing that it is important that the case should be disposed of shortly, and his representation that the hearing will not take more than ten minutes. *Wood* v. *Wood*, 19 W. R. 972. But see *Anon.*, 1 W. R. 10; *Dole* v. *Atkinson*, 3 Jur. (N.S.) 41.

The court laid down the following rule for

hearing short causes:—The certificate of plaintiff's counsel is a primâ facie ground for setting down the cause. The defendant, who has not consented, may appear, and if he can shew any fair reason why it should not be heard as a short cause, it will go into the general list; but otherwise it will be heard without the defendant's consent as a short cause. *Felstead* v. *Gray*, L. R. 18 Eq. 92.

XII. NEW TRIAL.

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a. In what Cases.

In Penal Actions.]—The court has authority to, and will, grant a new trial in a penal action, though the verdict is for the defendant, where the court is satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands. *Att.-Gen.* v. *Rogers*, 11 M. & W. 670; 2 D. (N.S.) 1037; 12 L. J., Ex. 395; 7 Jur. 704.

It is a settled rule of practice, that a rule nisi for a new trial is not granted on the ground of the verdict being against the evidence in an action on a penal statute where the defendant has obtained the verdict. *Hall* v. *Green*, 9 Ex. 247; 2 C. L. R. 427; 23 L. J., M. C. 15. S. P., *Gough* v. *Hardman*, 6 Jur. (N.S.) 402.

The court will grant a new trial in a penal action, on account of a mistake or misdirection of the judge. *Wilson* v. *Rastall*, 4 Term Rep. 753; 2 R. R. 515. S. P., *Calcraft* v. *Gibbs*, 5 Term Rep. 19. And see *Rex* v. *Russell*, 6 B. & C. 566; 9 D. & R. 566; 5 L. J. (O.S.) M. C. 80; 30 R. R. 432.

But not for any other cause. *Brooke* v. *Middleton*, 10 East, 268; 1 Camp. 450.

After a verdict for the defendant in a penal action, the court will not grant a new trial, where the verdict was contrary to the judge's direction, and founded on a mistake, if there has been no misconduct in the jury. *Ranston* v. *Etteridge*, 2 Chit. 273.

In Replevin.]—Where, in replevin, the plaintiff obtained a verdict, with damages 4*l.* 4*s.*, the court refused to grant a new trial, which was moved for on the ground that the verdict was against evidence, although it was insisted that the rule, as to trifling damages, could not apply to an action of this nature. *Brown* v. *Ray*, 9 Moore, 583.

In replevin, when the verdict is for the plaintiff, the court will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs. *Parry* v. *Duncan*, 7 Bing. 243; 5 M. & P. 19; M. & M. 533; 9 L. J. (O.S.) C. P. 83.

Interpleader Issue.]—Granting a new trial on the ground of the verdict being against evidence applies to interpleader issues. *Janes* v. *Whitbread*, 2 L. M. & P. 407; 11 C. B. 406; 20 L. J., C. P. 217; 15 Jur. 612.

—— **Application to what Court.**]—Under the Rules of 1883, Ord. LVII., r. 11, where an interpleader issue has been tried by a jury, and judgment given according to their finding by the presiding judge, application for a new trial must be made to the court of appeal and not to the divisional court. *Burstall* v. *Bryant*, 12 Q. B. D. 103; 49 L. T. 712; 32 W. R. 495; 48 J. P. 119. *But see next Case.*

Where a party desires to obtain a new trial in an interpleader issue, the application must be made to a divisional court. If, in such a case, it is desired both to move for a new trial, and also to appeal, under Ord. XL., r. 5, both applications must be made in interpleader as in other cases, in the first instance, to a divisional court, from the judgment of which an appeal lies to the court of appeal. *Robinson* v. *Tucker*, 53 L. J., Q. B. 317; 14 Q. B. D. 371; 50 L. T. 380; 32 W. R. 697—C. A.

Seduction.]—In actions for seduction and cases of that description, the court will be careful not to grant a new trial, unless they feel that the interests of justice require it. *Walker* v. *Entwisle*, 1 L. T. 553.

Ejectment.]—A new trial will not be granted in an action for mesne profits after a recovery in ejectment. *Holdfast* v. *Morris*, 2 Wils. 115.

Writ of Inquiry—Application to what Court.]—Where, in an action in the high court to recover damages, the defendant does not appear, and a writ of inquiry issues to the sheriff to assess damages with a jury, if either party desires to question the assessment of damages the motion for a new writ of inquiry must be made to the court of appeal, under s. 1 of the Judicature Act, 1890, and not to the Queen's Bench Division. *William Radam's Microbe Killer Co.* v. *Leather*, 61 L. J., Q. B. 38; [1892] 1 Q. B. 85; 65 L. T. 604; 40 W. R. 83—C. A.

Trial before Official Referee—To what Court.]—Where there has been a trial before an official referee, a motion for a new trial must be made

in the Queen's Bench Division, and not in the court of appeal. *Gower* v. *Tobitt*, 39 W. R. 193—C. A.

Compensation for Lands taken—Issue.]—The court has no power to grant a new trial of an issue directed under s. 41 of the Regulation of Railways Act, 1868, to determine the right of compensation for lands taken for the purposes of a railway. *Birmingham Land Co.* v. *L. & N. W. Ry.*, 58 L. J., Q. B. 587; 22 Q. B. D. 435; 60 L. T. 317; 37 W. R. 285.

County Court—Action Remitted for Trial.]—Rr. 3 and 4 of Ord. XXXIX., and r. 1 of Ord. LII. (of 1883), have no application to cases sent for trial to a county court, under 19 & 20 Vict. c. 108, s. 26; applications for new trials, therefore, are still regulated by the old practice. *Prichard* v. *Prichard*, 54 L. J., Q. B. 30; 14 Q. B. D. 55; 51 L. T. 859; 33 W. R. 198.

See also COUNTY COURT.

In County Courts.]—*See* COUNTY COURT.

In Criminal Cases.]—*See* CRIMINAL LAW.

Verdict under 20*l.*]—It is the custom of the Queen's Bench Division not to grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed 20*l.*, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person might be injured. *Joyce* v. *Metropolitan Board of Works*, 44 L. T. 811.

The rule of practice, limiting new trials to causes of action above 20*l.*, is founded on the reason that it must be purchased by payment of costs, and applies to the plaintiff and the defendant. The only exception is, where there has been a misdirection of the jury by the judge. *Young* v. *Harrison*, 2 C. & J. 14; 2 Tyr. 167; 1 L. J., Ex. 5.

The rule that a new trial will not be granted for either party where the sum given or recoverable is under 20*l.* does not apply to replevin. *Edgson* v. *Cardwell*, L. R. 8 C. P. 647; 28 L. T. 819.

A new trial will not be granted in hard or trifling actions after a verdict for the defendant, except for a misdirection of the judge, or where a point has been reserved. *Brooke* v. *Middleton*, 10 East, 268; 1 Camp. 450.

Where the judge misdirected the jury, by submitting for their consideration a fact not proved nor deducible from the evidence, the court granted a new trial, though the amount in question was less than 1*l.* *Haine* v. *Davey*, 4 A. & E. 892; 6 N. & M. 356; 2 H. & W. 30.

After a verdict for less than 20*l.*, a new trial is only granted where it can be granted without costs, e.g. for misdirection, and not where it could only be granted on payment of costs, e.g. for a verdict against evidence. *Bryan* v. *Phillips*, 3 Tyr. 181; 1 C. & M. 26.

Where a verdict is under 20*l.*, the court will not grant a new trial, although it be against evidence, and contrary to the opinion of the judge. *Scott* v. *Watkins*, 4 M. & P. 237; 8 L. J. (o.s.) C. P. 158. S. P., *Roberts* v. *Karr*, 1 Taunt. 495; 10 R. R. 592; *Tarlington* v. *Starey*, 7 W. R. 188.

Unless the conduct of the jury has been quite outrageous. *Manning* v. *Underwood*, M'Clel. & Y. 266. See *Allum* v. *Boultbee*, 9 Ex. 738; 2 C. L. R. 1072; 23 L. J., Ex. 208; 18 Jur. 406; 2 W. R. 459.

Where the verdict is perverse, the court will grant a new trial, although the damages are less than 20*l.* *Freeman* v. *Price*, 1 Y. & J. 402.

To an action claiming special damage for the non-delivery of goods within a reasonable time, the defendant, admitting negligence to have been the cause of the non-delivery, paid 10*l.* into court. The judge left it to the jury to say whether this sum was a sufficient compensation for the pecuniary loss the plaintiff had sustained, pointing out that the law did not entitle him to recover under some of the heads of his claim, and that on the evidence there was no pretence for saying that he had sustained any substantial loss. The jury having given a verdict for 5*l.* beyond the sum paid into court:—Held, that the amount of damages was a question for the jury, and had been properly left to them; and although the court might think the verdict wrong, and 10*l.* enough, yet the damages recovered being less than 20*l.*, the verdict could only be disturbed on the ground of its being perverse; and as the jury had not disobeyed any directions of the judge, the verdict could not be said to be perverse, and the court could not interfere to disturb it. *Adams* v. *Midland Ry.*, 31 L. J., Ex. 35; 10 W. R. 84.

The rule, if the damages are under 20*l.*, applies to cases of surprise and to actions of trover. *Banson* v. *Didsbury*, 4 P. & D. 441; 12 A. & E. 631.

Where a verdict for the plaintiff is under 20*l.*, the circumstance that other actions depend on the result of such verdict is no reason for granting a new trial on the ground of its being against the evidence. *Leese* v. *Sylvester*, 12 L. J., C. P. 250.

Action for an injury to the plaintiff's reputation, by the sale by the defendant of gun-locks of an inferior fabric with the name of the plaintiff stamped thereon. The jury having returned a verdict for the defendant upon an issue on damages, ultra 5*l.* paid into court, on the ground that the sum paid into court covered the pecuniary damage actually sustained by the plaintiff, the court, on an application for a new trial, declined to interfere. *Manton* v. *Bales*, 1 C. B. 444.

Substantial Wrong or Miscarriage.]—Before exposing parties to the expense of a new trial, the court must be able to say that the verdict was manifestly wrong, and that there had been a gross miscarriage of justice. *Jenkins* v. *Morris*, 14 Ch. D. 674; 42 L. T. 817—C. A.

Novelty of Question.]—The novelty of the question at issue is an element to be taken into consideration in deciding whether a new trial should be granted or not. *Metropolitan District Asylum* v. *Hill*, 47 L. T. 29; 47 J. P. 148—H. L. (E.)

Questions of Value and Importance.]—Value and importance are not of themselves sufficient grounds for granting a new trial, unless there is also some doubt in the question, though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. *Vernon* v. *Hankey*, 2 Term Rep. 113; 1 R. R. 444.

Where there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the court does not think the verdict wrong, yet, if the inheritance is to be bound for

over by the verdict, the court will grant a new trial on payment of costs. *Swinnerton* v. *Stafford* (*Marquis*), 3 Taunt. 91.

The court refused to grant a rule for a new trial in an action of trespass, on the ground that the verdict was against evidence, where the damages fell below 20*l*., though the case was stated to be of general importance, as relating to the boundaries of a jurisdiction. *Sowell* v. *Champion*, 6 A. & E. 407; 2 N. & P. 627; W., W. & D. 667.

The importance of the verdict to others besides the parties to the litigation is an element to be taken into consideration in deciding whether a new trial should be granted or not. *Metropolitan District Asylum* v. *Hill*, 47 L. T. 29; 47 J. P. 148—H. L. (E.)

Where there is no surprise and no miscarriage of justice, a new trial will not be granted on the ground that the verdict seriously affects the character of the applicant, he having been examined as a witness, although new evidence has been discovered tending to vindicate his character. *Lewis* v. *Trussler*, 2 C. L. R. 727. See *Price* v. *Griffin*, 1 Moll. 401; *Shields* v. *Boucher*, 1 De G. & Sm. 40.

Second or Third New Trial.]—There is no limit to the discretionary jurisdiction of the court in granting as many new trials as may seem to be proper, where the jury either mistake, or neglect, or abuse their duty, by finding from prejudice, &c. *Lopez* v. *De Tastet*, 8 Taunt. 712.

But where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by any rule or practice to a third trial. *Parker* v. *Ansel*, 2 W. Bl. 963.

Although it would be otherwise after two concurring verdicts. *Goodwin* v. *Gibbons*, 4 Burr. 2108.

In an action on a policy of insurance, a verdict was found for the plaintiff. A new trial was granted, on the ground that this verdict was contrary to the weight of the evidence; the plaintiff again had a verdict, upon the same evidence. On application for a third trial:—Held, that this second verdict ought not to be disturbed, as this would amount to superseding the functions of the jury, and should only be granted in a case of perverseness; Vaughan, J., and Coltman, J., dissentientibus. *Foster* v. *Steele*, 3 Bing. (N.C.) 892; 5 Scott, 25; 3 Hodges, 231; 6 L. J., C. P. 265.

In a case involving no question of law, the plaintiff's claim was supported almost exclusively by his own testimony, and was encountered by circumstantial evidence on the part of the defendant. A common jury having found for the plaintiff, a new trial was granted on affidavits disclosing fresh evidence. At the second trial this evidence was adduced, but the second jury (a special one) found for the plaintiff. The judge certifying that the verdict was "a very wrong verdict," the court granted a third trial, on the ground of its being against the weight of evidence. *Davies* v. *Roper*, 2 Jur. (N.S.) 167.

Where the circumstances of a case had been fully put into the possession of a jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the judge who last tried the cause thought the evidence against the verdict preponderated, the court refused to grant a second new trial on the same ground. *Swinnerton* v. *Stafford* (*Marquis*), 3 Taunt. 232.

Where a defendant on two successive trials of the same cause of action obtained a verdict, the court set aside the last verdict, and entered a nonsuit, in order that the plaintiff, who claimed title to property which savoured of the realty, might not be for ever concluded from agitating his right. *Lee* v. *Shore*, 2 D. & R. 198; 1 L. J. (O.S.) K. B. 48; 25 R. R. 317.

So, after a verdict found for the defendant, the court will, in its discretion, order a nonsuit to be entered, in order that the plaintiff may not be precluded from bringing another action. *Hodgson* v. *Forster*, 2 D. & R. 221; 1 B. & C. 110; 1 L. J. (O.S.) K. B. 35.

By Inferior Courts.]—Inferior courts have, generally speaking, no right to grant new trials without the aid of a statutory power to do so. *G. N. Ry.* v. *Mossop*, 17 C. B. 130; 25 L. J., C. P. 22; 2 Jur. (N.S.) 21; 4 W. R. 116.

An inferior court cannot grant a new trial, except on the ground of fraud, or irregularity in obtaining the verdict. *Rex* v. *Oxford Corporation*, 3 N. & M. 877.

b. For what Cause.

1. Excessive Damages.

Principles governing.]—In an action ex delicto in the nature of an action of libel, a new trial ought not to be granted on the ground that the damages are excessive, unless the court comes to the conclusion, upon all the circumstances, that the damages awarded by the jury are so large that no twelve reasonable men could have given them. *Praed* v. *Graham*, 59 L. J., Q. B. 230; 24 Q. B. D. 53; 38 W. R. 103—C. A.

While giving evidence at a police court in London, a witness named D. stated that H., an Irish Member of Parliament, was not an "Invincible." This was correctly reported in the "Evening Irish Times," of which, as well as the "Irish Times" (a Dublin daily morning paper), A. was proprietor. But in several London daily papers, and in the next issue of the "Irish Times," D. was represented as having said that H. was an "Invincible" (this being admittedly the name by which members of a criminal association were known). In an action for this libel by H. against A., his manager and editor, in which the defendants paid 50*l*. into court, with an apology, the jury found that the libel was inserted by gross negligence, and that the apology was not full. They were unable to agree upon the question whether the libel was inserted with actual malice, and the court was of opinion that a finding in the affirmative would have been against the weight of evidence. The jury found a verdict for 1,000*l*., which the judge at the trial considered excessive:—Held, that there was no reasonable proportion between the damages and the circumstances of the case, and that the verdict should be set aside, on the ground of excessive damages. *Harris* v. *Arnott*, 26 L. R., Ir. 55—C. A.

In an action for libel, the determining of the amount of damages is essentially for the jury. In no such case will the court interfere unless it appears clearly that the jury have given their verdict from vindictive or improper feelings. Where no such considerations exist, the verdict will not be disturbed. The amount awarded might be so large as to suggest that it might be excessive, but this must depend on the circumstances of each particular case. *Roberts* v. *Owen*, 53 J. P. 502.

Where a plaintiff had obtained against a railway company a verdict with damages, sustained by reason of an accident to a train in which he was a passenger, and a new trial was ordered by the court of Queen's Bench on the ground alone of excessive damages, the finding as to negligence by the defendant company being approved by two courts:—Held, that inasmuch as there had been no misdirection, the judge having put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case, and inasmuch as the damages were not of such an excessive character as to shew that the jury had either been influenced by improper motives or led into error, there ought not to be a new trial. *Lambkin* v. *S. E. Ry.*, 5 App. Cas. 352; 28 W. R. 837—P. C.

To induce the court to grant a new trial on the ground of excessive damages, it must be shewn that they are very excessive, or that a perverted view of the case has been taken by the jury. *Edgell* v. *Francis*, 1 Man. & G. 222.

The court will not grant a new trial on the ground that the damages are excessive, unless it is very manifest that the jury in assessing them have either been actuated by an improper motive, or that they have proceeded on a wrong principle. *Creed* v. *Fisher*, 9 Ex. 472; 23 L. J., Ex. 143; 18 Jur. 228. S. P., *Smith* v. *Woodfine*, 1 C. B. (N.S.) 660.

A verdict for damages will not be set aside and a new trial granted on the ground that the damages are excessive, unless the court comes to the conclusion that there was no reasonable proportion between the damages and the facts of the case. The court will be reluctant to set aside a verdict in an action of tort on the ground that the damages are excessive, where there is evidence of malice, and the nature of the case is such that malice is a legitimate consideration for the jury in assessment of damages. *Reeves* v. *Penrose*, 26 L. R., Ir. 141.

The court will not, in an action for a breach of promise of marriage, grant a new trial on the ground of excessive damages unless they are so large as to induce the court to infer that the jury was actuated by undue motives, or acted upon a misconception of the facts. *Gough* v. *Farr*, 1 Y. & J. 477.

The court may, in any case, grant a new trial upon the ground of excessive damages. *Ducker* v. *Wood*, 1 Term Rep. 277.

And there is no species of action in which the court will not grant a new trial for excessive damages, if the circumstances require it. *Hewlett* v. *Crutchley*, 5 Taunt. 277.

Even in trespass for assault and battery. *Jones* v. *Sparrow*, 5 Term. Rep. 257. S. P., *Goldsmith* v. *Sefton* (*Lord*), 3 Anst. 808.

But in personal torts the court will look narrowly into the circumstances, as they very rarely grant a new trial for excessive damages. *Fabrigas* v. *Mostyn*, 2 W. Bl. 929.

The jury are the proper judges of damages, and when they have once decided, the court will not in general disturb the verdict, unless they have taken into consideration matters out of the declaration or form of action; or, in matters which admit of certain estimation, they have extravagantly, or through prejudice, exceeded such measure. *Gilbert* v. *Birkinsham*, Lofft, 771; Cowp. 230.

In an action for a personal injury arising from indisputable negligence, the injury being permanent, and recovery apparently hopeless, the court will not reduce the damages if the judge is not dissatisfied with the verdict. *Britton* v. *South Wales Ry.*, 27 L. J., Ex. 355.

Except in case of outrageous damages. *Sharpe* v. *Brice*, 2 W. Bl. 942. S. P., *Leith* v. *Pope*, 2 W. Bl. 1327.

To render damages excessive, the amount should be such that no reasonable proportion exists between it and the circumstances of the case. *M'Grath* v. *Bourne*, Ir. R. 10 C. L. 160.

In an action for false imprisonment, a new trial will be granted upon the ground of excessive damages if, in the opinion of the court, they are enormous and excessive. *Corkery* v. *Hickson*, Ir. R. 10 C. L. 174.

Illustrations.]—In actions for tort the court will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained. *Williams* v. *Currie*, 1 C. B. 841.

Where, therefore, a landlord caused considerable injury to the crops of his tenant, by selling, felling, and removing timber without applying for leave to enter, and the jury assessed the damages at 300*l.*, the court refused to interfere, although the net value of the entire crops did not exceed 200*l.* *Ib.*

In trover for a diamond necklace, some of the diamonds composing it were traced to the defendant. The jury found a verdict against him, with damages to the amount of the value of the whole necklace. Upon an affidavit to reduce the damages to the value of the brilliants actually traced to him, he did not swear in terms that he never had possession of the whole necklace. Affidavit held insufficient. *Mortimer* v. *Cradock*, 12 L. J., C. P. 166; 7 Jur. 45.

300*l.* are not necessarily excessive damages for a few hours' imprisonment. *Leeman* v. *Allen*, 2 Wils. 160.

So 250*l.* are not excessive damages for a malicious prosecution for nuisances. *Farmer* v. *Darling*, 4 Burr. 1971.

In an action for diverting a watercourse, where the jury, under circumstances of aggravation, gave 3,000*l.* damages, the court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved; but they directed that the former verdict should stand as a security in the meantime for the damages which might be given on the second trial. *Pleydell* v. *Dorchester* (*Earl*), 7 Term Rep. 529.

An action for negligence was brought by a child of seven years old, by his next friend, to recover damages for injuries done to him by the horse of the defendant. The jury found a verdict for 150*l.* Nine days after the trial the child died. Judgment was afterwards signed by the next friend. An application for a new trial was then made, on the ground of the death of the plaintiff since the trial:—Held, that although the damages were presumably given on the supposition that the child would continue to live, the case was not one in which the court would grant a new trial. *Kramer* v. *Waymark*, 4 H. & C. 427; 35 L. J., Ex. 148; L. R. 1 Ex. 241; 12 Jur. (N.S.) 395; 14 L. T. 368; 14 W. R. 659.

In estimating the damages for breach of promise to marry where the defendant has seduced the plaintiff, the jury may take into consideration that her prospect of marrying has become less by reason of such seduction, and the mortifi-

cation to her feelings in ceasing to be a respected member of her family. The court will not interfere with the discretion of the jury as to the amount of damages, if they have not acted in error, or from misconception, or from undue motives. *Berry* v. *Da Costa*, 1 H. & R. 291 ; 35 L. J., C. P. 191 ; L. R. 1 C. P. 331 ; 12 Jur. (N.S.) 588 ; 14 W. R. 279. S. P., *Tullidge* v. *Wade*, 3 Wils. 18.

The question of damages is so peculiarly the province of the jury that the court will not in an action for seduction set aside a verdict on the ground of excessive damages, even if they appear disproportioned to the condition of the plaintiff, and where the court might not in itself have awarded them so liberally. *Evans* v. *Davies*, 17 W. R. 679.

Where a jury had given 750*l.* in an action for defamation for words spoken of a beneficed clergyman to his curate, a new trial was refused on the ground that damages were excessive. *Highmore* v. *Harrington*, 3 C. B. (N.S.) 142.

3,500*l.* having been awarded by a jury as damages, in an action against an attorney for breach of promise of marriage, the court refused to set aside the verdict on the ground that the damages were excessive. *Wood* v. *Hurd*, 2 Bing. (N.C.) 166.

The plaintiff, a person in a humble station of life, had a relation, a lady of fortune, residing at the defendant's house. The plaintiff being importunate in his demands for relief, and refusing to leave the premises, the defendant ordered a constable to take him into custody, which he did, and the plaintiff remained in custody at an inn. On the following morning he was brought before the defendant, who offered him two sovereigns, which the plaintiff accepted. The defendant also gave him money to pay for the hire of a horse and refreshment. In an action for false imprisonment, the jury having found a verdict for the plaintiff, with 100*l.* damages, the court considered them to be excessive, and directed a new trial. *Price* v. *Severn*, 5 M. & P. 125 ; 7 Bing. 316 ; 9 L. J. (O.S.) C. P. 99.

Power of Court to Reduce.]—In a case where the plaintiff is entitled to substantial damages, and a verdict for the plaintiff cannot be impeached, except on the ground that the damages are excessive, the court has power to refuse a new trial, on the plaintiff alone, and without the defendant, consenting to the damages being reduced to such an amount as the court would consider not excessive had they been given by the jury. *Belt* v. *Lawes*, 53 L. J., Q. B. 249 ; 12 Q. B. D. 356 ; 50 L. T. 441 ; 32 W. R. 607—C. A.

The defendant published in a newspaper several libels of the plaintiff, who brought an action thereon. The defendant, in his defence, denied that he published the words complained of in the defamatory sense alleged, and as to one of the libels paid a nominal sum into court. The cause of action in respect of which the money was paid in was the same as that set out in other paragraphs of the statement of claim with a different innuendo. The jury found a verdict for 50*l.* on the paragraph in respect of which the money was paid in, and 3,000*l.* in respect of the rest of the statement of claim :—Held, that verdict and judgment should stand for 3,000*l.*, but that a remittitur damnum should be entered as to the 50*l.* *Bolton* v. *O'Brien*, 16 L. R., Ir. 483—C. A. See *Leeson* v. *Smith*, 4 N. & M. 304.

2. Inadequacy of Damages.

It is a general rule, that the court will not set aside a verdict in an action of tort, on account of the smallness of the damages. *Mauricet* v. *Brecknock*, 2 Dougl. 509.

The jury having given a verdict for only 20*s.* in an action for slander, the court refused to grant a new trial at the instance of the plaintiff. *Rendall* v. *Hayward*, 5 Bing. (N.C.) 424 ; 7 Scott, 407 ; 2 Arn. 14 ; 8 L. J., C. P. 243 ; 3 Jur. 363.

In an action for slander, a new trial will not be granted on the ground that the damages are inadequate, unless there has been a mistake in point of law on the part of the judge, or a mistake in the calculation of figures or misconduct by the jury. *Forsdike* v. *Stone*, 37 L. J., C. P. 301 ; L. R. 3 C. P. 607. See *Kelly* v. *Sherlock*, 6 B. & S. 480 ; 35 L. J., Q. B. 209 ; L. R. 1 Q. B. 686 ; 12 Jur. (N.S.) 937.

In an action for injury by negligence of the defendant's servant, the jury found a verdict for the plaintiff, with one farthing damages, though it appeared that the plaintiff's thigh was broken, and that he had paid 10*l.* for surgical attendance. The court granted a new trial on account of the lowness of the damages. *Armitage* v. *Haley*, 4 Q. B. 917 ; D. & M. 139 ; 12 L. J., Q. B. 323 ; 7 Jur. 671. S. P., *Tedd* v. *Douglas*, 5 Jur. (N.S.) 1029.

The court refused, in an action for the negligent construction of a building whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages, there being no reason for supposing them to have been actuated by improper motives. *Howard* v. *Barnard*, 11 C. B. 653.

So, in an action against a surgeon for negligence, whereby the plaintiff lost his leg, a verdict being found for him, with nominal damages, the court refused to grant a new trial, the judge having expressed himself satisfied with the verdict. *Gibbs* v. *Tunaley*, 1 C. B. 640.

A new trial will not be granted on the ground that from the small amount of damages the jury must have come to a compromise, unless, from the circumstances of the case, it is evident that there has been a total refusal on the part of the jury to discharge their duty, and the verdict is necessarily wholly inconsistent. *Richards* v. *Rose*, 2 Ex. 218 ; 23 L. J., Ex. 3.

The court refused to grant a rule for a new trial on the ground of the insufficiency of the damages, where the jury had given only one farthing, in an action for taking the plaintiff before a magistrate on an unfounded charge of felony, merely because a question of character was involved. *Apps* v. *Day*, 14 C. B. 112.

In an action for negligently driving against and killing a horse proved to be worth 30*l.*, the jury, there being strong evidence to negative negligence on the part of the defendant, and some evidence the other way, contrary to the opinion of the judge, found for the plaintiff, damages 15*l.* The court refused to grant a new trial on the ground of the verdict being perverse. *Hawkins* v. *Alder*, 18 C. B. 640.

Where the defendants lost a verdict through the negligence of their attorney, and the verdict was for 7*l.*, one of the defendants having been in court during the trial :—The court refused to grant a new trial, on the grounds of the smallness of the sum, and the presence of the defendant in court, where he might have heard the whole of the evidence. *Watson* v. *Reeves*, 5 Bing. (N.C.)

112; 6 Scott, 783; 7 D. P. C. 127; 1 Arn. 388; 8 L. J., C. P. 36; 2 Jur. 991.

In an action for slander imputing that the plaintiff had committed perjury, the jury found a verdict for the plaintiff, damages one farthing. The verdict was not satisfactory to the judge who tried the cause:—Held, that there ought to be a new trial, inasmuch as the amount of the damages seemed to have been arrived at by a compromise without duly weighing the circumstances of the case. *Fulvey* v. *Stanford*, 44 L. J., Q. B. 7; L. R. 10 Q. B. 54; 31 L. T. 677; 23 W. R. 162.

At the trial of an action for serious personal injuries, caused by the defendant's negligence, the defendant produced no witnesses, the jury assessed the damages at one shilling, and the judge did not express any dissatisfaction with their finding; the majority of the court being of opinion, upon the evidence, that the amount of damages bore no reasonable proportion to the nature of the injuries, and inferring therefrom that the jury had not estimated the damages at all:—Held, that the verdict should be set aside, and a new trial granted. *Beattie* v. *Moore*, 2 L. R., Ir. 28.

A new trial will be granted, in an action for personal injuries sustained through the defendants' negligence, where the damages found by the jury are so small as to shew that they must have omitted to take into consideration some of the elements of damage. *Phillips* v. *L. & S. W. Ry.*, 49 L. J., Q. B. 233; 5 Q. B. D. 78; 41 L. T. 121; 28 W. R. 10—C. A.

Where in an action of contract the damages are not mere matter of computation, and there is any view upon which the jury might not unreasonably consider that there was a breach of contract, but no substantial damage, a verdict for the plaintiff for merely nominal damages will not, especially if the matter in dispute is only a small sum, be set aside. *Nichol* v. *Bestwick*, 28 L. J., Ex. 4.

In an action against a bailee for injury to and destruction of goods, the jury returned a verdict for the plaintiff, with nominal damages:—Held, that it was no ground for a new trial that, according to the evidence, the damage, if any, must have been more than nominal, and that there was uncontradicted evidence of a loss of goods to the extent of 2*l*. *Mostyn* v. *Coles*, 7 H. & N. 872; 31 L. J., Ex. 151; 10 W. R. 355.

It is no ground for a new trial, in an action for an assault and false imprisonment, that the plaintiff had incurred an expense of 7*l*. 14*s*. in procuring his discharge from custody, and the jury has awarded him a farthing only. *Bradlaugh* v. *Edwards*, 11 C. B. (N.S.) 377.

3. Absence of Evidence at the Trial.

If evidence, which either was in the possession of the parties at the time of a trial, or might by proper diligence have been procured, is not produced at the trial, and the case is decided adversely to the side for which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial. *Shedden* v. *Att.-Gen.*, L. R. 1 H. L. (Sc.) 470, 545; 22 L. T. 631.

A new trial is never granted on the ground that a party did not give evidence which he might have produced. *Cooke* v. *Berry*, 1 Wils. 98.

Nor to let the party into a defence of which he was apprised at the first trial. *Vernon* v. *Hankey*, 2 Term Rep. 113; 1 R. R. 444.

A plaintiff having been nonsuited for not producing a document on the trial, the court set aside the nonsuit on payment of costs, upon an affidavit only of his attorney, that he, the attorney, "as soon as he found that the action was likely to come on," commenced inquiries to ascertain in whose hand the document was, and, upon discovering this, immediately (through a person who promised to procure it) made efforts to obtain it, but obtained it too late for the trial, and now had it. *Atkins* v. *Owen*, 4 A. & E. 819; 2 H. & W. 59; 6 N. & M. 229.

Where a plaintiff had been nonsuited on the ground of the nonproduction of a bill of exchange, the court granted a new trial, upon an affidavit stating that the bill had been out of the jurisdiction of the court; had been sent for in due time, but not received until too late for the trial; and that it was then in the plaintiff's possession. *Atkins* v. *Owen*, 4 N. & M. 123.

After a full trial by a competent jury, if no fresh light can be thrown in, a new trial will not be granted. *Camden* v. *Cowley*, 1 W. Bl. 418.

So, if there appears on the whole evidence enough to sustain the verdict found, independently of the facts brought into doubt, the court will not interfere and order a new trial, although the right is bound. *Hartwright* v. *Badham*, 11 Price, 383.

But if the question has never been fully before the jury, a new trial will be granted. *Rex* v. *Malden*, 4 Burr. 2135.

The court will not grant a new trial to let in evidence negativing the consent of a minor's parent in an action depending on the validity of a marriage, when that evidence might have been produced at the first trial. *Doe* d. *James* v. *Price*, 1 M. & Ry. 683; 6 L. J. (O.S.) K. B. 157.

Counsel's Discretion.]—A new trial will not be granted because the counsel thought it prudent to omit evidence which they had in their briefs. *Spong* v. *Hogg*, 2 W. Bl. 802.

For a client is bound by the conduct of his advocate; and the court will not grant a new trial on the ground that the witnesses were not examined by counsel according to the request of the attorney engaged in the cause. *Hall* v. *Stothard*, 2 Chit. 267.

So, if the leading counsel takes one line of case, contrary to the opinion of his junior counsel, the court will not permit the junior counsel to obtain a new trial, upon the ground that he was prepared with evidence to support another line of case, which his leader repudiated. *Pickering* v. *Dowson*, 4 Taunt. 779.

Absence of Witnesses.]—The absence of a witness is no ground for a new trial: application ought to be made to postpone the trial. *Edwards* v. *Dignam*, 2 D. P. C. 642.

If a witness who is necessary to the plaintiff's case is not sent for in time, owing to the fraudulent management of the defendant's attorney in negotiating, till too late for the plaintiff to procure his presence at the assizes, the plaintiff should apply to the judge at nisi prius to put off the trial, and if refused, should withdraw the record; but he must not take his chance of success, for, if nonsuited, the court will not grant a new trial. *Turquand* v. *Dawson*, 1 C. M. & R. 709; 5 Tyr. 488.

A rule for a new trial will not be granted on affidavits alleging that a material witness has been prevented from attending the trial, without shewing grounds for a belief that the successful party is implicated in such misconduct; and it will not suffice to state merely a belief that the witness has been kept away at his instance. *Marsh* v. *Monckton*, 1 Tyr. & G. 34.

The court granted a new trial, on payment of costs, where the plaintiff had been nonsuited, in an action against the acceptor of a bill of exchange, by reason of the accidental absence of the witnesses subpœnaed by him to prove the handwriting of the defendant. *Shillito* v. *Theed*, 4 M. & P. 575; 6 Bing. 753; 8 L. J. (o.s.) C. P. 293.

Where a new trial is applied for on the ground of absence of a material witness, affidavits must be produced to the court, explaining the cause of the witness's absence, and stating in distinct terms that there is a good defence to the action on the merits. *Flooks* v. *Marriott*, 7 L. T. 363; 11 W. R. 121.

A new trial will not be granted on the ground of the absence of a material witness, when the proceedings have been regular and the applicant does not clearly shew merits. *Dunn* v. *Edwards*, 19 L. T. 394. See *King* v. *Kelk*, 20 L. T. 974.

A rule having been obtained to set aside a nonsuit, upon the ground that the defendant had, as it was alleged, prevented two or three co-plaintiffs from giving evidence, by bribery, it was not made to appear that the co-plaintiffs said to have been kept away could have given any material evidence, or that any steps had been taken to procure their attendance, and the rule was discharged. *Beale* v. *Martin*, 12 W. R. 135.

4. Discovery of New Evidence.

A new trial was granted on affidavits disclosing a conspiracy by the plaintiff to defraud the defendants, an insurance company, by setting fire to his house, which they had endeavoured, but had not had sufficient evidence, to prove at the trial. *Thurtell* v. *Beaumont*, 8 Moore, 612; 1 Bing. 339; 2 L. J. (o.s.) C. P. 4; 25 R. R. 644.

The discovery of new witnesses to impeach the testimony of a witness examined on the former trial is not sufficient ground to grant a new trial. *Dickenson* v. *Blake*, 7 Bro. P. C. 177.

Discovery of new evidence by the attorney of an executor defendant (then absent from England), though in the actual custody of the attorney himself, yet not known by him so to be, is a ground for a new trial. *Broadhead* v. *Marshall*, 2 W. Bl. 955.

A new trial will not be granted on the ground of the discovery of fresh evidence unless the proposed fresh evidence is such that there is a reasonable probability that if brought before a jury, a different verdict to that in the former trial would be given. *Anderson* v. *Titmas*, 36 L. T. 711.

A new trial will not be granted on the ground of newly-discovered evidence, if it appears that the party might by reasonable diligence have procured the evidence for the former trial. *Caldwell* v. *Johnston*, Ir. R. 6 C. L. 233.

A new trial of an ejectment was granted when a verdict had been found for the defendant, where the lessor of the plaintiff had, since the trial, discovered that they had conclusive evidence of a material fact (the marriage of their ancestor), which they failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married, and where it was expected that they might be obliged to enter, to avoid a fine intended to be levied before a new ejectment could be brought; but they would only do so on the terms of payment of the costs of the former trial. *Weak* d. *Burge* v. *Callaway*, 7 Price, 677; 21 R. R. 780.

A bill in equity to set aside a verdict is not sustainable, where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial upon cross-examination. *Taylor* v. *Sheppard*, 1 Y. & Coll. 271.

Papers which were in the possession of the party, and which with due diligence might have been produced, are not in the nature of evidence subsequently discovered. *Dixon* v. *Graham*, 5 Dow, 267.

Where, upon the trial of an issue, the evidence of a material witness, being uncorroborated, and being in other respects unsatisfactory, has been discredited by the judge, and the jury have given a verdict against the party producing that witness, the court, upon being satisfied, by affidavits filed since the trial, that the evidence of the witness may be substantially corroborated, will grant a new trial. *Shields* v. *Boucher*, 1 De G. & Sm. 40. See *Lewis* v. *Trussler*, 2 C. L. R. 727; *Price* v. *Griffin*, 1 Moll. 401.

5. Perjury, Forgery, or Conspiracy.

A new trial will be granted where the witnesses, upon whose testimony the verdict was obtained, have been since convicted of perjury. *Benfield* v. *Petrie*, 3 Dougl. 24.

But the mere finding an indictment for perjury before conviction is no ground. *Seeley* v. *Mayhew*, 4 Bing. 561.

In a testamentary suit the jury, being unable to agree, was discharged without giving a verdict. The question in dispute, the capacity of the deceased, was afterwards referred to a second jury, who found in the affirmative and for the plaintiff. Application was made for a new trial on the ground of the verdict being against the weight of evidence, but it was refused. Subsequently the plaintiff was convicted of perjury in reference to the evidence he gave in the suit: —Held, that that circumstance was not in itself sufficient to justify the court in allowing a new trial after an application with that object had been rejected. *Davies* v. *Brecknell*, 42 L. J., P. 39; L. R. 3 P. 88; 28 L. T. 604.

Where the evidence is positive, although evidently by perjury, the court will not in the first instance grant a new trial; but leave the party to his remedy by indictment for perjury. *Wheatley* v. *Edwards*, Lofft, 87.

An affidavit by the defendant that the plaintiff's witnesses had been guilty of perjury is no ground for a new trial in an action for an assault. *Proctor* v. *Simmons*, 9 Moore, 581.

The court will not grant a new trial on the ground that a principal witness has been indicted for perjury. *Hampshire* v. *Harris*, 3 Jur. 980.

A new trial will be granted if subornation of witnesses has been discovered since the former trial. *Fabrillius* v. *Cock*, 3 Burr. 1771.

Bill for a new trial; plaintiff suggesting that the mark to the bond was forged by one W., and all the pretended witnesses to the bond were dead, and that the verdict was recovered by surprise: a new trial ordered. *Coddrington* v. *Webb*, 2 Vern. 240.

If a witness be convicted of perjury, or the party of forgery, it is good cause for a new trial. *Tilly* v. *Wharton*, 2 Vern. 379.

Where the grand jury had found a true bill against the plaintiff for conspiring to defraud the defendants in an action, a new trial was refused. *Thurtell* v. *Beaumont*, 8 Moore, 612; 1 Bing. 339; 2 L. J. (O.S.) C. P. 4; 25 R. R. 644.

6. False or Mistaken Testimony.

The court will not generally grant a new trial on the ground that a witness became agitated and confused during the examination, and gave his evidence contrary to truth, from the effects of a sudden paralytic affection. *Richards* v. *Hammond*, M'Clel. 179.

Where the plaintiff's attorney swore to a conversation with a witness for the defendant, who had denied ever speaking to him, and, upon a verdict being found for the plaintiff, the judge committed the witness for perjury; the attorney having afterwards stated to the judge that he might have been mistaken, the court granted a new trial, and directed the costs of the former trial to be paid by the attorney. *Truebody* v. *Brain*, 9 Price, 77.

So the court granted a new trial on an affidavit of a material witness that he had made a mistake in giving his testimony. *Richardson* v. *Fisher*, 7 Moore, 546; 1 Bing. 145; 24 R. R. 690.

A misstatement by one of the plaintiff's witnesses, on a matter foreign to the question at issue between the parties, is no ground for a new trial. *Magnay* v. *Knight*, 1 Man. & G. 944.

Where a plaintiff was nonsuited because an agreement appeared by the defendant's evidence to contain more than the proper number of words for the stamp it bore, but it afterwards turned out that the witness called at the trial had miscounted the number of words: the court granted a new trial on affidavit of that fact. *Dudley (Lord)* v. *Robins*, 3 Car. & P. 26.

The mere contradiction of witnesses is not alone a sufficient ground for a new trial, although the judge directed the jury contrary to their finding. *Sprague* v. *Michell*, 2 Chit. 271.

Nor the mere affidavit of one party contradicting the witnesses on the other side. *Feise* v. *Parkinson*, 4 Taunt. 640; 13 R. R. 710.

If the testimony of witnesses on which a verdict has proceeded is founded on and derives its credit from particular circumstances, and those circumstances are afterwards clearly falsified by affidavit, the court will grant a new trial. *Lister* v. *Mundell*, 1 Bos. & P. 427.

In an action for negligence the plaintiff denied at the trial that he had said that the accident was caused by his own negligence. New trial so as to give the defendant an opportunity of shewing that the plaintiff had said so, refused. *Pistrucci* v. *Turner*, 5 W. R. 85.

7. Examination and Rejection of Witnesses.

An objection to the competency of witnesses discovered after a trial is not a sufficient ground of itself to grant a new trial; but it may have some weight with the court, where the party applying appears to have merits. *Turner* v. *Pearte*, 1 Term Rep. 717.

It is no ground for a new trial that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness who was called established the same fact, which was not disputed by the other side; and the defence proceeded upon a collateral point, upon which the verdict turned. *Edwards* v. *Evans*, 3 East, 451.

The improper rejection of a witness as incompetent is ground for a new trial since the 14 & 15 Vict. c. 90. *Boyle* v. *Wiseman*, 3 C. L. R. 482; 10 Ex. 647; 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

The court refused to grant a rule nisi for a new trial where a person (not originally intended to be examined) who was in court, and who had been there during the trial, was called to give evidence, and was not allowed to be examined on that ground. *Att.-Gen.* v. *Bulpit*, 9 Price, 4; 23 R. R. 637.

On an application for a new trial on the ground that a witness who described himself by a false name at the trial, and was sworn on the New Testament as a Christian, was at that time a Jew and attended the synagogue:—Held, that the objection was too late, and that the oath, as taken, subjected the witness to the consequences of perjury if he had sworn falsely. *Sells* v. *Hoare*, 3 Br. & B. 232; 7 Moore, 36.

The court will not grant a new trial on the ground of a refusal by the judge to allow a witness to be called after the case had been closed, unless it is made out very clearly indeed that the judge in refusing has wrongfully exercised his discretion. *Middleton* v. *Barned*, 18 L. J., Ex. 433.

Where an attorney gives evidence after opening the case as advocate a new trial will be granted. *Dunn* v. *Packwood*, 1 B. C. Rep. 312; 11 Jur. 242. S. P., *Stones* v. *Byron*, 4 D. & L. 393; 1 B. C. Rep. 248; 16 L. J., Q. B. 32; 11 Jur. 44. But see *Cobbett* v. *Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488; 1 W. R. 54.

It is no ground for a new trial that the plaintiff having been asked while under cross-examination whether he was the author of a pamphlet which contained expressions of opinion on religious subjects altogether at variance with those generally received amongst Christians, and having declined to answer on the ground that his answer in the affirmative might subject him to a criminal prosecution, the counsel for the defendant was permitted for a considerable time (obviously with a view to prejudice the plaintiff with the jury) to read various passages of a similar tendency from other printed documents, each time repeating the inquiry whether the plaintiff was the author, or whether the passage read expressed his notions on the subject, the jury being entitled to have before them all the facts and circumstances from which they might be enabled to judge of the degree of credit due to the party as a witness. *Bradlaugh* v. *Edwards*, 11 C. B. (N.S.) 377.

8. Improper Admission of Evidence.

The court will not permit a party to move for a new trial on an objection to the applicability of evidence, unless the objection was taken before the judge commenced his summing up. *Abbott* v. *Parsons*, 7 Bing. 563; 5 M. & P. 521.

The court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there is enough to warrant the finding of the jury. *Doe* d. *Teynham* (*Lord*) v. *Tyler*, 6 Bing. 561; 4 M. & P. 377; 8 L. J. (O.S.) C. P. 222; 31 R. R. 496. But see *Hodson* v. *Midland Great Western Ry.*, Ir. R. 11 C. L. 109.

Where improper evidence is received and a verdict given for the party adducing it, the court will grant a new trial, although there is no other evidence on the same point in favour of the same party, unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence. *Wright* v. *Doe* d. *Tatham*, 7 A. & E. 313. S. P., *De Rutzen* v. *Farr*, 4 A. & E. 53; 5 N. & M. 617; 1 H. & W. 735; 5 L. J., K. B. 38.

Where, in ejectment, evidence was received in favour of the plaintiff which was inadmissible, but all objections and exceptions were reserved for the opinion of the court by the consent of both parties:—Held, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted shewed the title to be in the lessors of the plaintiff; as, upon such a reservation, the court is called upon to decide whether the lessors of the plaintiff are entitled to recover or not. *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102.

Where an objection is taken to the admissibility of evidence, but such objection is not afterwards pressed, and no subsequent application is made to have it struck out, the circumstance of its having gone to the jury is no ground for a new trial, even though it should appear in the result to have been on particular grounds open to objection. *Ferrand* v. *Milligan*, 15 L. J., Q. B. 103; 10 Jur. 6.

The improper reception of evidence when the fact is fully proved aliundè is no ground for a new trial. *Stindt* v. *Roberts*, 5 D. & L. 460.

The mere fact of a document being admitted, though not legal evidence, the items enumerated in which were proved by other evidence, is no ground for granting a new trial. *Stindt* v. *Roberts*, 2 B. C. Rep. 212; 17 L. J., Q. B. 166; 12 Jur. 518.

When evidence legitimately admitted in the course of a cause raises a latent ambiguity, evidence to explain that is properly admissible; but if there is, in truth, no latent ambiguity, and the evidence to explain is consequently inadmissible, still the improper admission of such evidence would not be a ground for a new trial, because the writing would then be for the court to construe without regard to the evidence. *Bruff* v. *Conybeare*, 13 C. B. (N.S.) 263; 9 Jur. (N.S.) 78.

In an action for false imprisonment, where a verdict with 200*l.* damages was given for one night's confinement in a prison, evidence of a trespass by the defendant on the goods of the plaintiff arising out of the same transaction committed on the following day, was admitted for the purpose of shewing that the defendant was actuated by malice:—Held, to be no ground for granting a new trial. *Edgell* v. *Francis*, 1 Man. & G. 222.

A new trial will not be granted for evidence prematurely admitted, but which becomes admissible in the course of a trial. *Faund* v. *Wallace*, 35 L. T. 361.

In an action against the defendant for non-payment of money for a machine, the defence was that the machine was faulty in its construction. In opening the case the plaintiff's counsel, in order to shew that the defence was not bonâ fide, proposed to read in evidence a letter written by W., the defendant's son, who had the management of the machine, and alone corresponded with the plaintiff. Subsequently W., who was in court, was called as a witness by the defendant, but was asked no question; the judge then ruled that the letter was receivable in evidence against the defendant. A verdict was found for the plaintiff, and the defendant having applied for a new trial:—Held, that whether or not the evidence was admissible in the first instance, it subsequently became so by W. being called as a witness, and the fact that W. was not examined by the party calling him, nor asked whether he had acted bonâ fide, made no difference. *Ib.*

Under Ord. XXXIX. r. 3, the court may refuse a new trial on the ground of the improper admission of evidence, although a rule nisi has been obtained before the Judicature Acts came into operation. *Earp* v. *Faulkner*, 34 L. T. 284; 24 W. R. 774.

A verdict ought not to be disturbed for the reception of illegal evidence which had no effect whatever upon the result of the trial. *M'Creesh* v. *McGeough*, Ir. R. 7 C. L. 236.

In trespass quare clausum fregit, on a plea of a right over the locus in quo, a witness for the plaintiff, in cross-examination, spoke of the exercise of the same right by other persons besides the defendant; on his re-examination he gave evidence of the exercise of the right over places other than the locus in quo, and the jury found for the plaintiff:—Held, that the improper reception of this evidence was no ground for a new trial on the part of the defendant; the judge ought to have been requested to expunge it from his notes at the trial. *Blewitt* v. *Tregonning*, 3 A. & E. 554; 1 H. & W. 432.

Where documents are put as the defendant's evidence in the course of the plaintiff's case, without objection on the part of the plaintiff, they are to be taken as the defendant's evidence, and as received by consent, and their reception cannot be subsequently made a ground for a new trial; the question whether the issue raised on the record called for any evidence on the particular point, being quite a distinct and separate question. *Campbell* v. *Loader*, infra.

9. Improper Rejection of Evidence.

By Ord. XXXIX. r. 6, "A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence . . . unless, in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial." Where, therefore, in an action against a solicitor for negligence, founded on the breach by the defendant of an alleged duty, the jury negatived the facts on which such duty was founded, and judgment was entered for the defendant, a new trial will not be granted on the ground of improper rejection of evidence, when the evidence, if admitted, would only have gone to prove failure in the performance of the alleged duty and the extent to which it had been violated, but would not have thrown light upon its existence or nature. *Manley* v. *Palache*, 11 R. 566; 73 L. T. 98—P. C.

Where the motion for a new trial is grounded on the improper rejection of evidence, the evidence ought to have been formally tendered to the judge of the court and rejected by him. *Penn* v. *Bibby*, 36 L. J., Ch. 455 ; L. R. 2 Ch. 127 ; 15 L. T. 399 ; 15 W. R. 208.

The court refused to go into the question of improper rejection of a document on the ground that it did not appear by the judge's notes that the document had formally been tendered in evidence. *Campbell* v. *Loader*, 3 H. & C. 520 ; 34 L. J., Ex. 50 ; 11 Jur. (N.S.) 286 ; 11 L. T. 608 ; 13 W. R. 348.

Where an objection is taken to the reception of a document on the ground of the want of a stamp, and the objection is allowed by the judge and the evidence rejected, it is the duty of counsel intending to rely on such rejection as a ground for a new trial, to object to the rejection of the document after the judge's decision that it requires a stamp, and formally to tender the document in evidence, and to require a note to be taken of the tender and its rejection ; and failing to do so, the rejection cannot afterwards be made available as a ground for a new trial. *Ib.*

Where evidence is rejected which is tendered for one purpose, and it is inadmissible for that purpose, but is admissible in another view of the case not alluded to at the trial, the court will not grant a new trial upon an improper rejection of evidence. *Rex* v. *Grant*, 3 N. & M. 106 ; 5 B. & Ad. 1081.

If a document is offered on one ground which is untenable, and is rejected, and after the trial it is discovered that the document might have been offered on another ground, which was a good one, the court will not grant a new trial : at all events, not unless manifest injustice would ensue, and the party could not by due diligence have offered the document on the proper ground at the trial. *Doe* d. *Kinglake* v. *Beriss*, 7 C. B. 456 ; 18 L. J., C. P. 128.

The rejection of evidence, which, if admitted, would not alter the case, or establish any fact not already proved by other means, is not a ground for a new trial. *Alexander* v. *Barker*, 2 Tyr. 140 ; 2 C. & J. 133 ; 1 L. J., Ex. 40.

Where evidence has been improperly rejected, the court will grant a new trial, unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence. *Crease* v. *Barrett*, 1 C. M. & R. 919 ; 5 Tyr. 458 ; 4 L. J., Ex. 297.

When evidence tending to establish a point already supported by more direct proof is improperly rejected, the court will not grant a new trial on that ground, if it sees that the case would not have been advanced further by admitting the particular piece of evidence. *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497.

A new trial cannot be granted on the ground that documents have been improperly held protected from production, if it appears that they were irrelevant to the issues, or not admissible. *Beatson* v. *Skene*, 5 H. & N. 838 ; 29 L. J., Ex. 430 ; 6 Jur. (N.S.) 780 ; 2 L. T. 378 ; 8 W. R. 544.

To entitle a party to a new trial on the ground of the rejection of evidence, it must appear not merely that it was offered and not received, but that the judge was given to understand that its reception was pressed, and that he deliberately rejected it. *Whitehouse* v. *Hemmant*, 27 L. J., Ex. 295 ; 6 W. R. 488.

10. Misdirection and Non-Direction of Judge.

Misdirection.]—It is not misdirection for the judge to tell the jury his own opinion on the issue before them. *Smith* v. *Dart*, 54 L. J., Q. B. 121 ; 14 Q. B. D. 105 ; 52 L. T. 218 ; 33 W. R. 455.

It is no ground for a new trial for misdirection, that the judge expresses a strong opinion upon the facts either way ; the whole being left to the discretion of the jury, where the question is one peculiarly for their consideration. *Belcher* v. *Prittie*, 4 M. & Scott, 295 ; 10 Bing. 408 ; 3 L. J., C. P. 85. S. P., *Foster* v. *Steele*, 5 Scott, 28 ; 3 Bing. (N.C.) 892 ; 6 L. J., C. P. 265.

It is no misdirection if the judge states in strong terms the impression which the evidence has made upon his mind, unless it is clearly shewn that the impression was not warranted by such evidence. *Davidson* v. *Stanley*, 3 Scott (N.R.) 49 ; 2 Man. & G. 721.

Where in an action for the recovery of land there was evidence that part of the land claimed by the defendants under a possessory title admittedly derived from the plaintiffs, had been unenclosed within the statutory period, such evidence ought to have been submitted to the jury, and it was a misdirection on the part of the judge to say that, as the plaintiffs had not proved possession by themselves for twelve years before action, the verdict should be for the defendants ; and a new trial was rightly ordered by the Supreme Court. *Kingston Race Stand* v. *Kingston Corporation*, 66 L. J., P. C. 111 ; [1897] A. C. 509—P. C.

To entitle a party to a new trial on the ground of misdirection, it must be shewn that the jury has been thereby induced to form a wrong conclusion. *Newcastle* (*Duke*) v. *Browtowe*, 1 N. & M. 598 ; 4 B. & Ad. 273.

Where a new trial is moved for on the ground of a misdirection in point of law, if the court sees that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmonson* v. *Machell*, 2 Term Rep. 4.

It is not a misdirection if the judge refers the jury to their own knowledge of any particular facts, which have been proved as matter of illustration only, and not as matter of evidence. *Rex* v. *Sutton*, 4 M. & S. 532.

A direction, partially incorrect, is not a ground for a new trial, where the verdict is consistent with the justice of the case. *Wickes* v. *Clutterbuck*, 2 Bing. 483 ; 10 Moore, 63 ; 3 L. J. (O.S.) C. P. 67 ; 27 R. R. 692.

If the plaintiff's counsel acquiesces in the judge's ruling, whereby the defendant takes a verdict without going into his case, the plaintiff will not be afterwards permitted to move for a new trial on the ground of a misdirection. *Robinson* v. *Cook*, 6 Taunt. 336 ; 16 R. R. 624.

The judge directed the jury, if they came to a certain conclusion, to give their verdict for the plaintiff ; but if they came to either of two other conclusions, which he pointed out, to find for the defendant, and state on which ground their judgment was formed. The plaintiff then chose to be nonsuited :—Held, that he was not entitled to a new trial on account of misdirection, if either of the two latter points was rightly put to the jury. *Vacher* v. *Cocks*, 1 B. & Ad. 145 ; M. & M. 353 ; 8 L. J. (O.S.) K. B. 341.

In trespass quare clausum fregit, there was a plea claiming a right by custom, and another by prescription, and several others by non-existing

grants; the judge called the attention of the jury to the nature of the mode of claim, and told them that, in order to support the prescription, exclusive enjoyment was necessary:—Held, that it was no misdirection, as the expression "exclusive" was used to point their attention to the different nature of the claim by custom as a public right, and by prescription as a private right. *Blewitt* v. *Tregonning*, 3 A. & E. 554; 1 H. & W. 432.

If a judge, on leaving to the jury a question partly depending upon the construction of an act of parliament, does not give the jury an explanation of the meaning of the act sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. *Elliott* v. *South Devon Ry.*, 2 Ex. 725; 17 L. J., Ex. 262.

Where the plaintiff's case was clearly supported by a qualified admission made by the defendant:—Held, no misdirection, that the judge did not distinctly tell the jury that the whole admission must be taken together. *Beckham* v. *Osborne*, 6 Man. & G. 771; 7 Scott (N.R.) 520.

The court will not grant a defendant a new trial where there has been a misdirection with respect to one item only of the plaintiff's demand, and the plaintiff consents to reduce the damages by the whole sum in respect of which the misdirection took place. *Moore* v. *Tuckwell*, 1 C. B. 607; 15 L. J., C. P. 153.

Where a judge mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right, but the court will exercise its discretion according to its opinion of the result being in accordance with the justice of the case. *Black* v. *Jones*, 6 Ex. 213; 20 L. J., Ex. 152. S. P., *Norbury* (*Earl*) v. *Kitchin*, 7 L. T. 685.

A mistaken ruling as to a matter collateral to the issue, not being ground for a bill of exceptions, will never be made ground for a new trial, unless the court can see that injustice has been occasioned by the mistake. *Henman* v. *Lester*, 12 C. B. (N.S.) 776; 9 Jur. (N.S.) 601.

It is no ground for a new trial that the judge leaves to the jury as a question of fact that which he should himself have decided as a matter of law, unless the objection is presented to the notice of the judge. *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 724.

A wrong observation by a judge on a matter of fact, which is left as a question of fact for the jury, is no ground for a new trial. *Taylor* v. *Ashton*, 11 M. & W. 401; 12 L. J., Ex. 363.

It is no ground for setting aside a verdict that the judge in summing up has commented, however strongly, on the arguments made use of by the counsel for the unsuccessful party in his address to the jury. *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497.

On the trial of an action for slander, before the plaintiff's counsel stated his case, the judge, in the hearing of the jury, suggested to the parties that it would be better to withdraw a juror. This was declined, and the jury found a verdict for the defendant:—Held, that this observation of the judge was not calculated improperly to sway the jury to give their verdict for either of the parties. *Lloyd* v. *Jones*, 6 B. & S. 475.

The circumstance of the judge having left an immaterial question to the jury, with a direction that, if they find it one way, they must return a verdict for the defendant, does not entitle the plaintiff to a new trial, if upon all the other undisputed facts of the case the defendant is clearly entitled to the verdict. *Clarke* v. *Arden*, 16 C. B. 227; 24 L. J., C. P. 162; 1 Jur. (N.S.) 710; 3 W. R. 444.

Upon a difference of opinion, it is no misdirection to tell the jury that they ought to yield to conviction and to conversion by their fellows. *Everett* v. *Youells*, 1 N. & M. 530; 4 B. & Ad. 681.

It is for a party shewing cause against a rule for a new trial on the ground of misdirection to shew that the alleged misdirection did not cause a miscarriage of justice; and he must shew it by authentic evidence. *Anthony* v. *Halstead*, 37 L. T. 433.

Where a jury had not acted according to a misdirection, but had given damages, the court would not grant a new trial, on the ground of the misdirection. *Twigg* v. *Potts*, 1 C. M. & R. 89; 3 Tyr. 969; 3 L. J., Ex. 336.

The refusal by a judge to direct a jury to find for the plaintiff or for a defendant does not constitute misdirection. The evidence on which his refusal was founded, and the reasons for impeaching it, must be stated to him at the time. *Greene* v. *Bateman*, L. R. 5 H. L. 591.

Action by payee against the maker of a note. Plea, set-off. At the close of the defendant's case it was submitted that there was no evidence to go to the jury in support of his case. The judge declined to stop the case, and the plaintiff gave evidence; a verdict was found for the defendant:—Held, that the plaintiff could not afterwards move to enter a verdict, on the ground that the cause should have been stopped at the end of the defendant's case. *Allen* v. *Carew*, 7 El. & Bl. 463; 3 Jur. (N.S.) 1146.

Quære, whether the word misdirection in Ord. XXXIX. applies to a nonsuit. *Hall* v. *Jupe*, 49 L. J., C. P. 721; 43 L. T. 411.

The trustees of a dock were sued for injury to a vessel, on the ground that, knowing that the dock and the entrance thereto were, by reason of a bank or accumulation of mud, in an unfit state to be navigated and used, they suffered the same to continue in such state so that the vessel, in entering the dock, struck against and became embedded in the mud. The defendants denied this, ascribing the injury to another cause, and the witnesses on both sides appeared to agree that if the mud bank had existed as alleged it must have been seen by the defendants' servants. The judge was not asked by the defendants' counsel in his summing-up to leave specifically to the jury the question of their knowledge of its existence, and he left to the jury in substance the question whether the bank had existed as alleged by the witnesses on one side, and denied on the other. The jury found for the plaintiff, adding that the injury had not arisen from the cause to which it was attributed by the defendants:—Held, that there had been no misdirection, and that the verdict was not bad. *Gibbs* v. *Liverpool Dock Trustees*, 28 L. J., Ex. 57.

Where a question of fact, proper for the decision of the jury, has been withdrawn from them, and a verdict directed, a new trial would have been ordered, even though an opposite verdict would have been against the evidence. *Brew* v. *Conole*, Ir. R. 9 C. L. 151.

"Substantial Wrong or Miscarriage."]—The appellant wrote and circulated a letter addressed to the respondent charging the respondent with being "participant in illegal profits whilst

holding positions of trust." Both appellant and respondent were governors and benefactors of a college. The appellant also acted as solicitor to the college, and in that capacity had received profit-costs. In an action for libel by the respondent the judge in his charge to the jury expressed his opinion that by a clause in the memorandum of the college the solicitor was entitled to charge profit-costs, and substantial damages were awarded. On motion for a new trial, the Court of Appeal held that the clause referred to did not bear the construction placed upon it by the judge, but that, notwithstanding the misdirection, the case of libel was made out, and refused the application. The house of lords reversed the decision of the Court of Appeal, on the ground that there had been "a substantial wrong and miscarriage," inasmuch as an important and serious topic had been withdrawn from the jury. New trial ordered. *Bray* v. *Ford*, 65 L. J., Q. B. 213; [1896] A. C. 44; 73 L. T. 609—H. L. (E.)

Non-Direction.] — Non-direction is only a ground for granting a new trial where the verdict is against the weight of evidence. *Ford* v. *Lacey*, 7 H. & N. 151; 30 L. J., Ex. 351; 7 Jur. (N.S.) 684. S. P., *Great Western Ry. of Canada* v. *Braid*, 1 Moore, P. C. (N.S.) 101; 1 N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 444.

It is no ground for a new trial that the judge, in his summing up, omits specially to leave to the jury a point made in the course of the trial, if the whole case was substantially left to them. *Robinson* v. *Gleadow*, 2 Scott, 250; 2 Bing. (N.C.) 156; 1 Hodges, 245.

—— **Point not raised at Trial.**]—When counsel for the defendant advisedly abstained from submitting to the jury a question of fact which was open upon the pleadings, and which, if answered in his favour, would have entitled him to the verdict, and the judge also abstained from noticing it in his summing up, the court refused to grant the defendant a new trial as for a misdirection. *Martin* v. *G. N. Ry.*, 16 C. B. 179; 3 C. L. R. 817; 24 L. J., C. P. 209; 1 Jur. (N.S.) 613; 3 W. R. 477.

The defendant's counsel rested the defence exclusively on one issue, and after verdict on that, objected that the judge had omitted to notice a point of law not arising on that issue but on another:—Held, that he had precluded himself from the objection, and could not afterwards treat the judge's omission as a misdirection. *Horlor* v. *Carpenter*, 3 C. B. (N.S.) 172; 27 L. J., C. P. 1.

When counsel at a trial does not ask that a point should be submitted to the jury, but gets leave reserved to move, he cannot afterwards ask for a new trial on the ground that that point was not submitted to the jury. *Morgan* v. *Couchman*, 14 C. B. 100; 23 L. J., C. P. 36.

11. Direction as to Damages.

If the judge does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the court will direct a new trial, although the point was not taken by the plaintiff's counsel. *Knight* v. *Egerton*, 7 Ex. 407.

Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley* v. *Baxendale*, 9 Ex. 341; 2 C. L. R. 517; 23 L. J., Ex. 179; 18 Jur. 358; 2 W. R. 302.

In an action for breaking and entering the plaintiff's close, the plaintiff relied upon the bare possession, though it appeared that he had originally become possessed as tenant to W. under a written agreement. The defendant proved that five days after the commencement of the trespass he obtained a lease of the close from W., which he produced. The judge told the jury that in the absence of proof of the quantum of the plaintiff's interest in the premises he was only entitled to nominal damages:—Held, no misdirection. *Twyman* v. *Knowles*, 13 C. B. 222.

Where the judge, in the presence of the counsel, directs a verdict for the defendant, but at the same time tells the jury to assess damages for the plaintiff contingently, and the counsel do not object, it is not competent to the plaintiff afterwards to move for a new trial on the ground of a misdirection; he can only move to enter a verdict for the damages so contingently assessed. *Booth* v. *Clive*, 10 C. B. 827. S. P., *Morris* v. *Murray*, 13 M. & W. 52; 13 L. J., Ex. 261.

12. Ruling as to Right to Begin.

When injury has resulted from an erroneous decision of a judge, relative to the order of beginning, the court will in its discretion grant a new trial. *Geach* v. *Ingall*, 14 M. & W. 95; 15 L. J., Ex. 37; 9 Jur. 691. S. P., *Hickman* v. *Fernie*, 3 M. & W. 505.

An incorrect ruling as to the proper party to begin is no ground for a new trial, unless it also appears that substantial injustice or manifest injury has resulted from it. *Bradford* v. *Freeman*, 5 Ex. 734; 20 L. J., Ex. 36; 14 Jur. 987. *Edwards* v. *Matthews*, 4 D. & L. 721; 16 L. J., Ex. 291. *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655; 17 L. J., C. P. 127. *Booth* v. *Millns*, 4 D. & L. 52; 15 M. & W. 669; 15 L. J., Ex. 354.

13. Ruling as to Stamps on Documents.

See R. S. C., 1883, Ord. XXXIX. r. 8.

This provision does not apply where, on an objection being taken to the sufficiency of the stamp on a document, the judge, with consent of the parties, abstains from expressing an opinion on the point, and reserves it for decision in banco. *Eames* v. *Smith*, 1 Jur. (N.S.) 1025; 4 W. R. 9.

A judge holding a document admissible which has been objected to for insufficiency of stamp, ought not to reserve the question of sufficiency for the court. *Siordet* v. *Kuczinski*, 17 C. B. 251; 25 L. J., C. P. 2; 4 W. R. 153. S. P., *Tattersall* v. *Fearnley*, 17 C. B. 368.

14. Verdict against Weight of Evidence.

General Principle—Verdict unreasonable.]—In granting a new trial on the ground that the verdict was against the weight of evidence, the court must be satisfied not merely that the verdict was one which reasonable men ought not to have given, but that it was so unreasonable that a jury could not properly give it if they really performed the judicial duty cast upon them. *Solomon* v. *Bitton* (8 Q. B. D. 176) observed

upon. *Metropolitan Ry.* v. *Wright*, 55 L. J., Q. B. 401; 11 App. Cas. 152; 54 L. T. 658; 34 W. R. 746—H. L. (E.)

A new trial of an action ought not to be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury, acting as reasonable men, could have found. *Solomon* v. *Bitton* (8 Q. B. D. 176) explained. *Webster* v. *Friedeberg*, 55 L. J., Q. B. 403; 17 Q. B. D. 736; 55 L. T. 49; 34 W. R. 728—C. A.

The question whether a new trial should be granted, on the ground that the verdict was against the weight of evidence, must depend upon whether the verdict was such as reasonable men ought to have given, and not upon whether the learned judge who tried the action was dissatisfied or not with the verdict. *Solomon* v. *Bitton*, 8 Q. B. D. 176—C. A.

In a suit to revoke probate of a will the jury found by a majority that the testator was of unsound mind at the date of its execution:—Held, that the verdict must be set aside as against the weight of evidence; the medical evidence being insufficient to support it, while the other evidence of incapacity related to irrelevant circumstances, and was contradicted by witnesses who deposed to actual transactions with the testator, and to his conduct and condition at the time of executing his will. *Aitken* v. *McMeekan*, [1895] A. C. 310—P. C.

Where a new trial is sought to be obtained on the ground that the verdict in the court below was against the weight of evidence, in a case where there was some evidence to support the verdict, it is not enough that the judge who tried the case, or the judges of the Court of Appeal, might have come to a different conclusion; but there must be such a preponderance of evidence against the verdict as to make it unreasonable that the jury, when properly directed by the judge, should return the verdict they did. *Hampson* v. *Guy*, 64 L. T. 778—C. A. S. P., *Ferrand* v. *Bingley Local Board*, 56 J. P. 277—C. A.

A new trial cannot be granted unless the verdict was such as no jury could have found as reasonable men. *Australian Newspaper Co.* v. *Bennett*, 63 L. J., P. C. 105; [1894] A. C. 284; 6 R. 484; 70 L. T. 597; 58 J. P. 604—P. C.

In an action for damages owing to the negligent construction of a drain, the jury found that there was no negligence, but the full court set aside the verdict and ordered a new trial:—Held, that this order must be discharged. There being evidence both ways, the verdict was one which the jury, viewing the whole of the evidence, could reasonably find. *Brisbane Municipality* v. *Martin*, [1894] A. C. 249—P. C. S. P., *Dallas* v. *G. W. Ry.*, 57 J. P. 584—C. A.

Where in an action for compensation in respect of land compulsorily taken for public purposes the jury, after hearing the conflicting evidence of experts as to the existence of payable coal thereunder, assessed damages in respect thereof:—Held, that their verdict, being one which a jury could reasonably find, could not be set aside as against the weight of evidence. *Brown* v. *Railways Commissioner*, 59 L. J., P. C. 62; 15 App. Cas. 240; 62 L. T. 469—P. C.

—— **Questions of Science.**]—The ordinary reasoning according to which the verdict of a jury on a question of fact ought not to be disturbed, unless the preponderance of the evidence against the verdict be strong and clear, does not apply to cases in which the verdict depends upon a question of science which is not fully solved, but is still within the region of bonâ fide controversy. *Metropolitan District Asylum (Managers)* v. *Hill*, 47 L. T. 29; 47 J. P. 148—H. L. (E.)

Rules under Former Practice.]—The court, upon the weight of evidence, refused to grant a new trial of an issue devisavit vel non, although in many parts the evidence was conflicting and contradictory. *Swinfen* v. *Swinfen*, 27 Beav. 148; 28 L. J., Ch. 849; 5 Jur. (N.S.) 1276.

Though the verdict is against evidence and the strict rule of law, yet a new trial will not be granted merely to gratify litigious passions. *Farewell* v. *Chaffey*, 1 Burr. 54.

Nor where the jury has found for the defendant against evidence, if the plaintiff appears to have received no real injury. *Burton* v. *Thompson*, 2 Burr. 664; 2 Ld. Ken. 375.

Where the jury finds a verdict in opposition to the evidence of a witness, and the credibility of the witness is left to the jury, the court will not grant a new trial, though there was nothing to impeach the credit of the witness. *Lacey* v. *Forrester*, 3 D. P. C. 668.

In trespass for shooting a dog, the only witness called to prove the value stated it to be 2*l.* 10*s.*, and that was not contradicted; yet the jury found a verdict for 20*s.* The court refused to interfere either by increasing the damages or by granting a new trial. *Cinn* v. *Facey*, 5 N. & M. 405; 1 H. & W. 482.

A new trial will be ordered after a verdict for the defendant, if the jury find a verdict against all the evidence in a cause on a misapprehension of the law, whether arising from their own mistake, or the misdirection of a judge. *Gregory* v. *Tuffs*, 1 C. M. & R. 300; 2 D. P. C. 711; 4 Tyr. 820; 3 L. J., Ex. 295.

The court will not grant a rule for a new trial on the ground that the verdict was contrary to evidence, when they can see that substantial justice has already been done, and that the verdict would be the same way if a new trial were granted. *Boulton* v. *Pritchard*, 1 B. C. Rep. 173; 4 D. & L. 117; 11 Jur. 64.

Where, from the testimony before the court upon the report, it does not clearly appear that the finding of the jury was against the weight of the evidence, or that it is necessary to the justice of the case that there should be a new trial, or that the result would or ought to be different, the court will not disturb a verdict. *Deacle* v. *Hancock*, 13 Price, 226; M'Clel. 85.

Where the jury has found a verdict for the plaintiff on a presumption contrary to evidence, the court will not grant a new trial, if the plaintiff is entitled to recover in conscience and equity. *Wilkinson* v. *Payne*, 4 Term Rep. 468. S. P., *Cox* v. *Kitchen*, 1 Bos. & P. 338.

Where a judge left, as a question for the jury, a point which upon the evidence could only be determined one way, and the jury found a verdict against the evidence, the court refused to grant a new trial, otherwise than on payment of costs. *Doe* d. *Smith* v. *Pike*, 1 N. & M. 385; 3 B. & Ad. 738.

Where the jury has incorrectly, and contrary to the judge's direction, found for the defendant, the court will not grant a new trial, to enable the plaintiff to recover nominal damages only. *Harris* v. *Jones*, 1 M. & Rob. 173.

Where trespass is brought which involves a

question of right to land, and evidence of acts of ownership is given on both sides, and a verdict is found contrary to the direction of the judge, in which he stated that he considered the evidence on one side to preponderate, the court will grant a new trial. *Cooke* v. *Green*, 11 Price, 736.

A new trial was granted where the jury had drawn a wrong conclusion on facts admitted on both sides. *Bright* v. *Eynon*, 1 Burr. 390; 2 Ld. Ken. 53.

A verdict certified by the judge to be entirely to his satisfaction is never suffered to be impeached as contrary to evidence, by affidavits. *Plunket* v. *Kingsland* (*Lord*), 7 Bro. P. C. 404.

A new trial was refused, though the chief justice reported that the strength of evidence was against the verdict. *Swain* v. *Hall*, 3 Wils. 45.

Where there was evidence on both sides, a new trial was refused, although the verdict was against the opinion of the judge who tried the cause. *Anon.*, 1 Wils. 22.

The rule that, in determining whether a verdict ought to be set aside as against evidence the court will be guided by the opinion of the judge by whom the cause was tried, must be understood of those cases where there is a conflict of testimony, and does not apply where the judge only expresses his opinion as to the value of evidence given on what may be called a special verdict. *Allaway* v. *Harris*, 29 L. J., Ex. 214; 6 Jur. (N.S.) 347; 2 L. T. 434.

15. Verdict for Larger Sum than Claimed.

Where the jury found generally that the defendant had paid the plaintiff a larger sum of money than was claimed in the declaration, but found a verdict for the plaintiff, the court refused a rule to set aside this verdict, and to enter a verdict for the defendant. *Freeman* v. *Crafts*, 1 H. & H. 188; 4 M. & W. 4.

Where, by mistake, the damages had been laid at 10*l.* and a jury at the trial had found for the plaintiff damages 150*l.*, the court granted a new trial on payment of costs, with liberty to the plaintiff to amend. *Tebbs* v. *Barron*, 5 Scott (N.R.) 837; 12 L. J., C. P. 33. *See* infra, PLEADING (AMENDMENT), post, cols. 875 et seq.

16. In Cases of Nonsuit.

Where a plaintiff had been nonsuited upon the opening speech of his counsel, and it was afterwards shewn by affidavit that his witnesses could have proved a good cause of action, not stated in the opening speech, the court granted a new trial upon payment of costs. *Edger* v. *Knapp*, 5 Man. & G. 753; 6 Scott (N.R.) 707; 1 D. & L. 73; 7 Jur. 583.

Where a defendant applies to the judge for a nonsuit on the ground that the contract declared on is not proved, and he declines to nonsuit, but reserves the point, and the jury finds for the defendant, it is competent to him to set up the objection taken at the trial, in answer to a rule for a new trial obtained by the plaintiff, on the ground that the verdict is against evidence. *Mummery* v. *Paul*, 1 C. B. 316.

A plaintiff who chooses to be nonsuited in order to avoid an impending verdict for the defendant, cannot have a new trial on the ground that there was evidence to go to the jury. *Austin* v. *Evans*, 2 Man. & G. 430.

In an action for an allottee in a projected railway, upon the failure of the scheme, for the recovery of his deposit, where he had executed the subscribers' deed, there being no evidence that such execution was obtained by fraud, the defendant, under the direction of the judge, obtained a verdict:—Held, that as the plaintiff should have been nonsuited, a rule for a new trial ought not to be granted, although some observations made by the judge to the jury, as to what would constitute fraud, might not be legally correct, but in such a case the court will grant a rule to enter a nonsuit. *Atkinson* v. *Pocock*, 1 Ex. 796.

Quære, whether the word misdirection in Ord. XXXIX. applies to a nonsuit. *Hall* v. *Jupe*, 49 L. J., C. P. 721; 43 L. T. 411.

17. Mistake and Inconclusiveness.

Mistake.]—Where the judge, in summing up in favour of one of the parties, is stopped by the jury declaring themselves satisfied, and finding immediately for the other party, it is a good ground for a new trial. *Gainsford* v. *Blachford*, 6 Price, 36; 7 Price, 544.

A new trial of an issue will not be granted upon the ground of a mistake at the trial as to the date of a document if the court is satisfied that the correction of such mistake confirms the verdict; nor upon the ground that the unsuccessful party, relying on the mistaken document, refrained from producing other evidence at the trial. *Hughes* v. *Jones*, 1 N. R. 124.

The plaintiff having refused to answer relevant questions upon cross-examination was told by the judge that she would be nonsuited, and that she must either answer the questions or retire from the case. After conferring with her counsel, she still refused to answer, and the jury, upon the direction of the judge, found a verdict for the defendant. It appeared on the application for a new trial that the plaintiff was a foreigner, and did not understand the importance of answering the questions:—Held, that a new trial should be granted. *Wiedegemann* v. *Walpole*, 53 J. P. 614.

A new trial will not be granted after a verdict agreeable to justice, although irregular in form. *Aylett* v. *Lowe*, 2 W. Bl. 1221. S. P., *Holloway* v. *Hewitt*, Lofft, 232; *Anon.*, Lofft, 521.

When Inconclusive.]—New trial granted on the ground that the verdict was not sufficiently explicit. *Oakley* v. *Ood-Deen*, 2 L. T. 357.

Where the jury, on the trial of an issue relating to the title to land, found for the defendant on the ground that neither party had made out a satisfactory title, the court does not regard that as establishing the right of the defendant, and will direct a new trial. *Sunderland Freemen, Ex parte, Durham* (*Bishop*), *Ex parte*, 1 Drew. 184; 16 Jur. 370.

New trial of an issue granted, the verdict being unsatisfactory, from the circumstances under which the jury returned it. *East India Co.* v. *Bazett*, Jac. 91.

It is no ground for a new trial, that another jury in a cause nearly similar gave a different verdict. *Spong* v. *Hogg*, 2 W. Bl. 802.

Jury not Agreed.]—Where there were three several issues in a cause left by the judge to the jury, who having retired to consider their verdict, the judge, with the consent of both parties, left

the court, directing the associate to take the verdict upon each issue separately, and the associate, instead of doing so, asked the jury generally whether they found for the plaintiff or for the defendant, and the foreman answering, "We find for the plaintiff," the verdict was so entered. The court set aside the verdict, and granted a new trial, it appearing, upon affidavit of what passed in court, that there was some doubt expressed by one of the jury at the time as to the delivery of the verdict in that shape. *Bentley* v. *Fleming*, 1 C. B. 479; 3 D. & L. 23; 14 L. J., C. P. 174; 9 Jur. 402.

The judge told the jury, that, in case of their believing a fact, the verdict must be for the plaintiff; the jury retired, and afterwards returned into court and told the associate, who alone was there, that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so; but the jury expressed to him their dissent, and said that they were not agréed to find for the plaintiff. The court discharged a rule nisi, obtained on affidavit of these facts, for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff. *Doe* d. *Lewis* v. *Baster*, 5 A. & E. 129; 6 N. & M. 541; 2 H. & W. 264.

—— **Affidavits.**]—The affidavits of individual jurors to impugn a verdict recorded, on the ground that it was not given with their assent, are not receivable, but the affidavits of bystanders as to what passed within their knowledge touching the delivery of the verdict and the dissent of some of the jury at the time are admissible; and if the court sees reason to think that some of the jury may not have heard what passed at the time of delivering the verdict by the foreman, they will direct a new trial, and will not, at the defendant's request, merely vacate the verdict in order that it may be tried by the same panel, as if no trial had taken place. *Rex* v. *Woodler*, 6 M. & S. 366; 18 R. R. 402. S. P., *Raphael* v. *Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33; 4 W. R. 10.

Admissions of Jurymen.]—An admission by jurymen, that the verdict was given by mistake, when made after they had separated, though on the day of trial, is no ground for a new trial. *Davis* v. *Taylor*, 2 Chit. 268.

Nor are subsequent declarations of jurymen after a general verdict given according to the merits of the case. *Clark* v. *Stevenson*, 2 W. Bl. 803.

18. Mistake as to Qualification of Jury.

By Reason of Interest.]—The attorney for the defendant being the under-sheriff, and having summoned the jury, is no ground for a new trial after verdict for the defendant in a case of contradictory evidence. *Mason* v. *Vickery*, 1 Smith, 304.

The fact of the person acting as deputy for the sheriff, being the attorney for the defendant, is not a ground for a new trial. *Briggs* v. *Souton*, 9 D. P. C. 105; 1 W. P. C. 3; 4 Jur. 1014.

After a trial has been had, the court will not grant a venire de novo, on an allegation that the jury has been convened by the partner of the plaintiff's attorney; at least without proof that the party who objects was not aware of the fact at the trial. *Brunskill* v. *Giles*, 9 Bing. 13; 2 M. & Scott, 41; 1 L. J., C. P. 143.

The court will not grant a rule for setting aside a verdict, on an affidavit of the failing party, stating that one of the jury was a relation of the successful party, and that they were on terms of friendship and intimacy together, and particularising various instances and expressions on the part of the jurymen of partiality and prejudice. *Onions* v. *Naish*, 7 Price, 203. And see *Hewitt* v. *Ferneley*, 7 Price, 234; and *Wells* v. *Cooper*, infra.

In an action against a provisional committee-man of a proposed railway company for goods supplied in the course of the formation of the company, and which resulted in a verdict for the defendant, the foreman of the special jury was himself a provisional committee-man of the company. He did not make any affidavit that he was unaware of the question to be tried when he entered the jury box:—Held, a ground for a new trial; but it was granted only on payment of costs by the plaintiff, as it appeared that his attorney had been aware of the juryman's interest. *Bailey* v. *Macaulay*, 13 Q. B. 815; 19 L. J., Q. B. 73; 14 Jur. 80.

Where a public company is a party to an action, the mere fact that one of the jurymen was a shareholder in the company is no ground for granting a new trial. *Williams* v. *G. W. Ry.*, 3 H. & N. 869; 28 L. J., Ex. 2; 7 W. R. 97.

Not duly Qualified.]—The court will not set aside an inquisition to assess the value of land, under 8 & 9 Vict. c. 18, s. 41, on the ground that the jurymen by whom it was taken were not qualified to act as jurors, for they might have been challenged by the parties to the inquisition. *Chelsea Waterworks Co., In re*, 10 Ex. 731; 3 C. L. R. 329; 24 L. J., Ex. 79; 1 Jur. (N.S.) 143; 3 W. R. 174.

Where it was not distinctly sworn that the disqualification of a juror, being a town councillor of the borough in which the cause was tried, was not discovered till after verdict, the court refused to grant a rule for a new trial. *Peermain* v. *Mackay*, 9 Jur. 491.

In 1819 a level was taken and a survey made of lands in Bilsby, in Lincolnshire, liable to be rated to a drain called the Boy Grift, and the court of sewers directed a precept to the sheriff, requiring him to summon juries de corpore comitatûs, to appear at a certain place and time, and make a presentment. The sheriff having, under this precept, summoned a jury from the hundred of Calceworth, in the county, in May, 1819, they made a presentment that the Boy Grift was ruinous, and that certain works therein were absolutely necessary; and that lands in the occupation of various persons, including the plaintiff, received benefit or avoided danger by the drainage, and ought therefore to bear the charges thereof; and they accordingly assessed a rate, which the commissioners confirmed:—Held, that it was no objection to the presentment that the sheriff summoned the whole of the jury from the hundred of Calceworth. *Taylor* v. *Loft*, 8 Ex. 269.

Wrong Person serving on Jury.]—A jury retired to consider their verdict, and upon their returning into court, and their names being called over, one of the jurors, whose name was on the panel, did not answer to the name which the officer of the court had marked as the name of

the party called and sworn :—Held, upon objection taken before the verdict was recorded, that it was not a mis-trial. *Torbock* v. *Laing*, 5 Jur. 318.

A mistake in a juror's name in the panel is no ground for a new trial. *Dickenson* v. *Blake*, 7 Bro. P. C. 177.

The son of a juryman summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial. *Hill* v. *Yates*, 12 East, 229 ; 11 R. R. 371.

Where R. the elder was summoned on a special jury, and R. the younger was sworn and sat as one of such jury, he not being qualified to sit either on a special or common jury :—Held, that it was discretionary with the court to grant or refuse a new trial ; and it appearing that the clerk of the defendant's attorney was present at the trial, and knew of the mistake, and that the attorney himself did not make affidavit that he was ignorant of it, the court discharged a rule for a new trial on that ground. *Falmouth* (*Earl*) v. *Roberts*, 1 D. (N.S.) 633 ; 9 M. & W. 469 ; 11 L. J., Ex. 180.

It is in the discretion of the court to grant a new trial in a case where a person not impanelled has served upon the jury, and the court will not grant such new trial unless substantial injustice has been done by a wrong juror having served. *Wells* v. *Cooper*, 30 L. T. 721.

An action came on to be tried before a common jury, and the name of Thomas Fox, being on the common jury panel, was called amongst others by the associate, whereupon one Thomas Cox, who was on the special jury panel, went into the box by mistake, served upon the jury, and took part in the verdict, which was given for the plaintiff. The defendant alleged afterwards that Cox was a friend of the plaintiff, and had purposely, and in the interest of the plaintiff, tendered himself as a juror, but this was denied by Cox, in a letter written in answer to inquiries by the attorney of the plaintiff :—Held, that it was in the discretion of the court to grant a new trial, and a rule for a new trial discharged. *Ib.*

—— **Objection before Verdict.**]—When a person not summoned on the jury was sworn on a jury at nisi prius in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded ; the irregularity being noticed before verdict, the court awarded a venire de novo. *Dovey* v. *Hobson*, 6 Taunt. 460 ; 2 Marsh. 154.

On the trial of a special jury cause, when the names of the special jurymen, who had retired to consider their verdict, were called over on their return into court, it was discovered that a person on the impanelling of the jury, summoned as a special juryman on another cause, had answered by mistake to the name of a juryman summoned for the cause on trial, and had served in his stead. The defendant then objected to take the verdict of the jury so impanelled ; the plaintiff insisted on taking it ; and they gave a verdict for the plaintiff :—Held, a mis-trial, as the objection was taken before verdict ; and that there must be a venire de novo. *Doe* d. *Ashburnham* (*Earl*) v. *Michael*, 16 Q. B. 320 ; 20 L. J., Q. B. 276 ; 15 Jur. 677.

Trial by Jurors who had not Viewed after View by Others.]—The defendant had obtained a rule for a view, which was accordingly had, but upon the trial coming on at the assizes all the viewers were impanelled and engaged in trying a cause in another court. As this, however, was the last cause on the list, the judge (against the consent of the defendant) determined upon trying it, and other jurors were impanelled instead of the viewers, and a verdict was returned for the plaintiff :—Held, that this was a mis-trial, and a rule for a new trial was accordingly made absolute. *Kingston Union* v. *Landed Estates Co.*, 28 L. T. 644.

Waiver of Irregularity.]—A cause was tried under a writ of trial directed to the sheriff of Cambridgeshire, by a jury of persons resident in the town of Cambridge, none of whose names were on the jury list for the county ; but as it appeared that the defendant's attorney had seen and looked over the list before they were sworn, and had expressed himself satisfied :—Held, that the defendant was thereby precluded, after verdict for the plaintiff, from objecting to the irregularity. *Pryne* v. *Titchmarsh*, 10 M. & W. 605 ; 2 D. (N.S.) 474 ; 12 L. J., Ex. 45 ; 7 Jur. 202. See *Bailey* v. *Macaulay*, and *Falmouth* (*Earl*) v. *Roberts*, supra.

19. Misconduct of Jury.

What is.]—Where a jury has misconducted itself in their demeanour during the trial in such a way as to lead to the presumption that justice has not been properly administered, the court will grant a new trial. *Hughes* v. *Budd*, 8 D. P. C. 315.

The absence of the jury at intervals, and their drinking ale and smoking in the same room with the attorney for the plaintiff (for whom they returned a verdict), is such misconduct as will entitle the defendant to a new trial. *S. C.*, 4 Jur. 150.

The delivery of food to a juryman, after the jury was shut up to consider of their verdict, is no ground for setting the verdict aside, if it does not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a juryman whose holding out decided the event. *Everett* v *Youells*, 1 N. & M. 530 ; 4 B. & Ad. 681.

When a jury on a writ of inquiry, after having retired, covertly procured victuals and liquor, the court ordered a new trial, on the ground of misconduct on the part of the jury. *Cooksey* v. *Haynes*, 27 L. J., Ex. 371.

Misconduct of a juror after trial, in asking money from the party who obtained the verdict, the party not being implicated, and the verdict not being unsatisfactory, is no ground for a new trial. *Sibey* v. *Stephens*, 7 L. T. 274 ; 11 W. R. 19.

In an action for seizing and impounding the plaintiff's cow, the evidence was conflicting, and a verdict was returned for the plaintiff. The judge was dissatisfied with the verdict, and the court granted a new trial, on affidavits, one of which stated that the defendant, at a public-house, before the trial was concluded, heard the jury discoursing among themselves on the subject of the cause, and that one of them said to one of his fellows, "the parson (meaning the defendant) will get served out" ; and another juryman said to one of his fellows, "You will be for the parson." Two persons (one of whom had been examined at the trial) also deposed that they

would not believe the plaintiff's principal witness on his oath. *Allum* v. *Boultbee*, 9 Ex. 738; 2 C. L. R. 1072; 23 L. J., Ex. 208; 18 Jur. 406; 2 W. R. 459.

It is a ground for a new trial, if a juror before being sworn expresses a determination to give the verdict one way. *Ramadge* v. *Ryan*, 2 M. & Scott, 421; 9 Bing. 333; 2 L. J., C. P. 7.

Compromise—Evading Duty.]—In an action of tort, where the jury has made a compromise, and, instead of deciding the issue of guilty or not guilty, has agreed to find for the plaintiff without substantial damages, or has evaded the duty of applying their minds to the consideration of the amount of damages, so that there has been no real assessment of them, the court will grant a new trial. *Kelly* v. *Sherlock*, 6 B. & S. 480; 35 L. J., Q. B. 209; L. R. 1 Q. B. 686; 12 Jur. (N.S.) 937.

A verdict decided by lot is a bad verdict, and the court will, where such verdict has been given, grant a new trial. *Harding* v. *Hewett*, 8 D. P. C. 598; 4 Jur. 292.

In an action on a bill of exchange for 50*l*., the issue being whether goods were accepted by the plaintiff in satisfaction of the bill, the jury found for him with 25*l*. damages:—Held, that, if that finding could, upon the evidence, be accounted for only on the supposition that the jury had, by way of compromise among themselves, split the difference, the defendant was entitled to a new trial. *Hall* v. *Poyser*, 13 M. & W. 600; 14 L. J., Ex. 98.

Where Verdict Perverse.]—Where the judge recommends a verdict for the plaintiff with nominal damages, but the jury gives substantial damages, such verdict cannot be treated as perverse. *Chilvers* v. *Greaves*, 5 Man. & G. 578; 6 Scott (N.R.) 539.

A verdict is not perverse where it is against the advice or opinion of the judge on some matter rightly left to the jury, and their verdict of substantial damages will not be disturbed where the judge was of opinion that nominal damages should only have been awarded. *Adams* v. *Midland Ry.*, 31 L. J., Ex. 35; 10 W. R. 84.

In an action on a note, by indorsee against maker, he pleaded that he was induced to make the note by the fraud of the payee, and that it was indorsed by the payee without consideration, and that the plaintiff sued thereon as trustee. The defendant having closed his case, the judge told the jury that there was no evidence to sustain the plea. The jury, however, returned a verdict for the defendant. The court granted a new trial without examining whether the direction of the judge was right or wrong. *Wood* v. *Cox*, 17 C. B. 280.

Although there is no absolute rule invalidating a verdict certified by the judge at the trial to be perverse, yet such certificate affords ground for setting aside the verdict when coupled with other circumstances appearing in the report suggestive of perversity, such as the award of nominal damages when not apparently warranted by the evidence; though these circumstances would not, per se, and in the absence of such a certificate, be sufficient to disturb the verdict. *Quinlane* v. *Murnane*, 18 L. R., Ir. 53—C. A.

Declining to find special Verdict.]—It is the privilege of a jury to decline finding any other than a general verdict; and therefore if the judge explains to them, and they clearly understand that, in the absence of a particular fact, the plaintiff's right to recover will depend upon a doubtful legal question, and the judge requests them to find that fact, if satisfied of its existence, but they nevertheless give a verdict for the plaintiff generally, and on being pressed refuse to find the particular fact, the court will not set aside the verdict. *Devizes Corporation* v. *Clark*, 3 A. & E. 506.

Affidavits to Impugn Verdict.]—The affidavit of a juror, that the jury, having been divided, tossed up, and that the plaintiff had won, was rejected; because such conduct is a very high misdemeanour in all the jurymen; and the court must derive their knowledge from some other source than the party implicated. *Vaise* v. *Delaval*, 1 Term Rep. 11.

The court will not receive the affidavit of a party stating that he was informed by one of the jury that the verdict was decided by the drawing of lots. *Straker* v. *Graham*, 4 M. & W. 721; 7 D. P. C. 223; 1 H. & H. 449; 8 L. J., Ex. 86.

Nor is the affidavit of a juryman admissible for this purpose. *Ib.*

But the court will receive the affidavit of a party who actually saw the jury draw lots, or take the necessary steps for that purpose. *Ib.* S. P., *Harvey* v. *Hewett*, 8 D. P. C. 598; 4 Jur. 292.

Affidavits of jurors as to what took place in open court, on the delivery of their verdict, are receivable. *Roberts* v. *Hughes*, 7 M. & W. 399; 10 L. J., Ex. 337.

The court refused to grant a rule for a new trial upon an affidavit stating that one of the jury declared in open court, in the presence and hearing of the others, that the verdict had been decided by lot. *Burgess* v. *Langley*, 5 Man. & G. 722; 1 D. & L. 21; 6 Scott (N.R.) 518; 12 L. J., C. P. 257.

A subsequent confession of a juryman to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, and not otherwise proved to the court, is no ground for a new trial. *Aylett* v. *Jewell*, 2 W. Bl. 1299.

An affidavit of a person who was informed by a juryman of misconduct on the part of the jury will not be received as evidence of such misconduct. *Davis* v. *Roper*, 4 W. R. 9.

Affidavits in Opposition.]—Where a rule for a new trial is drawn up on reading affidavits imputing personal misconduct and partiality to some of the jurymen, affidavits of such jurymen, denying and explaining the conduct attributed to them, may be read on shewing cause against the rule. *Standewick* or *Standerwicke* v. *Hopkins* or *Watkins*, 2 D. & L. 502; 14 L. J., Q. B. 16; 9 Jur. 161.

The affidavit of a juryman is receivable to explain away an imputation of misconduct. *Jones* v. *Powell*, 4 W. R. 252.

Verdict given so as to carry Costs.]—It is no ground for setting aside a verdict, that the jury has given only a shilling damages, under a mistaken impression that it would carry costs. *Meurs* v. *Griffin*, 2 Scott (N.R.) 15; 1 Man. & G. 796.

In an action for a libel tending to ridicule the plaintiff, a sheriff's officer, in his calling, the judge told the jury that the publication was

libellous. The jury asked what sum would carry costs, and being told that a shilling would, returned a verdict for the defendant; the court granted a new trial. *Levy* v. *Milne*, 12 Moore, 418; 4 Bing. 195; 5 L. J. (O.S.) C. P. 153.

The judge told the jury that if they gave the plaintiff more than 40*s.* he could not influence the costs, but if they gave him less than 40*s.* each party would have to pay his own costs:—Held, no misdirection. *Ib.*

The counsel for the plaintiff told the jury that unless they gave damages for 5*l.* 5*s.*, in all probability the costs would be thrown upon the plaintiff:—Held, that he was wrong in so doing, and that the jury, in estimating damages, has no right to take into their consideration what amount will carry costs, the question of costs being with the judge. *Poole* v. *Whitcombe*, 12 C. B. (N.S.) 770; 3 F. & F. 79; 6 L. T. 783; 10 W. R. 732. S. P., *Russell* v. *Wenlveser*, 16 W. R. 710.

Although if a jury asks what amount of damages will carry costs, there is no reason why the judge should not inform them, yet giving a verdict in ignorance that it will not carry costs is no reason why, after an application for a certificate which implies that the verdict is recorded, the verdict should be disturbed. *Kilmore* v. *Abdoolah*, 27 L. J., Ex. 307.

20. Improper Influence on Jury.

Where, in a qui tam action for usury, the principal witness, the borrower, had distributed a printed memoir containing a statement of the case, which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them:—Held, that the discovery of this circumstance after the trial was not a sufficient cause for a new trial. *Spencely* v. *De Willott*, 3 Smith, 321.

But where a plaintiff swore that hand-bills reflecting on his character had been distributed in court, and shewn to the jury at the trial, the court would not receive affidavits of the jury in contradiction, but granted a new trial, although the defendant denied all knowledge of the circulation or distribution of the hand-bills. *Coster* v. *Merest*, 3 Br. & B. 272; 7 Moore, 87; 1 L. J. (O.S.) C. P. 2; 24 R. R. 667. *S. C.*, nom. *Coster* v. *Symons*, 1 Car. & P. 148.

A witness called for the plaintiff, in answering a question put to him by the defendant's counsel on cross-examination, added a statement which was not evidence, and of which the judge did not make a note. The plaintiff's counsel, in his reply, observing upon the statement so made, was interrupted by one of the jury, who had understood the statement in a sense opposite to the truth. The plaintiff's counsel thereupon asked the judge to recall the witness, in order that the mistake might be corrected. The judge refused to do so, saying that the statement was not evidence, and told the jury that they must not take it into their consideration:—Held, that the decision of the judge was correct, and that the possibility of the jury having permitted their verdict to be influenced by the statement was no ground for a new trial. *Cattlin* v. *Barker*, 5 C. B. 201; 11 Jur. 1105.

A new trial was granted in a civil case in the time of Edward 3, because a great lord concerned in the cause sat on the bench at the trial. *Anon.*, 6 Term Rep. 623.

Where two of the jury, during the progress of a trial which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and consequently before the summing up:—Held, that this did not avoid a verdict found for him. *Morris* v. *Vivian*, 10 M. & W. 137; 2 D. (N.S.) 235; 11 L. J., Ex. 367.

Held, also, that it was discretionary with the court whether they would set aside the verdict, and grant a new trial in such a case. *Ib.*

The mere fact that some of the jury had during the adjournment of the trial been treated by one of the plaintiff's witnesses previously examined, who had told them that he knew more about the case than he had already stated in his evidence, thereby causing himself to be re-examined, does not necessarily invalidate the verdict subsequently found for the plaintiff. *Harris* v. *Harris*, Ir. R. 3 C. L. 294.

21. Verdict obtained by Trick or Surprise.

A verdict obtained by a trick was set aside without costs. *Anderson* v. *George*, 1 Burr. 352.

Surprise may be, not must be, a ground for a new trial. *Edie* v. *East India Co.*, 1 W. Bl. 298; 2 Burr. 1216.

Where a cause, which was expected to last the whole day, was postponed, and an indictment for libel, which stood next in the paper, was tried out of its turn, and the defendants were found guilty, the court refused a new trial, on the ground of surprise. *Reg.* v. *Richardson*, 8 D. P. C. 511.

The court will not grant a new trial upon the ground of surprise, merely because the unsuccessful party has neglected properly to instruct his attorney. *Tharpe* v. *Stallwood*, 5 Man. & G. 760; 1 D. & L. 24; 6 Scott (N.R.) 715; 12 L. J., C. P. 241; 7 Jur. 492.

A new trial will not be granted on the ground of surprise, though it appears on affidavit that a witness who was expected did not appear at the trial, unless it is stated that there was surprise. *Hoare* v. *Silverlock*, 19 L. J., C. P. 215.

A party must be wholly surprised by the evidence to entitle himself to a new trial on this ground; it is not enough that the fact which caused the surprise was not attempted to be elicited on cross-examination of his witness, but came upon him by way of defence. *Roberts* v. *Holmes*, 2 C. L. R. 726.

A party to a cause, who has not been called as a witness, cannot have a new trial on the ground of surprise, in regard to the effect of any conversation with himself, at all events if he admits some conversation to have occurred, and the effect of it is not necessarily decisive of the case. *Holme* v. *Clark*, 10 W. R. 527.

A new trial will not be granted to a defendant on the ground of surprise, in an action on a special count, merely because an amendment has been made in it at the trial, which in some degree altered the plaintiff's case, although it appears that if the new case had been raised in the first instance the defendant could have brought further evidence to disprove it. *White* v. *S. E. Ry.*, 10 W. R. 564.

A new trial on the ground of surprise will not be granted in regard to a matter which was raised by the party at the trial, and merely to enable him to support it by further evidence not in its nature more conclusive. *Timmins* v. *Birmingham Gas Co.*, 10 W. R. 546.

When an allegation of a matter of fact has been once fairly investigated between the litigating parties, before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident, or any subsequent discovery of a material kind, the investigation should be considered sufficient, and the judgment thereupon conclusive as between those parties. *Waters* v. *Waters*, 2 De G. & Sm. 591.

When a cause was about to be tried, negotiations took place ending in an agreement by the defendant to allow judgment to be signed, and by the plaintiff to withdraw the record. The defendant's attorney did not sign the agreement, and the plaintiff consequently went on to trial and obtained a verdict:—Held, that the plaintiff ought to have informed the defendant of his intention to go on, and as he did not the verdict was set aside. *Skinner* v. *Tyson*, 17 L. T. 551.

A party nonsuited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise, where he has served a clerk in the office with the subpœna duces tecum to produce the document, but has omitted to apply to the head of the office for permission for its production. *Austin* v. *Evans*, 2 Man. & G. 430.

When the clerk of the defendant's attorney had, in pursuance of the ordinary notice to admit documents, attended before the trial at the office of the plaintiff's attorney, and there inspected two deeds:—Held, on motion by the defendant for a new trial on the ground of surprise, that the court could not hold that the defendant was surprised by the production of the deeds at the trial or their effect. *Caldwell* v. *Johnston*, Ir. R. 6 C. L. 233.

Although a witness proves a fact to the surprise of the other party, and though by mistake he was not cross-examined, nor was any evidence given to contradict him, nor any observation made on his evidence, it is no ground for a new trial. *Bell* v. *Thompson*, 2 Chit. 194.

Although surprise be a good ground for a motion for a new trial, and affidavits may be used to establish that ground, they must be conclusive; and the facts in respect of which the evidence creating the surprise was given must be such as that the verdict may be mainly attributable to their effect upon the decision of the cause. *Hartwright* v. *Badham*, 11 Price, 383.

It is not, as a surprise, a ground for a new trial, that the evidence in the cause varied the facts of the case in proof from that put on the record by the pleadings, so as to defeat pleas of justification on the trial, by a variance in point of description in respect of a matter of which defendant was ignorant until so proved. *Edwards* v. *Broxon*, 2 Tyr. 163; 2 C. & J. 18.

A new trial will not be granted on the ground of surprise, where a witness has falsely stated an immaterial fact, which the other party was not prepared to contradict. *Magnay* v. *Knight*, 1 Drink. 20.

To constitute surprise a case must have been made at the trial which the opposite party could not reasonably have been expected to meet. *Dillon* v. *City of Cork Steam Packet Co.*, Ir. R. 9 C. L. 118.

Unless sharp practice or fraud on the part of the plaintiff is shewn, the court will not disturb the verdict on the ground of surprise. *Bransdon* v. *Didsbury*, 9 D. P. C. 199; 1 W. P. C. 46; 12 A. & E. 631; 4 P. & D. 441.

22. Absence of Parties, their Solicitor or Counsel.

Where a verdict was obtained in the absence of the defendant, on account of no notice of trial being given, the court set aside the verdict, though he did not swear positively to a good defence on the merits. *Williams* v. *Williams*, 2 D. P. C. 350.

Where a cause which stood thirty off was taken out of its turn, as undefended, in the absence of the defendant's attorney, who was casually absent, no notice having been given that it would be taken as an undefended cause, the court set the verdict aside and granted a new trial. *Aust* v. *Fenwick*, 2 D. P. C. 246.

The court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance by his late attorney of the state of the action, that he had a good defence upon the merits, and that the verdict passed against him by reason of the negligence of such attorney. *Moody* v. *Dick*, 4 N. & M. 348.

If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court will grant a new trial, compelling the attorney to pay the costs as between attorney and client out of his own pocket. *De Roufigny* v. *Peale*, 3 Taunt. 484; 12 R. R. 687.

A cause being entered, in a written list of the day, at nisi prius, is notice to the attorney that it may be tried at any time in the course of the day: therefore, where a cause had been for several days in that list, and tried out of its order as an undefended cause, in the absence of the defendant's attorney, the court granted a new trial, on the terms of payment of the costs of the former. *Fourdrinier* v. *Bradbury*, 3 B. & Ald. 328.

At the assizes in Yorkshire the causes are entered by the marshal in two lists, one for the E. R. and the other for the W. R. A cause having by mistake been entered in the wrong list was tried as an undefended cause, the defendant's attorney having searched only one list, without finding it; the court granted a new trial, and held, that the attorney was not bound to search both lists. *Hunter* v. *Hornblower*, 3 D. P. C. 491.

Where a cause was set down in the written list at nisi prius, and taken out of its turn as an undefended cause, and was tried as such, in the absence of the defendant's counsel and attorney, who were instructed to defend; the court refused to grant a new trial, without an affidavit of merits, though moved for on payment of costs. *Blackhurst* v. *Bulmer*, 1 D. & R. 553; 5 B. & Ald. 907.

A cause in which counsel had been instructed for the defendant, having been called on out of its turn, upon an allegation of the plaintiff's counsel that it was undefended, a verdict was taken for the plaintiff before the defendant's counsel arrived; the court granted a new trial, the costs of the application to abide the event of the cause. *Dorrien* v. *Howell*, 6 Bing. (N.C.) 245; 8 Scott, 508; 8 D. P. C. 277.

Where a cause was called on in its turn for trial, and no attorney being present, and no counsel instructed, on behalf of the plaintiff, he was nonsuited, the court granted a new trial, on payment of the costs of the day by the attorney for the plaintiff out of his own pocket, together

with the costs of the application, to the defendant. *Townley* v. *Jones*, 8 C. B. (N.S.) 289; 29 L. J., C. P. 299; 6 Jur. (N.S.) 1158.

When a defendant has appeared by attorney and has not regularly displaced him, notice to such attorney, after an intimation from him that he has no instructions to defend the action, that it will be taken as an undefended case, will, if there is time for a counter-notice of an intention to defend, warrant the plaintiff in taking the case as undefended, although out of its order, on the morning of the day after the opening of the commission. *Lett* v. *Watkins*, 27 L. J., Ex. 319.

At the sittings after term in London, a cause was entered in the list of causes for trial in the second court of nisi prius. Notice was given in that court, during the temporary absence of the defendant (who appeared in person), that it would be taken in the first court, and after some interval of time it was accordingly then called on, and (the defendant not appearing) was taken as undefended. It did not appear that the defendant had been called in the second court. The court granted a new trial. *Cook* v. *Beardsall*, 29 L. J., Ex. 35; 1 L. T. 14.

The court will not grant a new trial, even on payment of costs, where the defendant or his attorney, having an opportunity of trying, permits a verdict to be taken against him, as in an undefended cause. *Breach* v. *Casterton*, 7 Bing. 242; 4 M. & P. 867; 9 L. J. (o.s.) C. P. 48.

The court refused to grant a new trial, on the ground that the cause had been called in the absence of the defendant's attorney, and that the plaintiff's case had been gone into, no one appearing on the other side, the affidavits on which the motion was founded not stating that any briefs had been prepared for counsel. *Twilt* v. *Crawley*, 1 M. & Scott, 229; 8 Bing. 144; 1 L. J., C. P. 49.

Whilst a cause stood on the paper for trial, the plaintiff having obtained an order to amend (which was, in fact, unnecessary), the defendant took out a summons to rescind that order for irregularity, and an order to that effect was obtained; whilst the second order was in discussion at chambers, the cause was tried, and the plaintiff obtained a verdict; the court refused to grant a new trial, without an affidavit of merits. *Clark* v. *Manns*, 1 D. P. C. 656.

Where a cause was taken out of its turn, and in the absence of the defendant, at the suggestion of the plaintiff, that it was a short one, the court refused to set aside the verdict. *Cottam* v. *Banks*, 1 B. C. Rep. 302; 11 Jur. 148.

Where a cause has been regularly tried as undefended, and a verdict taken for the plaintiff, in the negligent absence of the defendant's attorney, the court will grant a new trial on an affidavit of merits: but only on payment of costs. *Third* v. *Goodier*, 1 L. M. & P. 717.

The plaintiff in an action for crim. con. having been nonsuited, in consequence of the accidental absence of his attorney, the court granted a new trial on payment of costs as between attorney and client, it appearing that another action might be barred by the Statute of Limitations, and plaintiff be thereby precluded from taking ulterior proceedings. *Ayling* v. *Goldring*, 1 C. B. 635.

Where a cause was tried in the absence of the defendant's attorney, before the time specified in the notice of trial, the court set aside the verdict without an affidavit of merits. *Hanslow* v. *Wilks*, 5 D. P. C. 295.

A new trial granted in ejectment, upon payment of costs, and other equitable conditions, where the cause coming on unexpectedly had been tried as an undefended cause. *Doe* d. *Cooling* v. *Appleby*, 4 P. & D. 538; 9 D. P. C. 556.

The court refused to grant a new trial upon any terms where the cause had been taken (in its proper course) in the absence of the defendant's counsel, the defence intended to be set up being without equity. *Blogg* v. *Bousquet*, 6 C. B. 75.

Where a cause was taken out of its turn, upon the statement of the plaintiff's counsel that it was undefended, and it appeared that counsel had been instructed for the defendant, but that notice that the cause would be defended was not served till late on the previous night, the court granted a new trial, upon payment of the amount of damages into court; the costs of the trial and of the application to abide the event. *De Medina* v. *Shrapnell*, 12 L. J., C. P. 37.

When a cause has been entered for trial as undefended, it is the duty of the plaintiff's attorney, upon notice from the defendant of his intention to defend, to inform the court that the cause will be defended; and if it afterwards is tried as undefended out of its proper turn, a new trial will be granted without an affidavit of merits. *Wolff* v. *Goldring*, 44 L. J., C. P. 214; 32 L. T. 161; 23 W. R. 473.

23. Death of Parties.

In an action for negligence brought by an infant by his next friend, in which damages were recovered for injuries done to him, the death of the infant since the trial is no ground for granting a new trial, though the damages were presumably given on the supposition that the infant would continue to live. *Kramer* v. *Waymark*, 4 H. & C. 427; 35 L. J., Ex. 148; L. R. 1 Ex. 241; 12 Jur. (N.S.) 395; 14 L. T. 368; 14 W. R. 659.

The circumstance that the plaintiff was dead when an issue was tried, being unknown at the trial, does not afford a ground for a new trial. *Bird* v. *Kerr*, 4 Kay & J. 270.

See ante, cols. 73 et seq.

c. Practice.

See R. S. C., 1883, Ord. XXXIX.

Application to Court of Appeal.]—*See* Ord. XXXIX. r. 1.

—— **Cases before this Rule.**]—When the judge at a trial with a jury directs a finding to be given upon facts which are not really in dispute, and thereupon gives judgment for the party in whose favour the finding is entered, the party against whom judgment is given, if he is dissatisfied with the finding, may apply to a divisional court for a new trial, but cannot in the first instance appeal from the judgment to the Court of Appeal. *Yetts* v. *Foster*, 3 C. P. D. 437; 38 L. T. 742; 26 W. R. 745—C. A.

Where an action has been tried by a judge without a jury, if the unsuccessful party is dissatisfied with the judgment either on the ground that the judge has misdirected himself as to the law, or that his findings as to the facts are against the weight of evidence, the proper mode of obtaining relief is by appeal to the Court of

Appeal, and not by motion for a new trial. *Potter* v. *Cotton*, 49 L. J., Q. B. 158; 5 Ex. D. 137; 41 L. T. 460; 28 W. R. 160—C. A.

Where an action has been tried by a judge of one of the common law divisions without a jury, an appeal lies direct to the Court of Appeal. It is not proper in such a case to move for a new trial. *Pannell* v. *Nunn*, 28 W. R. 940—C. A.

When, at the close of the plaintiff's case, the judge, being asked to rule that there was no evidence for the jury, left certain questions to them, which they answered in the plaintiff's favour, and judgment was entered pursuant to the findings:—Held, that the defendant, as he complained of misdirection, which, if made out, would result in a new trial, could not appeal direct to the Court of Appeal, but must apply in the first instance to the divisional court. *Davies* v. *Felix*, 48 L. J., Ex. 3; 4 Ex. D. 32; 39 L. T. 322; 27 W. R. 108—C. A.

After a trial by a judge without a jury, any application for a new trial must be made to the Court of Appeal under Ord. XXXIX. r. 1, whatever the ground of it may be. *Oastler* v. *Henderson*, 46 L. J., Q. B. 607; 2 Q. B. D. 575; 37 L. T. 22—C. A.

Upon a nonsuit at a trial before a judge and jury, an application for a new trial ought to be made to the divisional court, and not to the Court of Appeal. *Etty* v. *Wilson*, 47 L. J., Ex. 664; 3 Ex. D. 359; 39 L. T. 83—C. A.

Where, on a trial in the Chancery Division, the judge has not found a separate verdict on a question of fact, but has decided the case as a whole according to the old practice of the Court of Chancery, a motion for a new trial on the ground of improper rejection of evidence cannot be made, the remedy of the unsuccessful party being by appeal from the order, and the Court of Appeal having power at the hearing of the appeal to admit any evidence which may have been improperly rejected. *Dollman* v. *Jones*, 12 Ch. D. 553; 41 L. T. 258; 27 W. R. 877—C. A. And see *Lowe* v. *Lowe*, 48 L. J., Ch. 383; 10 Ch. D. 432; 40 L. T. 236; 27 W. R. 309—C. A.

—— **Chancery Division—Trial at Assizes.**]—Where the issue of fact in an action in the Chancery Division has been tried by a jury before a judge of a common law division, an application for a new trial of the issue was heard by the judge of the Chancery Division to whose court the action was attached. *Jenkins* v. *Morris*, 49 L. J., Ch. 392; 14 Ch. D. 674; 42 L. T. 817—C. A.

When an action, commenced in the Chancery Division, has been tried by a jury before one of the judges of a common law division, it is thenceforth transferred to the division to which the judge belongs, and an application for a new trial must therefore be made to a divisional court of that division. But this does not apply to an action in which an issue has been directed by a judge of the Chancery Division. The action in that case still remains attached to the Chancery Division. *Jones* v. *Baxter*, 5 Ex. D. 275; 28 W. R. 817—C. A.

When an action attached to the Chancery Division has been tried by a jury before a judge of one of the common law divisions, application for a new trial must be made to a divisional court. *Hunt* v. *City of London Real Property Co.*, 47 L. J., Q. B. 42; 3 Q. B. D. 19; 37 L. T. 344; 26 W. R. 37—C. A.

Trial at Bar—Application not Ex parte.]—Where an information to recover penalties under the Parliamentary Oaths Act of 1866 has been tried at bar, a motion for a new trial must not be made ex parte, but upon notice of motion to the other side. *Att.-Gen.* v. *Bradlaugh*, 54 L. J., Q. B. 205; 14 Q. B. D. 667; 52 L. T. 589; 33 W. R. 673—C. A.

Notice of Motion.]—A notice of motion for a new trial on the ground of misdirection should state how and in what matter the judge misdirected the jury. *Pfeiffer* v. *Midland Ry.*, 18 Q. B. D. 243; 35 W. R. 335. S. P., *Murfett* v. *Smith*, 56 L. J., P. 87; 12 P. D. 116; 57 L. T. 498; 35 W. R. 460; 51 J. P. 374. And *Taplin* v. *Taplin*, 57 L. J., P. 79; 13 P. D. 100; 58 L. T. 925; 37 W. R. 256; 52 J. P. 406.

It is a sufficient statement of the grounds in a rule for a new trial, that "the judge's direction to the jury that the plaintiff was entitled only to nominal damages was wrong." *Watson* v. *Lane*, 2 Jur. (N.S.) 119.

—— **Amendment.**]—The court will not allow a rule for a new trial to be amended, by providing that the suit should not abate in the event of the death of the defendant where a surety had previously entered into a bond for payment of the damages and costs of the second trial. *Lopez* v. *De Tastet*, 8 Taunt. 712.

A rule for a new trial having been made absolute on payment of costs by the defendant, the court refused to expunge the conditional words upon suggestion that the plaintiff's attorney was not on the roll. *Punter* v. *Grantley (Lord)*, 3 Scott (N.R.) 647; 3 Man. & G. 295. *See* Ord. XXXIX. r. 5.

Time within which Application made.]—*See* Ord. XXXIX. r. 4.

—— **Before this Rule.**]—According to the proper interpretation of Ord. XXXIX. r. 1a, as amended by the Rules of March, 1879, a party applying for a new trial has the whole of four days within which to move; and if no divisional court sits upon the fourth day his time is then extended to the next sitting of a divisional court. *Grant* v. *Holland*, 49 L. J., Q. B. 800; 29 W. R. 32.

In computing the time within which a motion for a new trial of a cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions must have been made under Ord. XXXIX. r. 1, days on which the divisional court was not actually sitting were not to be reckoned before the Rules of Court of the 1st December, 1876, Ord. XXXIX. repealing the first-mentioned order. *Hallums* v. *Hills*, 46 L. J., Q. B. 88; 24 W. R. 956—C. A.

The time for an application for a new trial on the ground of misdirection under Ord. XXXIX. r. 6, begins to run from the time when the jury is discharged. *Shaw* v. *Hope*, 25 W. R. 729.

—— **Extension of Time.**]—Where a party failed to appeal from such interlocutory order within twenty-one days, under the mistaken belief that such order was final, and that appeal might be brought at any time within twelve months:—Held, that such mistake was not a circumstance which would justify the court in enlarging the time for appealing after the expiration of the twenty-one days under Ord. LVII. r. 6. *Highton*

v. *Treherne*, 48 L. J., Ex. 167; 39 L. T. 411; 27 W. R. 245—C. A.

The Court of Appeal has power, under Ord. LVIII. r. 5, to enlarge the time for moving for a new trial. *Purnell* v. *G. W. Ry.*, 45 L. J., Q. B. 687; 1 Q. B. D. 636; 35 L. T. 605; 24 W. R. 909—C. A.

A married woman believing her husband to be dead, went through the ceremony of marriage with another man and had several children by him. She afterwards obtained a decree for judicial separation against her second husband, the jury having found—first, that he had committed adultery; and secondly, that the first husband was dead at the time of the second marriage. The second husband, having subsequently ascertained that the first husband was alive, instituted a suit for nullity of marriage, and applied to the Court of Appeal for a new trial of the wife's suit, notwithstanding the expiration of the time limited for that purpose by the Rules of the Supreme Court:—Held, that the court had jurisdiction to extend the time, but that such extension ought not to be granted except upon the terms of the applicant making a suitable provision for his supposed wife. *Wilkins* v. *Wilkins*, 65 L. J., P. 55; [1896] P. 108; 74 L. T. 62; 44 W. R. 305—C. A.

A suggestion of perjury on the part of a defendant and his witnesses, and that fresh evidence has been discovered by the plaintiff since the expiration of the time for moving for a new trial, affords no ground for asking the court to dispense with the rule of court as to time. *Gambart* v. *Mayne*, 14 C. B. (N.S.) 320.

The court has a discretionary power, after the lapse of the four days for giving notice of appeal from a judgment, upon an application for a new trial, to enlarge the time for giving such notice. *Ward* v. *Lumley*, 5 H. & N. 656; 29 L. J., Ex. 372; 6 Jur. (N.S.) 560; 8 W. R. 543.

Where the point had been reserved, and it was sworn that there was an intention to give the notice and that it had been omitted within the four days by mere mistake, and there had been verbal notice of the intention, and the application was made promptly, the court allowed the formal notice to be given. *Ib.*

On an application for further time to deliver notice of appeal from a decision on a motion for a new trial, within four days from the time of the decision, it is necessary not only to shew sufficient reason to account for the default, but likewise to satisfy the court, that supposing the court had originally a discretionary power to allow an appeal, the court could have allowed it in the particular case. *Watson* v. *Lane*, 25 L. J., Ex. 240.

It is not a sufficient reason for the default, that the attorney inadvertently allowed the time to elapse. *Ib.*

Parties—Notice to Co-defendant.]—An action was brought against A. and B. to recover damages for tort, and a verdict was returned against A. and in favour of B. A. obtained an order calling upon the plaintiff only to shew cause why a new trial should not be granted, which order was subsequently discharged. A. appealed:—Held, that an order for a new trial would not be made in the absence of B., and B. was ordered to be served with notice of the appeal, and directed to shew cause to the Court of Appeal why a new trial should not be granted against him, although the time for moving for a new trial had expired. *Purnell* v. *G. W. Ry.*, 45 L. J., Q. B. 687; 1 Q. B. D. 636; 34 L. T. 822; 24 W. R. 720—C. A.

—— **Who may be heard.**]—A. and B. were found to be next of kin by the master, who rejected C.'s claim. C. excepted to the report, and upon an issue directed by the court he was found to be sole next of kin. A. alone moved for a new trial:—Held, that B. might be heard in support of the motion. *Johnston* v. *Todd*, 5 Beav. 394.

Cause cannot be shewn on behalf of the attorney who claims a lien on the verdict for his costs. *Sloman* v. *Allen*, 1 Man. & G. 96, n. S. P., *Wiedemann* v. *Walpole*, 56 J. P. 5—C. A.

Security for Costs.]—A party moving in the Court of Appeal under the Supreme Court of Judicature Act, 1890, and the Rule of the Supreme Court, August, 1890, for a new trial, after trial of an action with a jury, will not be ordered to give security for the costs of the motion. *Heckscher* v. *Crosley*, 60 L. J., Q. B. 75; [1891] 1 Q. B. 224; 39 W. R. 211—C. A.

—— **Foreigner resident Abroad.**]—The plaintiff, a foreign resident abroad, having no property within the jurisdiction, was unsuccessful upon a trial with a jury, and moved for a new trial: the defendant applied that the plaintiff should be ordered to give security for the costs of the motion:—Held, that the proper practice was to make the application in the first instance at chambers, subject to an appeal direct to the Court of Appeal. *Bentsen* v. *Taylor*, 62 L. J., Q. B. 516; [1893] 2 Q. B. 193; 4 R. 508; 69 L. T. 333; 41 W. R. 593—C. A.

Postponing Hearing.]—Where a motion for a new trial is to be made conditionally on the result of a decision pending in a similar cause, notice of motion should be given in the ordinary way and application should be made to the court to postpone the hearing till after such decision is given. *Peckett* v. *Short*, 32 W. R. 123.

Staying Proceedings pending Application.]—The Court of Appeal, following the former practice of the divisional court, will not grant a stay of execution pending an application for a new trial except under special circumstances: and the mere allegation either that there has been a misdirection, or that the verdict was against the evidence, or that there was no evidence to go to the jury, is not to be considered as a special circumstance. *Monk* v. *Bartram*, 60 L. J., Q. B. 267; [1891] 1 Q. B. 364; 64 L. T. 45; 39 W. R. 310—C. A.

When an order nisi for a new trial has been refused by a divisional court, and granted on appeal by the Court of Appeal, such order should not include a stay of proceedings. A stay of proceedings in such a case must be obtained by a substantive application to the divisional court or a judge in chambers or from the Court of Appeal on appeal from such substantive application. *Goddard* v. *Thompson*, 47 L. J., Q. B. 382; 38 L. T. 166; 26 W. R. 362—C. A.

The Court of Appeal has no original jurisdiction in any case to order a stay of proceedings or execution. *Ib.*

Jurisdiction—Verdict for one and against another Defendant.]—In an action for negligence against a railway company and also against H. the verdict was in his favour and against the

company. Notice of an order nisi for a new trial, obtained by the company, on the ground that the verdict was against the weight of evidence, was, by direction of the court, served on H. The order nisi was discharged by the Queen's Bench Division, and the company appealed, but gave no notice of the appeal to H. At the hearing the Court of Appeal directed notice of the appeal to be served by the plaintiff on H., and also notice to him to shew cause why a new trial should not be had against him. He accordingly appeared, but under protest, alleging that the court had no jurisdiction to call on him to shew cause, since he had been discharged by the finding of the jury and the order of the court below, and since the four days within which, under Ord. XXXIX. r. 1, a motion for a new trial ought to be made had elapsed :—Held, that the court had jurisdiction. After hearing H. shew cause, the court made the order absolute for a new trial against both defendants. *Purnell* v. *G. W. Ry.*, 45 L. J., Q. B. 687 ; 1 Q. B. D. 636 ; 35 L. T. 605 ; 24 W. R. 909—C. A.

The court cannot grant a new trial as to one defendant, where a verdict has been found against him, and for the other defendants. *Doe* d. *Dudgeon* v. *Martin*, 2 D. & L. 678 ; 13 M. & W. 811 ; 14 L. J., Ex. 128.

Where, in an action against five defendants, a verdict has been found against four, and in favour of one a rule by the four for a new trial ought to be drawn up calling upon the other defendant, as well as the plaintiff, to shew cause why a new trial should not be granted. *Belcher* v. *Magnay*, 13 M. & W. 815, n. ; 3 D. & L. 70 ; 14 L. J., Ex. 305 ; 9 Jur. 475.

In an action for false imprisonment against two, where a verdict has been given against one, it is no ground for refusing a new trial to him, that the other has obtained a verdict. *Green* v. *Elgie*, 2 Q. B. 99 ; 8 Jur. 187.

Where a rule nisi for a new trial is obtained by one only of two defendants, although it must be served upon the other, he cannot be heard in support of the rule, but he may shew cause against its being made absolute. *Wakley* v. *Healey*, 18 L. J., Ex. 426.

In an action of tort against seventeen defendants, two suffered judgment by default, fifteen pleaded the general issue ; the plaintiff entered a nol. pros. against one of the two, obtained a verdict of 900*l.* against the other, and the jury found their verdict in favour of the fifteen. The verdict as to five of the fifteen being unwarranted, the court granted a new trial against them, leaving the verdict against the others, and that against the defendant who suffered judgment by default, untouched. *Price* v. *Harris*, 10 Bing. 331 ; 3 M. & Scott. 838 ; 3 L. J., C. P. 73.

A verdict having been found for two defendants, in an action for work and labour done, a rule for a new trial was moved for on the ground of misdirection ; but it being admitted that there was no evidence against one of the defendants, the court, in granting the rule nisi, imposed as a term that his name should be struck out of the declaration, and the plaintiff should pay his costs. *De Bernardy* v. *Harding*, 8 Ex. 821 ; 22 L. J., Ex. 340.

—— **Power to enter Judgment.**]—On an application for a new trial under 53 & 54 Vict. c. 44, the Court of Appeal has power to enter judgment instead of ordering a new trial, where it is satisfied that the verdict is perverse and that no further evidence could be given. *Allcock* v. *Hall*, 60 L. J., Q. B. 416 ; [1891] 1 Q. B. 444 ; 64 L. T. 309 ; 39 W. R. 443—C. A.

The Court of Appeal has power under Ord. LVIII. r. 4, to enter judgment instead of sending a case down for a new trial where it has come to the conclusion that the verdict is against the weight of evidence, and that all the facts are before the court. *Millar* v. *Toulmin*, 55 L. J., Q. B. 445 ; 17 Q. B. D. 603 ; 34 W. R. 695—C. A. See *S. C.* in H. L., infra.

Quære, whether on appeal from an order of a divisional court upon an application for a new trial on the ground of the verdict being against the weight of evidence, the Court of Appeal has power to give judgment for the appellants instead of directing a new trial. *Millar* v. *Toulmin* (17 Q. B. D. 603) doubted. *Toulmin* v. *Millar*, 57 L. J., Q. B. 301 ; 12 App. Cas. 746 ; 58 L. T. 96—H. L. (E.)

A rule of court which provides that "upon a motion for judgment or for a new trial, the court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly," does not empower the court when and because it has set aside one or more findings which have been made matters of objection, to disregard or negative other findings of the jury which have not been objected to. *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, 65 L. J., P. C. 46 ; [1896] A. C. 257 ; 74 L. T. 201—P. C.

A defendant, in an action which had been tried by a judge without a jury, gave notice of appeal against the judgment, and also obtained ex parte a rule nisi for a new trial. He did not set down the appeal for hearing, but, before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages :—Held, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Supreme Court, 1875, Ord. XL. r. 10, upon the application to make the rule for a new trial absolute. *Waddell* v. *Blockley*, 10 Ch. D. 416 ; 40 L. T. 286 ; 27 W. R. 233—C. A.

Where a judge entered judgment for the plaintiffs on special findings of a jury, and the defendants moved in a divisional court for a new trial on the ground that the findings were against the weight of evidence :—Held, that the divisional court had jurisdiction, under Ord. XL. r. 10, to enter final judgment for the defendants. *Hamilton* v. *Johnson*, 49 L. J., Q. B. 155 ; 5 Q. B. D. 263 ; 41 L. T. 461—C. A.

The Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the Rules of December, 1876, have not altered Ord. XL. r. 10. Therefore the divisional court on a motion to set aside a verdict which has been found for the plaintiff, instead of ordering a new trial, may give judgment for the defendant, where such court is satisfied that there is really no evidence to support the verdict, and that it has before it all the materials necessary for finally determining the question in dispute. *Daun* v. *Simmins*, 48 L. J., C. P. 343. Affirmed, 41 L. T. 783 ; 28 W. R. 129 ; 44 J. P. 264—C. A. S. P., *Yorkshire Banking Co.* v. *Beatson*, 49 L. J., C. P. 380 ; 5 C. P. D. 109 ; 42 L. T. 455 ; 28 W. R. 879—C. A.

The Court of Appeal has power under Ord. XL. r. 10, to order judgment in an interpleader

action to be entered for the execution creditor without directing a new trial. *Williams* v. *Mercier* or *Mercier* v. *Williams*, 51 L. J., Q. B. 594; 9 Q. B. D. 337; 47 L. T. 140; 30 W. R. 270—C. A.

When judgment has been given in an action tried before a jury who have found specially the facts in dispute, upon a motion in the High Court to set aside the findings, the court has power to set aside the judgment and enter it for the unsuccessful party at the trial, if they are of opinion that the findings and the judgment at the trial cannot stand, and if they have before them all the materials necessary for finally determining the questions in dispute. *Hamilton* v. *Johnson*, 49 L. J., Q. B. 155; 5 Q. B. D. 263; 41 L. T. 461; 28 W. R. 879—C. A.

Power to review Findings as to Facts.]—Where a trial has taken place before a judge without a jury, the Court of Appeal, in all cases except that of surprise, has jurisdiction upon an appeal to review the findings as to the facts, without a rule for a new trial having been obtained. *Jones* v. *Hough*, 49 L. J., Ex. 211; 5 Ex. D. 115; 42 L. T. 108—C. A.

Terms—Condition as to Costs.]—Where a new trial is granted on the ground of the unsatisfactory nature of the verdict, a condition should not be imposed that the party applying for the new trial should pay the costs of the previous trial. *Metropolitan Asylum District* v. *Hill*, 47 L. T. 29; 47 J. P. 148—H. L. (E.)

The court will not make the payment of the costs of the day a condition precedent to the plaintiff's proceeding to a second trial. *Doe* d. *Evans* v. *Edwards*, 2 D. P. C. 572.

Where the Court of Queen's Bench grants a rule to set aside a trial and verdict, in a cause that has been taken as undefended, on an affidavit of merits by the defendant, it is not the practice to make the payment of costs by the defendant on a particular day a condition in the rule. *Bland* v. *Warren*, 2 N. & P. 97; 6 D. P. C. 21.

Where a cause was taken by mistake, the court refused to make the payment of costs a condition for a new trial. *Etherington* v. *Kemp*, 1 Chit. 634.

Where a bankrupt sued for the benefit of his assignees, the court refused to grant a new trial, unless his assignees would abide by the verdict, and become responsible for the costs. *Noble* v. *Adams*, 7 Taunt. 59; 2 Marsh. 366; Holt, 248; 17 R. R. 445.

Certain issues having been tried, and verdicts found for the plaintiffs, the defendants moved for a new trial, upon which it was ordered that the plaintiffs' costs of the trial should be taxed, and that, upon the defendants paying those costs, a new trial should be had:—Held that the defendants were not compellable to pay the costs under the order, unless they thought fit to proceed to a new trial. *Lambert* v. *Fisher*, 7 Sim. 525. Affirmed, *Ib.*, 528, n.

—— **Appeal.**]—An appeal will not be allowed simply in respect of costs, but it does not follow that a condition involving the payment of costs is to be considered as a dispute merely about costs, in a case in which the Court of Appeal affirmed an order of the Queen's Bench Division granting a new trial to the defendants in an action, but imposed the condition that the defendants should pay the costs of the first trial:—Held, that the defendants were entitled to appeal against the order coupled with this condition. *Metropolitan Asylum District* v. *Hill*, 49 L. J., Q. B. 745; 5 App. Cas. 582; 43 L. T. 225; 28 W. R. 663—H. L. (E.)

History of Practice as to granting New Trials.]—See *S. E. Ry.* v. *Smitherman*, per Blackburn (Lord), 47 J. P. 773—H. L. (E.)

Affidavits Receivable.]—Upon a motion for a new trial, in an action for breach of promise of marriage, on the ground that the damages are excessive:—Semble, that the court will not receive the affidavit of the defendant, for the purpose of explaining or contradicting the evidence given at the trial. *Berry* v. *Da Costa*, 1 H. & R. 291; 35 L. J., C. P. 191; L. R. 1 C. P. 331; 12 Jur. (N.S.) 588; 14 W. R. 279.

When a rule for a new trial had been moved for on behalf of a plaintiff on the ground of surprise, and had been granted, the court would not afterwards, when cause was shewn against the rule, allow fresh affidavits to be used, made since the motion, for the purpose of shewing that there was reasonable ground for believing that the plaintiff would succeed at the new trial; although the affidavits before the court sufficiently disclosed surprise in fact, and two of the judges thought that justice had not been done at the trial. *Horrocks* v. *Maudsley*, 23 L. T. 853.

Affidavits cannot be used to supply alleged omissions in a judge's notes of evidence in a trial before him. *Coles* v. *Bulman*, 17 L. J., C. P. 302; 12 Jur. 586.

Upon a motion for a new trial in an action of crim. con. on the ground of surprise, the court received the affidavit of the defendant, but not that of the plaintiff's wife. *Hawker* v. *Seale*, 17 C. B. 595. S. P., *Ling* v. *Croker*, 2 C. B. (N.S.) 760.

An affidavit to contradict the statement of a judge as to what occurred at the trial before him is inadmissible. *Rex* v. *Grant*, 3 N. & M. 106; 5 B. & Ad. 1081.

Upon an application to set aside a verdict on the ground of excessive damages, the court will not receive the affidavits of the defendant's witnesses, either to explain or to add to evidence given by them at the trial. *Phillips* v. *Hatfield*, 8 D. P. C. 882.

—— **Of Jurymen.**]—The affidavit of a juryman may be received to explain the circumstances under which he came into the jury box, on the trial of a cause affecting his own interest, though his affidavit of what occurred in the box during the trial is not receivable. *Bailey* v. *Macaulay*, 13 Q. B. 815; 19 L. J., Q. B. 73; 14 Jur. 80.

On motion for a new trial on the ground that the verdict was entered by mistake, the court received the affidavit of a juryman as to what occurred in open court, on delivery of the verdict. *Roberts* v. *Hughes*, 1 D. (N.S.) 82.

Affidavits of jurymen are admissible as to matters which pass openly in court; but where there is a judge's report on the same points, that is conclusive. *Everett* v. *Youells*, 1 N. & M. 530; 4 B. & Ad. 681.

An affidavit of a juryman is not admissible to shew what was said by a judge at the trial of a cause where the judge's notes are before the court. *Ib.*

Affidavits of jurymen to the effect that they did not understand the answers given by their foreman to certain questions put to them, to

amount to a finding for the plaintiff, are inadmissible. *Raphael* v. *Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33; 4 W. R. 10. S. P., *Rex* v. *Wooller*, 6 M. & S. 366. *See also cases*, ante, col. 530.

Judge Explaining Finding.]—When by agreement the jury was discharged and the cause submitted to the decision of the judge:—Held, that on a motion for a new trial or to take a verdict for the plaintiff, it was competent for the judge to explain to the court the reasons and precise meaning of his finding. *Chatterton* v. *Cave*, 47 L. J., C. P. 545; 3 App. Cas. 483; 38 L. T. 397; 26 W. R. 498—H. L. (E.)

Point not raised at Trial.]—A new trial will not be granted on a point not taken at the trial until after the case on both sides has been closed. *Eyre* v. *New Forest Highway Board*, 56 J. P. 517—C. A.

Where at a trial the defendant's counsel relied upon one particular point, and advisedly abstained from raising others which might have been raised, on the argument of a rule for a new trial on the ground of misdirection, the court confined the counsel to the point raised at the trial. *Jones* v. *Provincial Insurance Co.*, 3 C. B. (N.S.) 65; 26 L. J., C. P. 272; 3 Jur. (N.S.) 1004; 5 W. R. 885. S. P., *Green* v. *Read*, 8 L. T. 83; and *cp. cases*, ante, col. 519.

Leave to appeal, in an action for infringement of a patent, was granted, and the court added to the leave, "and also on the ground that, taking the specification and disclaimer to be good, there was no evidence to go to the jury of infringement." This second point had not been discussed in the court below. The exchequer chamber affirmed the judgment of the court below, on the question of the sufficiency of the specification and disclaimer, but directed a new trial, on the ground that there was no evidence of infringement to go to the jury:—Held, that the exchequer chamber had authority to grant a new trial. *Seed* v. *Higgins*, 8 H. L. Cas. 550.

Where an application for a new trial has been refused, the applicant cannot on appeal raise an objection that was not raised at the trial. *Greene* v. *Bateman*, L. R. 5 H. L. 591.

On a motion for a new trial, counsel cannot present a point which does not appear by the judge's notes to have been raised at the trial. *Gibbs* v. *Pike*, 1 D. (N.S.) 409; 9 M. & W. 351; 12 L. J., Ex. 257; 6 Jur. 465.

Disagreement of Jury—Agreement to accept Verdict of Majority.]—On the trial of an action in the county court, there being a disagreement of the jury, the parties were asked by the judge if they would accept the verdict of the majority, and they consented to do so, but afterwards the unsuccessful party applied for, and obtained from the judge a new trial, on the ground that the finding of the jury was against the weight of evidence and unreasonable:—Held, that the learned county court judge had power to entertain the application for a new trial, notwithstanding the consent of the parties to accept the verdict of the majority of the jury, the learned judge being within his jurisdiction in holding that the consent of the parties to accept the verdict of the majority meant no more than that they agreed to treat that as equivalent to a unanimous verdict. *Groome* v. *Sluker*, 69 L. T. 293.

Waiver of Right.]—If the plaintiff's counsel acquiesces in the judge's ruling, whereby the defendant takes a verdict without going into his case, the plaintiff cannot afterwards move for a new trial on the ground of misdirection. *Robinson* v. *Cook*, 6 Taunt. 336; 16 R. R. 624.

Where the plaintiff's counsel, after a judge has begun to sum up, proposes to be nonsuited, he cannot move to set aside the nonsuit, notwithstanding the judge may have expressed a strong opinion as to the effect of the evidence. *Simpson* v. *Clayton*, 2 Bing. (N.C.) 467; 2 Scott, 691; 5 L. J., C. P. 91. See *Butler* v. *Dorant*, 3 Taunt. 229.

By submitting to a nonsuit, not spontaneously, but in deference to an opinion expressed by the judge that the action is not maintainable, a plaintiff is not precluded from moving to set that nonsuit aside. *Sweet* v. *Lee*, 3 Man. & G. 452; 4 Scott (N.R.) 77; 5 Jur. 1134.

Submitting to a nonsuit, in deference to the opinion of the judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit. *Alexander* v. *Barker*, 2 C. & J. 133; 2 Tyr. 140; 1 L. J., Ex. 40.

If a plaintiff elects to be nonsuited instead of allowing his case to go to the jury, he cannot afterwards move to set aside the nonsuit. *Barnes* v. *Whiteman*, 1 W. P. C. 17; 9 D. P. C. 181.

On what Points.]—Where a legal objection is taken at the trial, and overruled by the judge, without reserving the point, and the court is afterwards of opinion that the objection was a good ground of nonsuit, the court will grant a new trial only, and will not permit a nonsuit to be entered. *Minchin* v. *Clement*, 1 B. & Ald. 252.

When leave is reserved to move to enter a nonsuit upon one point only, the court when it has the facts before them upon the judge's notes, will take the whole of these facts into its consideration, and will come to such a decision as these facts require. *Doe* d. *Pritchard* v. *Dodd*, 2 N. & M. 838.

If leave is reserved to enter a nonsuit, the court will, notwithstanding the leave reserved being thus restricted in point of form, order a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, if that course seems most consistent with doing justice between the parties. *Winterbottom* v. *Derby (Earl)*, 36 L. J., Ex. 194; L. R. 2 Ex. 316; 16 L. T. 771; 16 W. R. 15. *See* Ord. XXXIX. r. 6.

Court equally divided.]—When on a rule to enter a nonsuit, and for a new trial, the court was equally divided in opinion, the court, instead of allowing the rule to drop, discharged it, in order to enable the parties to appeal. *Burnett* v. *Allen*, 4 Jur. (N.S.) 488.

If a rule for a new trial drops in consequence of the judges being equally divided in opinion, the party who obtained the rule may appeal. *Levi* v. *Green*, 4 Jur. (N.S.) 86; 6 W. R. 209.

Money paid into Court.]—The amount of the verdict and costs, paid into court by the defendant to obtain a stay of execution, ordered to be paid back to him after the verdict had been set aside and a new trial granted. *Cosgrave* v. *Trade Auxiliary Co.*, Ir. R. 8 C. L. 165.

Appeal from Discretion.]—In ejectment for the recovery of premises by reason of a forfeiture for breach of covenant, for converting dwelling-houses into shops, the court held that the user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, although occasionally complained of, was evidence from which a jury might presume a licence:—Held, that the court might have granted a new trial, but as in its discretion it did not, the Court of Appeal would not exercise a counter-discretion by granting such new trial. *Gibson* v. *Doeg*, 7 L. T. 71; 10 W. R. 581—Ex. Ch.

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XIII. JUDGMENTS AND ORDERS.

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a. GENERALLY.

Junior Judge withdrawing Judgment.]—Upon a special case stated in Ord. XXXIV. r. 2, in case of a difference of opinion, the junior judge withdraws his judgment. *South Staffordshire Tramways* v. *Sickness and Accident Assurance Association*, 60 L. J., Q. B. 473; [1891] 1 Q. B. 402; 63 L. T. 807; 55 J. P. 168. S. P., *Metropolitan Ry.* v. *Fowler*, 60 L. J., Q. B. 518; 64 L. T. 662; 39 W. R. 652.

On a case coming before a divisional court on points of law raised on the pleadings under Ord. XXV. r. 2, the court was divided in opinion, and the junior judge withdrew his judgment to enable the case to be taken to the Court of Appeal. *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. 318; 60 L. T. 360; 53 J. P. 373.

In a case referred by the judge sitting in chambers to the divisional court, the judges differed in opinion, and the junior judge withdrew his judgment. *Hodgson* v. *Bell*, 24 Q. B. D. 302; 62 L. T. 481; 54 J. P. 455.

On an appeal from a county court, the divisional court was divided in opinion and the junior judge withdrew his judgment. *Stevens* v. *Hounslow Burial Board*, 61 L. T. 839; 38 W. R. 236; 54 J. P. 309.

In a revenue case on appeal by the crown to the divisional court, the judges were divided in opinion; the junior judge withdrew his judgment in accordance with the old practice in the Court of Exchequer. *Reg.* v. *Income Tax Commissioners*, 22 Q. B. D. 305; 59 L. T. 832; 37 W. R. 294; 53 J. P. 198. S. P., *Colquhoun* v. *Brooks*, 57 L. J., Q. B. 70; 19 Q. B. D. 418; 57 L. T. 455; 36 W. R. 332: *Reg.* v. *Income Tax Commissioners*, 57 L. J., Q. B. 337; 20 Q. B. D. 549; 59 L. T. 455; 36 W. R. 671; 52 J. P. 695.

The withdrawal of the judgment of the junior judge only takes place where there is an appeal, at least I am not prepared to say that if there were no appeal it would be done, because judges are equal in point of authority.—Per Lord Esher, M.R. *Colquhoun* v. *Brooks*, 21 Q. B. D., p. 56.

Where a case, requiring to be heard before a divisional court, is heard by a court consisting of only two judges, and these judges differ in opinion, the proper practice is to have the case re-heard before three or more judges of that division, and the old practice of one of the judges withdrawing his judgment should not be adopted. Where one of two judges withdraws his judgment, the order made is that of a single judge, and not of a divisional court. *Greene* v. *Thornton*, 16 L. R., Ir. 381—C. A.

Where two judges are sitting, and have arrived at opposite opinions in respect of any particular case, the old practice of the queen's bench division will be resorted to, and the junior judge will withdraw his judgment. *Att.-Gen.* v. *Noyes*, 44 L. T. 809.

Grounds of Dissent should be stated.]—A judge who differs from the opinion of the majority of a court from which an appeal lies, should always state fully the ground of his dissent, in order to guide the unsuccessful party as to the propriety of an appeal. *Price* v. *Salusbury*, 14 L. T. 110—H. L.

Contrary to Facts — Indemnity — Costs.]—When persons, even without mala fides, make or adopt a statement, the contrary of which they ought to have known by reasonable diligence to be the truth, and a wrongful order is made by the court grounded on such statement, all such persons are liable to indemnify the persons who suffer through such an order from all the consequences. *Spencer, In re*, 39 L. J., Ch. 841; 21 L. T. 808; 18 W. R. 240.

The primary liability in respect of costs falls upon the solicitor, through whose agency the order was obtained, and the primary liability as to the fund lost though the order falls upon those who wrongfully received it. *Ib.*

Joinder of Parties.]—Notwithstanding a misjoinder of plaintiffs, the court permits a decree to be made at the hearing, when it appears that justice can be done to all parties, notwithstanding the misjoinder. *Lambert* v. *Hutchinson*, 1 Beav. 277; 8 L. J., Ch. 196.

If the defendant has a good defence against one of the plaintiffs, who hold a joint office, though not against the others, the court cannot make good a decree in the suit for the plaintiffs. *Hunter* v. *Richardson*, 6 Madd. 89.

In order to bind remaindermen they must be served with the decree: but it is a rule of practice that no such direction should form part of the decree. *Greaves* v. *Smith*, 22 W. R. 388.

Office Copy.]—An office copy of an order is for all practical purposes the same as the original order. *Davenport* v. *Townsend*, 15 L. T. 528; 15 W. R. 378.

Original order lost. New office copy issued on affidavit of loss. *Scott* v. *Heisch*, 33 L. T. 498; 24 W. R. 108.

Liberty to Apply.]—The rule that an order of the court carries with it "liberty to apply," though not expressly reserved, only applies where the order is one not of a final character. *Penrice* v. *Williams*, 52 L. J., Ch. 593; 23 Ch. D. 353; 48 L. T. 868; 31 W. R. 496.

In every order of the court, liberty to apply to the court is implied, without its being expressly reserved. *Fritz* v. *Hobson*, 49 L. J., Ch. 735; 14 Ch. D. 542; 42 L. T. 677; 28 W. R. 722.

Powers of Court.]—A private act of parliament provided that, with certain exceptions, no incumbrance should be paid unless the claim in respect thereof was proved to the satisfaction of the court. A claim being made, upon a judgment entered up for 3,850*l.*, for services performed by a non-professional person in obtaining the act and other matters, the court refused to allow the claim, the claimant failing to prove the services in respect of which the claim was made. *Carew, In re*, 30 Beav. 274; 31 L. J., Ch. 214; 8 Jur. (N.S.) 297; 10 W. R. 98.

On motion by petition in the court below for the discharge of a receiver, the court refused the motion and dismissed the petition with costs, but ingrafted on the order of dismissal certain directions, asked for by the defendants and supported by their affidavits, in opposition to the motion:—Held, that such addition to the order was contrary to the practice of the court, and ought not to have been made; and that, upon the facts disclosed, an order for the dismissal of the receiver ought to have been made pursuant to the prayer of the petition. *Palmer* v. *Barrett*, 1 Moore, P. C. 415.

Validity of Order.]—Where a statute directs that a proceeding under it may be enforced by application to a judge, upon an affidavit of the facts for a summons, the granting of the summons without an affidavit sworn at the time is only an irregularity, and does not affect the validity of an order duly made in other respects upon such summons. *Furber, Ex parte*, 27 L. J., Ex. 453; 4 Jur. (N.S.) 956; 6 W. R. 625.

A judge's order is a nullity, if obtained from his clerk by misrepresenting his decision. *Woosnam* v. *Price*, 3 Tyr. 375; 1 C. & M. 352.

An order, by consent, allowing the plaintiff to enter up judgment in default of payment of debt and costs in a certain time, is not void under 1 & 2 Vict. c. 110, s. 9, by reason of no attorney having been present. *Stevens* v. *Miller*, 3 Man. & G. 228. S. P., *Brooks* v. *Hodson*, 8 Scott (N.R.) 223; 7 Man. & G. 529.

A summons to change the venue from London to Newcastle being opposed by the plaintiff, the judge indorsed the summons, "No order; the plaintiff undertaking to tax, if successful, as if tried in Northumberland":—Held, that this was binding upon the plaintiff as an undertaking, though no order was ever drawn up. *Clarke* v. *Tyne Improvement Commissioners*, 37 L. J., C. P. 110; L. R. 3 C. P. 230; 17 L. T. 509; 16 W. R. 480.

No Indemnity on Performance.]—An insurance company paying under a decree of the court the money payable under a lost policy is sufficiently indemnified by the decree, and is not entitled to any indemnity from the person to whom the money is paid. *England* v. *Tredegar (Lord)*, 35 L. J., Ch. 386; L. R. 1 Eq. 344.

b. PARTIES BOUND BY.

Estoppel.]—*See* ESTOPPEL.

Co-Defendants.]—Decree between co-defendants, when their whole case appears clearly upon the pleadings and proofs between plaintiff and defendant. *Holton* v. *Lloyd*, 1 Moll. 30.

A decree made between co-defendants upon evidence arising from pleadings and proofs between plaintiffs and defendants. *Conry* v. *Caulfield*, 2 Ball & B. 255.

Under special circumstances, an injunction was granted, on the application of a defendant against a co-defendant. *Edgecumbe* v. *Carpenter*, 1 Beav. 171; 8 L. J., Ch. 17.

A suit was instituted by a party entitled in remainder against a trustee, to make him responsible for a trust fund invested on an improper security, and a decree was made for its restitution:—Held, that in this suit the tenant for life, who was a defendant, was not entitled against the co-defendant, the trustee, to an account of the interest which had accrued pending the suit, there being no such case made by the pleadings. *Goodwin* v. *Clewley*, 2 Beav. 30.

The court will try a case between co-defendants, and where the decision of a right between co-defendants is essential to, and necessarily involved in, the decision of the plaintiff's right, the decree will be conclusive as between the co-defendants; but otherwise, the right of co-defendants inter se will not be affected by proceedings which are necessary only for establishing or ascertaining the rights of the plaintiff. *Cottingham* v. *Shrewsbury (Earl)*, 3 Hare, 627; 15 L. J., Ch. 441.

If a case wholly destructive of the foundation of the plaintiff's title is put forward in the answer of one defendant, and established, the court will not give effect to it as between the plaintiff and that defendant merely, but it shall enure to the benefit of the other defendants, though they have not made that case by their answers. *Wilson* v. *Bell*, 5 Ir. Eq. R. 501.

Leave to Attend.]—Where a court of equity directs an issue in a cause in which there are many parties, and selects some to have the conduct of the trial, giving all leave to attend, all are bound by the result. *Malone* v. *Malone*, 8 Cl. & F. 179; West, 637. *S. C.*, 3 Ir. Eq. R. 536; 2 Dr. & Wal. 491.

Persons with Notice.]—The defendant, having notice of a decree to which he was no party, pays money contrary to that decree. Ordered that he

should pay the money over again. *Harvey* v. *Mountague*, 1 Vern. 57.

A party who has notice of an order of the court is bound by it from the time the order is pronounced; and if the order be for an injunction, and the party, after notice, be guilty of a breach of it, he may be committed for the contempt without the production of the writ of injunction, and although the writ have not actually issued. *M'Neil* v. *Garratt*, Cr. & Ph. 98; 10 L. J., Ch. 297; 5 Jur. 836.

Appearance by Person not Served.]—If person named defendant, but who has never been served with subpœna, or appeared to bill, appears by counsel, and consents to be bound by decree, the defect is cured. *Capel* v. *Butler*, 2 Sim. & S. 457; 4 L. J. (o.s.) Ch. 69.

Where a person not a party to the suit, or interested in a question, appears by counsel, and submits to be bound by the decision, the court would not hear him without the consent of the other parties to the suit. *Bozon* v. *Bolland*, 1 Russ. & M. 69.

A party named as a defendant to the bill may, with the consent of the plaintiff only, appear at the hearing of the cause and be bound by the decree, although such party has not been served with the subpœna to appear or has not appeared in the suit; but a person who has not been named as a defendant to the bill cannot appear at the hearing without the consent of all the parties to the cause. *Dyson* v. *Morris*, 1 Hare, 413; 11 L. J., Ch. 241; 6 Jur. 297.

Shareholders—Company.]—A decree declaring that all the shareholders in a company are bound to pay what may be found due to the plaintiff, does not make the shareholders personally liable. *Vigers* v. *Pike*, 8 Cl. & F. 562.

Absent Parties.]—*See* supra, PARTIES. col. 69.

c. FORM OF.

In Particular Cases.]—*See* specific titles.

Without Prejudice.]—Decree for tithes declared to be without prejudice to the right, where the party appears to have failed in establishing a modus by mismanaging the suit. *Lake* v. *Skinner*, 1 Jac. & Walk. 9.

Where a sole plaintiff united in himself the title to a residuary fund in different characters having conflicting rights in the subject-matter:—Held, that although he might maintain the suit, yet the court would not in a suit so constituted decide on those rights, but make provision by the decree that the defendants might not be prejudiced by the peculiar form of the suit. *Blease* v. *Burgh*, 2 Beav. 221; 9 L. J., Ch. 226.

—— **Absent Parties.**]—*See* supra, PARTIES. col. 69.

"Until further Order."]—When an order is made to last until a particular day "or until further order," the words "further order" mean an order made on an earlier day than the day specified. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 38 L. T. 277; 26 W. R. 549.

Conditional.]—A judge's order, "that upon payment of debt and costs by a certain day, all proceedings should be stayed," is only conditional on the defendant. *Fricker* v. *Eastman*, 11 East, 319.

An order nisi at chambers makes itself absolute. *Humphreys* v. *Jones*, 8 D. P. C. 408; 6 M. & W. 418; 9 L. J., Ex. 168.

Therefore, if the party obtaining it does not attend in support of it, the party shewing cause should go before the judge, and apply to have it discharged, otherwise it will become absolute. *Ib.*

"Peremptory."]—An order "peremptory" for time to plead does not preclude a defendant from again applying by summons for further time; and, if he takes out such further summons, judgment signed for want of a plea after the summons is returnable, is irregular. *Beazley* v. *Bailey*, 16 M. & W. 58; 4 D. & L. 271; 16 L. J., Ex. 1; 10 Jur. 906.

By Ord. XIX. r. 8, of the Rules of the Supreme Court, 1883, "the party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons":—Held, that where upon an application for extension of the time for delivering a pleading, an order "peremptory" is made for delivery of the pleading within a time limited by the order, the time continues to run, notwithstanding that the applicant subsequently obtains an order for particulars. *Falck* v. *Æthelm*, 24 Q. B. D. 174; 59 L. J., Q. B. 161; 38 W. R. 196—C. A.

Separate Decree.]—Although different suits may involve the same subject-matter, and the same parties, the court will not decline to make a separate decree in each suit, unless the frame of the two suits and the relative position of the parties to each be the same. *Godfrey* v. *Maw*, 1 Y. & Coll. C. C. 485.

A court of equity has discretion to moderate its decree in any manner that suits the real and substantial justice of the case, and in a suit for tithes, if a defendant sets up distinct farm moduses, there may be a separate decree establishing or overruling each modus separately; and the whole costs may be decreed according to the justice of the case, against each defendant. *Wolley* v. *Brownhill*, M'Clel. 317, 324; 13 Price, 500.

Benefit to both Parties.]—It is no objection to a decree in favour of a plaintiff that it must necessarily benefit one of the defendants. *Smith* v. *Pincombe*, 3 Macn. & G. 653; 16 Jur. 205.

Names of Parties.]—Where the minutes of a decree order that "A. and all parties interested should be at liberty to attend the trial," the names of all the parties interested should be specified in it. *Wood* v. *Denne*, 1 L. J. (o.s.) Ch. 89.

A decree declaring, in the terms of the prayer of a charity information, that certain persons are not entitled thereto, is not defective for not also declaring who are entitled. *Shore* v. *Wilson*, 9 Cl. & F. 355.

Entering Evidence.]—Every decree, although it only direct issues or inquiries, ought to recite the evidence on which it is founded: and, therefore, where evidence is tendered and

objected to the court ought to decide at once upon its admissibility, and not to allow it to be entered as read de bene esse. *Parker* v. *Morrell*, 2 Ph. 453 ; 17 L. J., Ch. 226 ; 12 Jur. 253.

Every decree, though it merely directs inquiries, ought to contain a statement of the evidence on which it is founded, and therefore a decree reciting that certain evidence had been read, but that both parties consented that the entry of it should be without prejudice to its admissibility, thereupon directing certain inquiries, was held to be irregular. *M'Mahon* v. *Burchell*, 2 Ph. 127 ; 1 Coop. C. C. 457. Varying 3 Hare, 97.

Where an objection to the evidence at the hearing of a cause is allowed, the tender of the evidence and its rejection ought to be expressly recited in the decree, and the evidence ought not to be entered as read. *Watson* v. *Parker*, 2 Ph. 5 ; 1 Coop. C. C. 54 ; 15 L. J., Ch. 400 ; 10 Jur. 577.

The appellants from an order on a claim in a winding-up gave notice to read a mass of affidavits made in the winding-up but not used on the hearing below. The respondent objected to their being admitted, but took copies. The Court of Appeal confined the argument in the first instance to a question not affected by these affidavits, and being against the appellants on that question, dismissed the appeal with costs, so that the question as to the admissibility of the affidavits was not decided. The respondent applied to have the affidavits entered in the order, as otherwise he would not be able to get the costs of having taken copies :—Held, that the application could not be granted, and that the respondent ought not to have taken copies unless and until the court held the evidence admissible, in which case it would have given him time to enable him to meet it. *Brampton and Longtown Ry., In re, Shaw's Claim*, L. R. 10 Ch. 186 ; 33 L. T. 5 ; 23 W. R. 813.

It is not proper to enter in a decree evidence as "read de bene esse, saving just exceptions." If its admissibility is disputed, the point should be determined by the court. *Draker* v. *Draker*, 25 Beav. 641.

A decision having been partly founded on answers given by one of the parties in court to questions from the judge, it was ordered that evidence should be mentioned in the decree. *Bousquet* v. *Bent*, 42 L. J., Ch. 575 ; 21 W. R. 749.

Orders in chambers should not contain recitals of affidavits dated after the date of the order. *Ashley* v. *Taylor*, 48 L. J., Ch. 406 ; 10 Ch. D. 768 ; 39 L. T. 573 ; 27 W. R. 228.

Entry of Evidence as Read.]—Inquiries being directed at the first hearing, the evidence was entered as read, "saving just exceptions." *Gee* v. *Gurney*, 8 Beav. 315.

It is not the practice to enter evidence as read, saving just exceptions. *Sherwood* v. *Beveridge*, 2 Coll. C. C. 536.

In an undefended case the proofs shall be entered as read, and the plaintiff shall take such decree as he shall abide by. *Raymond* v. *Evans*, 1 Longf. & T. 582.

When a petition is dismissed with costs, the court will not limit the payment of costs merely as to the affidavits that were read on the hearing of the petition, for in general all affidavits filed are entered as read. *Lucas, Ex parte, Oldham, In re*, 3 Deac. & C. 664 ; 1 Mont. & Ayr. 405.

Costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart* v. *Greenall*, M'Clel. 705 ; 13 Price, 755.

Upon decree taken by default of defendant at hearing, the evidence is not entered as read. *Stubbs* v. ——, 10 Ves. 30.

Evidence read or agreed to be so considered, is entered in decree as read at hearing, and where it does not appear, by registrar's minutes, that any evidence was read at hearing, court ought not, upon subsequent application, to make order that evidence be entered as read. *Bute (Earl)* v. *Eden*, 1 Bro. P. C. 466.

A defendant, when a decree is made in his favour without his defence having been heard, is entitled to have entered in the decree as read all the evidence which he could have put in at the hearing. *Manby* v. *Bewicke*, 3 Jur. (N.S.) 685 ; 5 W. R. 867.

Office copies of former proceedings in other courts in old suits, relating to the matters in litigation, may be read and entered in the decree as evidence, without any previous order of the court for that purpose. *Ib.*

Affidavits in opposition to an application to the court, notice of an intention to read which has been given to the other side, are to be entered as read, though the court decides in favour of the parties intending to use them without hearing such parties, and although such affidavits were not filed specially for the purpose of the application. *Catholic Printing and Publishing Co.* v. *Wyman*, 1 N. R. 49 ; 32 L. J., Ch. 53 ; 9 Jur. (N.S.) 436 ; 11 W. R. 49.

Deeds, which being more than thirty years old prove themselves, used at the hearing of a motion for decree, should be inserted in the list of evidence in the decree, although not included in the list of evidence to be read, and not referred to in any affidavit. *Boyd* v. *Petrie*, 19 W. R. 221.

A rule not drawn up as on reading affidavits, if any were read on moving, is irregular, and will be discharged. *Mash* v. *Ash*, 10 W. R. 85.

Order to Execute Deeds.]—An order may be made on a party to an action to execute a conveyance of lands directed to be sold in such action, although the conveyance has not been settled at chambers. *Dougherty* v. *Teaz*, 21 L. R., Ir. 379.

A direction for a conveyance to be settled by the master only, "if the parties differ," is improper, if to be executed by an infant. *Calvert* v. *Godfrey*, 2 Beav. 267.

Where an infant heir is declared by the decree of the court to be a trustee for a purchaser, the court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary. *Meller* v. *Knight*, 1 Keen, 129 ; 5 L. J., Ch. 168.

—— **Refusal to Execute.**]—Where by a decree all proper parties are directed to execute, and some who are within the jurisdiction refuse to do so, the court will not in the first instance direct the master to execute under the 4 & 5 Will. 4, c. 78, but will issue an attachment against them. In such a case, a creditor who has proved his charge under the decree is as much bound by it as if he were a party to the cause. *Usher* v. *Scanlan*, Fl. & K. 243 ; 3 Ir. Eq. R. 474.

By a deed, dated 1827, A. covenanted with B., his son and heir-at-law, after the decease of C., to convey to certain uses an estate which should thereupon descend to A. In 1828, C.

was found a lunatic, never having been married, and died in 1830, when A. conveyed the estate, which was subject to his covenant of the deed of 1827, in violation of that covenant, to D. By a decree of the house of lords the conveyance of 1830 was set aside, and B. and his children were declared entitled to the benefit of the deed of 1827. C., the lunatic, in 1820, while he was compos mentis, had made a will, under which E. took an estate tail; and in 1841 a compromise was entered into between him and D., who was in possession, by which he released all right and title to the estate, in consideration of a conveyance of a portion of it, and of a term of the whole, to secure the value of the portion so conveyed. A supplemental bill was filed by B. and his children against D. and E., who was not a party to the original suit; and a decree was made, declaring the right of B. and those claiming under him to have a conveyance in pursuance of the decree pronounced by the house of lords, such conveyance never having been procured by them. Upon appeal:—Held, that D. by that decree was bound to convey, notwithstanding the subsequent conveyance or release which he had obtained from E.; nor was he relieved by the circumstance, that it had become impossible to convey the property without parting with some other interest which the decree was not intended to affect. *Persse* v. *Persse*, 2 Jur. (N.S.) 551; 4 W. R. 629.

The probate division has jurisdiction under s. 14 of the Judicature Act, 1884, in the event of any person neglecting or refusing to obey its order to execute a deed, to direct its execution by any other person whom it may nominate for the purpose. *Howarth* v. *Howarth*, 55 L. J., P. 49; 11 P. D. 95; 55 L. T. 303; 34 W. R. 633—C. A. Affirming 50 J. P. 376.

Where a defendant refused to obey an order, directing her to execute a mortgage, the judge appointed his chief clerk to execute it under s. 14 of the Judicature Act, 1884. *Edwards, In re, Owen* v. *Edwards*, 33 W. R. 578. S. P., *Derham* v. *Kiernan*, Ir. R. 5 Eq. 217.

—— **Time for Execution.**]—A secret purchase, by an agent from his principal, was set aside. By the decree, possession was directed to be given, and a conveyance to be executed. Accounts were also directed to be taken of the rents and purchase-money, and the balance was directed to be paid, but no lien given:—Held, that the conveyance must at once be made without waiting for the result of the accounts. *Trevelyan* v. *Charter*, 9 Beav. 140.

After a decree for specific performance and execution of the conveyance, the purchaser neglected to pay the purchase-money. The court, on the application of the vendor, fixed a day and place for that purpose. *Morley* v. *Clavering*, 30 Beav. 108.

Where a decree directing an act to be done, has been drawn up without fixing a time within which the act is to be done, the decree is not rendered ineffectual by the operation of the 11th and 12th orders of August, 1841, but the court will, upon motion for that purpose, fix a time for the performance of the act. *Needham* v. *Needham*, 1 Hare, 633; 12 L. J., Ch. 378; 6 Jur. 1081.

An order of the court for the delivering up of a deed "forthwith" is a sufficient expression of time within the meaning of Consolidated Order XXIII. rule 10. *Thomas* v. *Nokes*, L. R. 6 Eq. 521; 16 W. R. 995.

—— **Date of Deed.**]—Where the party cannot obtain the rights to which the court has declared him entitled, without antedating a deed which the court orders to be executed, the court will order such deed to be dated at the time at which it ought to have been executed. *Mundy* v. *Joliffe*, 9 L. J., Ch. 95; 4 Jur. 621.

d. Entry, Drawing Up and Service.

1. In Ordinary Cases.

See R. S. C., 1883, Ord. XLI. rr. 1 & 2.

Entry of.]—Under Rules of Supreme Court, 1875, Ord. XL. the court has power to order judgment to be entered in the same way as the judge at the trial, as a matter of law, should have directed it to be entered; but the court has no power to withdraw questions of fact from the jury which are properly for their consideration. *Milissich* v. *Lloyds*, 46 L. J., C. P. 404; 36 L. T. 423; 25 W. R. 353; 13 Cox, C. C. 575—C. A.

It is no ground of objection to a judgment that the plaintiff, having it pronounced entirely in his favour, has entered it up partly for himself, and partly for the defendant. *Harnidge* v. *Wilson*, 8 D. P. C. 417; 4 Jur. 339.

Entry of judgment is not final till costs have been taxed. *Pierce* v. *Derry*, 4 Q. B. 635; 3 G. & D. 477; 12 L. J., Q. B. 277; 7 Jur. 552. S. P., *Butler* v. *Bulkeley*, 8 Moore, 104; 1 Bing. 233; 1 L. J. (O.S.) C. P. 77.

Signing.]—A declaration in trespass contained two counts, upon one of which there was a verdict for the plaintiff, with one farthing damages; upon the other a verdict for defendant. The plaintiff did not sign judgment, and the defendant took out a summons calling upon him to shew cause why he should not sign judgment, and why, upon his default in so doing, the postea should not be delivered to the defendant, that he might sign it. Both parties attended, and an order being made as prayed, the postea was delivered to the defendant, who signed judgment for the plaintiff on the first count, and for himself on the second. Upon application to set aside the judgment so signed:—Held, that if the plaintiff intended to enter a nolle prosequi or retraxit upon the first count, he should have declared that intention upon the hearing of the summons, and that the judgment was properly signed by the defendant. *Taylor* v. *Nesfield*, 4 El. & Bl. 462; 24 L. J., Q. B. 126; 1 Jur. (N.S.) 309; 3 W. R. 163.

Where a verdict was taken by consent for the plaintiff at nisi prius, subject to the certificate of a barrister to be given in the following Michaelmas term, with power to enlarge the time for making it, and he enlarged the time till the following Easter term, and in the month of March gave his certificate, directing that the verdict should stand for a smaller amount:—Held, that final judgment might be signed immediately on the entry of this verdict upon the postea, and that the plaintiff was not bound to wait until after the expiration of the four first days of Easter term. *Cramer* v. *Churt*, 15 M. & W. 310; 3 D. & L. 672; 15 L. J., Ex. 263; 10 Jur. 671.

The form No. 10, of a writ of execution, where matter of account is referred to and decided on by an arbitrator or officer of the court or judge, as settled by the judges, does not dispense with the

necessity of signing of judgment. *Kendil* v. *Merrett*, 18 C. B. 173; 25 L. J., C. P. 251; 2 Jur. (N.S.) 523; 4 W. R. 594.

Where a judge's order was made for payment of debt and costs, which were demanded immediately after taxation, and not being paid, the plaintiff on the same day signed judgment:—Held, that the judgment was irregular. *Perkins* v. *National Assurance and Investment Association*, 2 H. & N. 71; 26 L. J., Ex. 182; 3 Jur. (N.S.) 371; 5 W. R. 470.

Signing judgment against an order of nisi prius made by consent, is an irregularity, although it is also a breach of faith. *Bikker* v. *Beeston*, 29 L. J., Ex. 121.

All the proceedings in an action in one of the superior courts are deemed to be taken before the court itself; and although the master's office of the queen's bench is situate in the city of London, yet a judgment signed therein is in contemplation of law a step in a suit taken before the court itself sitting at Westminster. *Tapp* v. *Jones*, 43 L. J., C. P. 250; L. R. 9 C. P. 418; 30 L. T. 499; 22 W. R. 632.

Drawing Up.]—By a mistake in the registrar's office, an order made on an undertaking to speed was erroneously drawn up. The order was discharged with costs of the application to discharge it, it being the duty of the party who procures an order, to see that it is properly drawn up. *Landars* v *Allen*, 6 Sim. 620; 4 L. J., Ch. 18.

Decrees founded upon the finding of issues are not to be drawn up, except by consent, before the time for moving for a new trial has expired. *Macdonald* v. *General Sewage and Manure Co.* 23 W. R. 435.

Mode of proceeding where a difficulty arose in drawing up a decree made on appeal, in consequence of there being no proper affidavit of service of the setting down of the appeal on some of the respondents. *Rackham* v. *Siddall*, 1 Macn. & G. 607; 2 H. & Tw. 44.

Observations as to the mode and forms of drawing up and passing decrees in the registrar's office. By consent, the registrar, in drawing up a decree, sometimes permits such alterations to be made in it as he believes the court would sanction, and which are binding on the parties. *Davenport* v. *Stafford*, 8 Beav. 503; 14 L. J., Ch. 414; 9 Jur. 801.

A decree drawn up in a manner not warranted by the minutes on the hearing, set aside with costs, upon motion. *Loftus* v. *Swift*, 2 Sch. & Lef. 642.

When an order was made dismissing a petition, the court refused a motion of the respondents for leave to draw up the order, on production to the registrar of a copy of the petition, upon an affidavit that notice had been given to produce the original petition, which had not been complied with, and that the deponent believed it to be lost or destroyed. *Hobler, In re*, 9 Jur. 419.

An order made by the court, and correctly drawn up, will not in all cases be discharged solely on the ground that it was passed by the registrar, without notice to the other parties in the cause. *Hart* v. *Tulk*, 6 Hare, 611; 18 L. J., Ch. 162.

An order drawn up in the registrar's office, in the absence of a defendant, will not be set aside where no error is shewn. *Smith* v. *Acton*, 28 Beav. 559.

A defendant's solicitor having refused to produce counsel's brief to the registrar on drawing up an order made and consented to, the court, upon motion of the plaintiffs, ordered the registrar, on non-production of the brief within a week, to draw up the order without it, and directed the plaintiffs to add the costs of the motion to their security. *Yeatman* v. *Reed*, 35 L. J., Ch. 176; 13 L. T. 580; 14 W. R. 123.

A notice to draw up an order served one day for the next is regular. *Christmas, In re*, 19 Beav. 519.

When it is intended that a time for the passing of an order should be fixed verbally under the Consolidated Order I. rule 27, the time should be named by the registrar personally (not by his clerk) in the presence of the parties. An application to the registrar's clerk to fix a time for the passing of an order should be made only when it is desired to have an appointment in writing to be served on the opposite party in the way prescribed by the latter part of Ord. I. r. 27. *London and County General Agency Association, In re, Pulbrook, Ex parte*, 21 L. T. 283; 17 W. R. 1075.

In a case where the evidence did not shew that the provisions of Ord. I. r. 27, had been complied with, leave was given to move to vary the minutes of an order which had been actually passed and entered. *Ib.*

Drawing up and Service of Order.]—An order does not take effect until it is drawn up and served. *Metcalf* v. *British Tea Association*, 46 L. T. 31.

The rule that an order must be drawn up and served before the other party is in a situation to take a fresh step, in order to operate as a stay of proceedings, applies to an order to amend on payment of costs to be taxed. *Normanby* v. *Jones*, 3 D. & L. 143.

The court cannot take notice of a consent on a summons, unless followed in due time by an order drawn up and served. *Wood* v. *Harding*, 3 C. B. 968.

An order giving leave to sign judgment under Ord. XIV., unless a sum is paid before a day named, need not be served upon the defendant before judgment is signed upon it. *Hopton* v. *Robertson*, 23 Q. B. D. 126, n.

Where the defendant, in an action for the recovery of land and for arrears of rent, failed to comply with an order that if he did not within three days file an affidavit in answer to interrogatories his defence should be struck out and judgment signed:—Held, that the plaintiffs were entitled to sign judgment under the order without previously serving it upon the defendant, and that a judgment so signed, being a regular judgment, could not be set aside in the absence of an affidavit of merits. *Farden* v. *Richter*, 58 L. J., Q. B. 244; 23 Q. B. D. 124; 60 L. T. 304; 37 W. R. 767.

When an order has been made in chambers dismissing an action, unless the next step is taken by the plaintiff within a specified time, and the plaintiff does not take that step within the specified time nor appeal against the order, the order takes effect, and the time for taking the step cannot subsequently be extended, the action having become dead, notwithstanding that the order has not been drawn up or served upon the plaintiff before it became operative. Dicta in *Metcalf* v. *British Tea Association* (46 L. T. 31) not adopted. *Script Phonography Co.* v. *Gregg*, 59 L. J., Ch. 406.

A plaintiff who obtains an order to be at

liberty to amend his writ, is not obliged to draw it up; and if he gives notice of abandoning the order and the writ, and the defendant afterwards appears, a judgment of non pros. for not declaring is irregular. *Solly* v. *Richardson*, 6 D. P. C. 774; 1 W. W. & H. 277.

A consent indorsed on a judge's summons binds neither party, unless the order is drawn up and served pursuant thereto. *Joddrell* v. ——, 4 Taunt. 253.

Where upon a summons attended at chambers the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not. *Macdougall* v. *Nicholls*, 5 N. & M. 366; 3 A. & E. 813; 1 H. & W. 462.

A party who applies to a judge for indulgence, and obtains it on certain terms, may draw it up or not as he thinks proper; and the opposite party by drawing it up himself, without the consent of the party applying, does not thereby make it operative against him. *Wright* v. *Skinner*, 4 D. P. C. 727.

A judge's order for staying proceedings must be drawn up forthwith and served immediately, otherwise it will not be binding. *Charge* v. *Farkall*, 7 D. & R. 422; 4 B. & C. 865.

Delay in drawing it up operates as a waiver of it. *Ib.*

On a summons to change the venue from London to Newcastle, the judge indorsed the summons, "No order; the plaintiff undertaking to tax, if successful, as if tried in Northumberland":—Held, that this was binding on the plaintiff as an undertaking, though no order was ever drawn up. *Clarke* v. *Tyne Improvement Commissioners*, 37 L. J., C. P. 110; L. R. 3 C. P. 230; 17 L. T. 509; 16 W. R. 480.

A party who obtains a judge's order can derive no benefit from it unless it is duly served upon his opponent. *Belcher* v. *Goodered*, 4 C. B. 472; 4 D. & L. 814; 16 L. J., C. P. 176.

A party obtaining an order should serve it forthwith, that is, before the opposite party is entitled to take a fresh step. *Kenny* v. *Hutchinson*, 8 D. P. C. 171; 6 M. & W. 134; 9 L. J., Ex. 60.

A plaintiff obtained an order to amend the postea at half-past nine o'clock on the 22nd November, but did not draw it up until the 23rd, and it was not served until four o'clock on the 24th:—Held, that, as no fresh step could have been taken by the defendant, the plaintiff had not abandoned the order. *Sandford* v. *Alcock*, 10 M. & W. 689; 12 L. J., Ex. 40.

Service — What Sufficient.]—A defendant resident out of the jurisdiction, was directed to execute deeds of conveyance, under 4 & 5 Will. 4, c. 78, s. 8. Having been denied at his residence, the messenger saw him in the house through an open window, informed him of the object of his visit, and left copies of the order and deed upon a table inside the window, requiring him at the same time to execute the deed:—Held, that personal service of the order and tender of the deed, had been effected sufficiently to give the court jurisdiction to direct the master to execute the deeds. *Clarke* v. *De Burgh*, Sau. & Sc. 100, n.

A defendant out of the jurisdiction, and directed to execute a deed of conveyance, in pursuance of the 4 & 5 Will. 4, c. 71, s. 8, on hearing the messenger coming into the room where he was sitting, ordered the door to be barred. The messenger heard the defendant's voice but did not see him, and standing outside the door, in a loud voice stated the object of his visit, at the same time offering to leave copies of the decrees, order, and deed of conveyance, with the son and daughter of the defendant, which they refused, and the son forcibly turned him out of the house. He then sent to the residence of the defendant a notice and copy of the order of the court, with an explanatory letter (which there was strong evidence that the defendant received) appointing a time and place for the defendant to execute the deeds of conveyance, the defendant not having executed the deed:—Held, that under the circumstances this was good personal service of the copies of the order and decree, and a sufficient tender of the deed of conveyance within 4 & 5 Will. 4, c. 78. *Piers* v. *Piers*, Sau. & Sc. 89. And see *Pasley* v. *Roberts*, *Ib.*, 104, n.

Notice of order of setting down an appeal dropped into a letter-box attached to the outer door of plaintiff's chambers, after the party serving it had called several times, and always found the chambers closed:—Held, to be good service on plaintiff. *Lodge* v. *Pritchard*, 2 N. R. 537; 11 W. R. 1086—L.JJ.

—— **Waiver of Objections to.**]—A party consenting to the alteration of a date of an order after it had been served, cannot object that the order, as altered, has not been served on him. *Stubbs* v. *Sargon*, 4 Beav. 400.

Original Lost.]—Original decree not to be found; but having been acted upon by reports, and recited in an order on further directions, was allowed to be drawn up from an office copy, and entered nunc pro tunc. *Donne* v. *Lewis*, 11 Ves. 601.

The original of an order made on a petition had been lost, and no entry could be found in the report office, but the minutes of the order appeared in the registrar's minute book; under these circumstances, and on the production of the briefs of counsel, and the evidence used on the hearing of the petition, the order was directed to be re-drawn. *St. Paul's (Dean)*, *Ex parte*, 18 W. R. 724.

Where an order, not entered, but drawn up and passed, cannot be found after a lapse of nine years, the court will direct a re-issue of such order upon the affidavit of the solicitor who obtained it. *Russell* v. *Tapping*, 3 W. R. 379.

2. Minutes.

Orders must be drawn up and entered by the registrar before they bear authority; for the registrar's minutes are only a warrant for an order. *Anon.*, 2 Freem. 46.

A motion cannot be made upon a decretal order till it is passed with the registrar. *Smith* v. *Reynolds*, Mos. 69.

Order of a preceding Lord Chancellor not to be re-heard upon minutes, but must first be drawn up. *Taylor* v. *Popham*, 15 Ves. 72.

The court pays no regard to minutes of orders in the registrar's book. Orders to be attended to must have been drawn up. *Fingal (Earl)* v. *Blake*, 2 Moll. 50.

A notice of motion to vary minutes, does not prevent their being drawn up. *Bell, In re*,

Brown, Ex parte, 2 Mont. & Ayr. 578; 1 Deac. 690.

The minutes of a decree cannot be made use of in the court. The decree itself must be pronounced. *Hall* v. *Hill*, Fl. & K. 619.

A decree in notes is not a document which the court will act upon. *Nash* v. *Dillon*, 1 Moll. 46.

No use can be made of a decree remaining in notes. *Byrne* v. *Frere*, 2 Moll. 157.

Solicitors are entitled to charge for settling the minutes of orders, although no minutes are issued. *Reece, In re, Gould* v. *Dummet*, 35 L. J., Ch. 794; L. R. 2 Eq. 609; 12 Jur. (N.S.) 614; 14 L. T. 881; 14 W. R. 1008.

A plaintiff upon the defendant dispensing with a statement of claim, set down his action as a short cause, and moved for judgment according to prepared minutes. Upon the defendant objecting that the action must be brought to trial, it was ordered that the action be placed in the general non-witness list. *Wilmott* v. *Young*, 44 L. T. 331; 29 W. R. 413.

e. DATE OF.

When effective.]—Ord. XLI. r. 3, of the Rules of the Supreme Court, 1883, applies to actions tried before a judge with a jury; and where the judge upon the findings of the jury, pronounces judgment in court, upon entry of the judgment the proceedings are complete, and the judgment takes effect as of the date on which it was pronounced. *Holtby* v. *Hodgson*, 59 L. J., Q. B. 46; 24 Q. B. D. 103; 62 L. T. 145; 38 W. R. 68—C. A.

The time at which an order is made is that of the order being pronounced and of its date, and not of its being drawn up. *Hookey, Ex parte*, 4 De G. F. & J. 456.

Generally speaking, an order takes effect from the time it is made. *Jones* v. *Roberts*, M'Clel. & Y. 567.

The order for confirming absolutely a master's report as to a purchase, when served, operates from the day on which it was pronounced. *Aberdeen* v. *Wathin*, 6 Sim. 146.

Order for dismissal does not take effect till drawn up, and then it acts retrospectively from time of making it. *Verlander* v. *Codd*, 1 Sim. & S. 94.

Minutes varied.]—If, on the close of the argument, at the hearing of a cause, minutes of the decree are delivered, which are afterwards varied by any subsequent judgment, the decree may be dated at the date of the original minutes, but if the judgment is postponed, it should bear date at the time when it is pronounced. *Att.-Gen.* v. *Stamford (Earl)*, 12 L. J., Ch. 297.

Orders in Chambers.]—Orders in chambers should be dated of the day on which they are finally made, and should not be antedated, nor contain recitals of affidavits dated after the date of the order. *Ashley* v. *Taylor*, 48 L. J., Ch. 406; 10 Ch. D. 768; 39 L. T. 573; 27 W. R. 228.

On what Day may be Signed.]—A judgment cannot be signed on a dies non juridicus. *Harrison* v. *Smith*, 9 B. & C. 243; 7 L. J. (O.S.) K. B. 171.

But it may be signed on a holiday. *Bennett* v. *Potter*, 2 C. & J. 622; 1 L. J., Ex. 258.

Death of Party.]—Judgment having been signed and execution issued on the day on which the defendant died:—Held, that the judgment and execution were regular. *Wright* v. *Mills*, 4 H. & N. 488; 28 L. J., Ex. 223; 5 Jur. (N.S.) 771; 7 W. R. 498.

Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done; therefore where a judgment was signed at the opening of the office at its usual hour, eleven a.m., and the defendant died at half-past nine a.m., on the same morning:—Held, that the judgment was regular. *Ib.*

The mere entry of judgment is sufficient within s. 139 of 15 & 16 Vict. c. 76, and it is not necessary to perfect the judgment by taxation of costs. *Frewen* v. *Lethbridge*, 4 H. & N. 418; 28 L. J., Ex. 243; 7 W. R. 442.

The death of an infant plaintiff in an action for negligence between the verdict and the signing of judgment is no ground for a stay of proceedings if judgment has been signed within the time specified in the Common Law Procedure Act, 1852. *Kramer* v. *Waymark*, 4 H. & C. 427; 35 L. J., Ex. 148; L. R. 1 Ex. 241; 12 Jur. (N.S.) 395; 14 L. T. 368; 14 W. R. 659.

The 17 Car. 2, c. 8, s. 1, which requires a judgment to be entered up two terms after verdict, gives an executor two terms during which it is practicable to enter judgment. *Heathcote* v. *Wing*, 11 Ex. 355; 3 C. L. R. 1110; 25 L. J., Ex. 23.

The verdict referred to in the statute is the complete verdict on which judgment may be signed. *Ib.*

Therefore where, at the spring assizes in 1854, a verdict was taken by the plaintiff, subject to a reference, and in Easter vacation, before award, he died, and on the last day in Michaelmas term the arbitrator made his award, directing the verdict entered for the plaintiff to stand:—Held, that a rule obtained in Easter term, 1855, to enter judgment as of Easter term, 1854, nunc pro tunc, was in time. *Ib.*

A judgment for a defendant is valid, although not entered up within two terms after the death of the defendant, the verdict having been given during her life, and the delay occasioned by a motion touching an award. *Brydges* v. *Smyth*, 8 Bing. 29; 1 M. & Scott, 93.

See supra, PARTIES (CHANGE OF, &c.), col. 73, et seq.

Ante-dating — Entering nunc pro tunc.]—Where an order had been drawn up, but never passed and entered, the court allowed the order to be redrawn up, passed and entered nunc pro tunc. *Jones, In re, Bullis* v. *Jones*, 39 W. R. 619.

Decree pronounced twenty-three years ago having been lost, ordered, on motion, to be redrawn according to the minutes and entered nunc pro tunc. *Lawrence* v. *Richmond*, 1 Jac. & Walk. 241.

An order of the court was directed to be marked nunc pro tunc with the day of the month and year in which it was left to be entered. *Buske* v. *Beetham*, 9 L. J., Ch. 54; 4 Jur. 599.

The court will direct a decree to be made up from the registrar's notes, and entered nunc pro tunc, on the application of a third person. *Stoney* v. *Saunders*, Hay. & J. 341.

The court refused to order a decree to be drawn up nunc pro tunc, after a long lapse of time. *Withy* v. *Norton*, 4 Y. & Coll. 266; 5 Jur. 501.

Order on peremptory undertaking to speed

the cause entered nunc pro tunc of course on motion, without notice, about two years afterwards. *Dixon* v. *Shum*, 18 Ves. 520.

A previous order of the vice-chancellor, which had been omitted to be drawn up, ordered to be entered nunc pro tunc, if the vice-chancellor should think fit. *Lewis*, *Ex parte*, 3 Deac. & C. 198.

To get leave to enter judgment as of a former date, nunc pro tunc, it must be shewn that the court could at that former date, have ordered such a judgment to be entered. *O'Riordan* v. *Walsh*, Ir. R. 8 C. L. 158.

Judgment nunc pro tunc cannot be entered unless the delay is the act of the court. *Fishmongers' Co.* v. *Robertson*, 4 D. & L. 656; 3 C. B. 970; 16 L. J., C. P. 118.

The entry of judgment nunc pro tunc is not a matter of right nor of settled practice, but may be refused or granted by the court at its discretion. *Hemming* v. *Batchelor*, 44 L. J., Ex. 54; L. R. 10 Ex. 54; 33 L. T. 16; 23 W. R. 398.

—— **Death of Party.**]—When a nonsuit was directed at the trial with a stay of execution, and the plaintiff died before the stay of execution had run out, the court refused to allow judgment nunc pro tunc to be entered for the purpose of the defendant obtaining his costs, on the ground that the nonsuit was provisional, and no decisive judgment had been given in the defendant's favour before the plaintiff's death. *Ib.*

A summons taken out by the plaintiff was not reached on the day when it was returnable and was adjourned; the plaintiff died before the day to which it was adjourned:—Held, that no order such as might have been made on the summons could now be made. *Turner* v. *L. & S. W. Ry.* (L. R. 17 Eq. 561) distinguished. *Wilks, In re, Child* v. *Bulmer*, 60 L. J., Ch. 696; [1891] 3 Ch. 59; 65 L. T. 184; 40 W. R. 13.

The death of a sole plaintiff, after argument and before judgment, does not prevent the delivery thereof, and it will be entered nunc pro tunc, as of the date when the arguments were concluded. *Turner* v. *L. & S. W. Ry.*, 43 L. J., Ch. 430; L. R. 17 Eq. 561.

In an action in which there were issues of fact and of law, after verdict for the plaintiff on the former, and a rule for a new trial which was discharged, the plaintiff in the same term in which the rule was discharged, set down the issues in law for argument, but died before they were reached; judgment upon them was subsequently given for the plaintiff. In one of several actions consolidated with that action, the court ordered judgment to be entered up as of the term in which the case was set down in the special paper for argument. *Miles* v. *Williams*, 9 Q. B. 47; 16 L. J., Q. B. 56; 11 Jur. 36.

The judgment of the court relates to the time of hearing the argument, and may be entered nunc pro tunc, against one of several defendants, as well as against a sole defendant, when death takes place after verdict and before judgment. *Harrison* v. *Heathorn*, 1 D. & L. 529; 6 Scott (N.R.) 794.

A plaintiff applied to sign judgment on the 3rd January (when the time for pleading expired), but upon the officer suggesting that there was a doubt whether those three days were to be reckoned in the time for pleading, he forbore to sign judgment. On the same day the defendant died. The court refused to allow the plaintiff to sign judgment nunc pro tunc. *Wilkes* v. *Perks*, 5 Man. & G. 376; 6 Scott (N.R.) 42; 12 L. J., C. P. 145; 7 Jur. 68.

A cause in which a verdict was entered for the plaintiff was referred at the spring assizes, 1851. The arbitrator made his award, directing a verdict to be entered for the plaintiff in Trinity term following. The plaintiff died on the 2nd November following; on the 3rd December the will was taken to the proper office to be proved, in order to enable the executrix to sign judgment; but in consequence of a caveat having been entered by the defendant, probate was not obtained till the 6th May, 1852. In Trinity term, 1852, the executrix moved for leave to enter up judgment as of Michaelmas term, 1851:—Held, that inasmuch as the delay was not attributable to any act of the court, the court had no authority to grant the application. *Freeman* v. *Tranch*, 12 C. B. 406; 21 L. J., C. P. 214; 16 Jur. 1141.

A defendant obtained a verdict in December, 1829. In the following term the plaintiff obtained a rule nisi for a new trial, which rule the court afterwards directed to be suspended, to await the issue of another cause which involved the same point. The defendant died in November, 1830. The court, after a lapse of two years and a half from the date of the verdict, allowed the judgment to be entered up nunc pro tunc. *Key* v. *Goodwin*, 4 M. & Scott, 620.

A verdict was found for the plaintiff at the sittings after Trinity term, 1857. In Michaelmas term a rule nisi was obtained to enter a verdict for the defendant; this rule was made absolute to enter a nonsuit in Hilary term, 1858. The plaintiff having died on the 14th of December, 1857, the court allowed judgment to be entered, nunc pro tunc, as of Michaelmas term. *Moor* v. *Roberts*, 3 C. B. (N.S.) 844; 27 L. J., C. P. 161; 4 Jur. (N.S.) 241; 6 W. R. 297.

No will of the deceased having been proved, nor any letters of administration granted, the rule was drawn up calling upon the legal representatives (if any) upon notice of the rule to be given to them or to the attorney in the cause of the late plaintiff. *Ib.*

A plaintiff died after verdict and before judgment, a rule to set aside the verdict being pending at the time of his death. After that rule had been discharged, the court allowed judgment to be entered nunc pro tunc. *Seymour* v. *Greenwood*, 30 L. J., Ex. 189.

Where by the terms of an order, made by consent, a plaintiff is to be at liberty to sign judgment for debt and costs on a particular day, but before that day the defendant dies, the court will not permit the plaintiff to enter judgment nunc pro tunc, as of the day when the consent was given. *Wilkins* v. *Canty*, 1 D. (N.S.) 855; 11 L. J., Q. B. 191; 6 Jur. 807.

See also supra, PARTIES (CHANGE OF, &c.), col. 73 et seq.

Postdating Judgment.]—Where, after an order had been made in an action for the partition and sale of certain property, in which it was referred to as "firstly, &c., described in the said statement of claim," it was discovered that the property was there misdescribed, leave was given to amend the statement of claim, and the order was ordered to be postdated as of a day after the amendment had been made. *Winkley* v. *Winkley*, 44 L. T. 572; 29 W. R. 628.

Prospective Order.]—When a person, entitled to a vested interest in trust funds in court, to be

paid at twenty-one, would attain that age in the long vacation, a prospective order was made for the payment out of the fund to her at such date. *Penn's Estate, In re*, 42 L. J., Ch. 880 ; 21 W. R. 865.

f. INROLMENT.

See now R. S. C., 1883, Ord. LXI. r. 8.

What Decrees or Orders.]—An order on motion dismissing a bill for want of prosecution may properly be inrolled, and is properly entitled in the cause as it stood at the date of the order on the record, although, in fact, some of the parties named in the title may be then dead, and the suit may have been revived between the date of the order inrolled and the inrolment. *Williams* v. *Page*, 1 De G. & J. 561 ; 26 L. J., Ch. 813 ; 5 W. R. 854.

On a petition of course the registrar made an order directing inrolment in the chancery division of a decree of the Court of Session in Edinburgh, sequestrating the estate of the company, appointing a judicial factor, and ordering delivery of the books of the company :—Held, that there was no authority, either by statute or custom, for making such an order, and that the inrolment must be vacated. *Dundee Suburban Ry., In re*, 58 L. J., Ch. 5 ; 59 L. T. 720 ; 37 W. R. 50.

There is no rule preventing the inrolment of a decree which, among other things, directs the taking of accounts. *Parker* v. *Downing*, 1 Myl. & K. 634 ; Coop. t. Brough. 148.

An order refusing a motion for a new trial of an issue, devisavit vel non, may be inrolled at the application of either party. *McGregor* v. *Topham*, 4 Hare, 162.

Inrolment of a decree of the commissioners under the 12 & 13 Vict. c. 77. *Irish Incumbered Estates Act, In re*, 2 W. R. 281.

Amendment of.]—The court directed a sum of money to which, by a previous decree, the court had in error declared that the attorney-general was entitled, to be paid to the party really entitled, notwithstanding the inrolment of the former decree. *Fox* v. *Charlton*, 6 N. R. 352.

A clerical error in the inrolment of a decree corrected by the Master of the Rolls. *Att.-Gen.* v. *Greenhill*, 34 Beav. 174.

To what Court.]—The proper court for applying for an order for the inrolment of a decree is the court of the Lord Chancellor. *Patch* v. *Ward*, 28 L. T. 260.

Effect of—Appeal.]—Under the Judicature Act, the inrolment of a decree has no effect in preventing an appeal. *Hastie* v. *Hastie*, 2 Ch. D. 304 ; 34 L. T. 747 ; 24 W. R. 564—C. A.

Time for.]—Time allowed for inrolling a decree or order is six calendar months from the date thereof. *Man* v. *Ricketts*, 1 Ph. 530 ; 14 L. J., Ch. 255 ; 9 Jur. 543.

In July, 1873, a decree declaring W. entitled to large estates was affirmed by the lords justices. In February, 1877, the unsuccessful party applied for leave to enrol the decree, that he might appeal to the house of lords. In the meantime W., believing himself undisputed owner of the estates, had, in October, 1876, accepted a peerage :—Held, that a party who applies within five years is entitled to inrolment as a matter of right, unless the conduct of the applicant has been such as to make it unreasonable that he should be allowed to inrol ; that his merely doing nothing raised no case against him ; and that his rights could not be affected by the mere fact that the opposite party had altered his position on the faith of being owner of the estates. *Cope* v. *De La Warr* (*Earl*), 5 Ch. D. 666 ; 37 L. T. 109—C. A.

A plaintiff within one month of the end of the five years after a decree had been made, applied to have it inrolled and obtained an order accordingly. After the expiration of the five years, he discovered that one of the defendants was dead, and having then revived the suit, he applied to have the decree inrolled. The application was refused. *Patch* v. *Ward*, 43 L. J., Ch. 486 ; L. R. 9 Ch. 269 ; 30 L. T. 152 ; 22 W. R. 458.

An inquiry as to damages having been directed on a claim under a winding-up, the official liquidator applied to have it conducted in court and before a jury. This application was dismissed on the 11th of December, 1873. The official liquidator gave notice of appeal to the house of lords, but not until after the period of three weeks from the dismissal had expired. After the damages had been assessed in chambers the official liquidator, on the 9th of February, 1875, obtained ex parte a conditional order for leave to enrol the order of the 11th of December, 1873, but on hearing the other side this conditional order was discharged :—Held, that liberty to inrol the order of December, 1873, ought not to be granted. *Lafitte & Co., In re*, L. R. 10 Ch. 316.

—— **Enlargement of.**]—A person against whom a decree was made by the Court of Appeal was at the date of the decree residing out of the jurisdiction, and suffering from softening of the brain, of which disease he died, nearly three years after date of the decree :—Held, that these were not such peculiar circumstances as to render it just and expedient to enlarge the time for inrolment of the decree under the General Order XXIII. r. 28. *Hooper* v. *Gumm*, 26 L. T. 537.

In a suit where the defendant had died after the conditional inrolment of the decree, but before it had been made absolute, the court, on the application of the executors of the defendant's will, enlarged the time for shewing cause against the inrolment of the decree. *Patch* v. *Ward*, 21 W. R. 244.

Vacating Inrolment—By whom Application made.]—The inrolment of a decree ordered to be vacated upon the application of a person not a party to the cause. *Bruff* v. *Cobbold*, 41 L. J., Ch. 402 ; L. R. 7 Ch. 217 ; 26 L. T. 223 ; 20 W. R. 284.

A fund was held in trust for a class of persons. B., who claimed to be a member of the class, obtained a decree against the trustees for the distribution of the fund. In this decree was inserted a declaration to the effect that B. was entitled to participate in the fund, and inquiries were directed as to what other persons were entitled. A., who was not a party to the suit, put in a claim to be a member of the class, and therefore entitled to participate in the fund ; he also claimed the whole of the fund in case no other person should establish his membership of the class. Being desirous of disputing the

title of the plaintiff he presented a petition of rehearing, in order to strike out of the decree the declaration as to the plaintiff's title. This petition could not be heard in consequence of the decree having been inrolled. He therefore moved to vacate the inrolment:—Held, that he was entitled to have the inrolment vacated, the costs of the application being ordered to be dealt with by the judge on the rehearing. *Ib.*

—— **By what Court.**]—When a decree of the Court of Chancery has been enrolled, the Court of Appeal has no jurisdiction to order the inrolment to be vacated. Such an order can now be made by the Lord Chancellor only. *Allan* v. *United Kingdom Electric Telegraph Co.*, 24 W. R. 898—C. A.

—— **When Necessary.**]—Where in a creditors' suit for administration of the estate of T. a decree was made in the presence of A. declaring that certain property belonged to T. beneficially, and the decree was inrolled, such inrolment does not render it incumbent on A. to file a bill of review and get the inrolment vacated before instituting a suit to set aside the sale by which T. purported to have become the beneficial owner of the property. *Widgery* v. *Tepper*, 47 L. J., Ch. 550; 7 Ch. D. 423; 38 L. T. 434; 26 W. R. 546—C. A.

That an inrolled decree in a former suit may be a bar to the relief sought by a second suit, the objects and purposes of the two suits must be identical, and in that case, before the court has jurisdiction over the second suit, the inrolment of the decree must be vacated; but where the objects are not the same there is no such necessity. *S. C.*, 46 L. J., Ch. 703; 25 W. R. 726.

—— **In what Cases.**]—A plaintiff was a day too late in proceeding on a caveat against the inrolment of an adverse decree in consequence of a petition of appeal presented by him on the last day not being then answered, owing to the absence from office of the Lord Chancellor's principal secretary, and the defendant inrolled the decree. On the plaintiff's application the inrolment was vacated, but he was required to pay all the costs. *Blackman* v. *Cornish*, 42 L. J., Ch. 576; 29 L. T. 85; 21 W. R. 741.

The twenty-eight days within which, by Consolidated Order XXIII. r. 27, the party who has entered a caveat must proceed after a docket for inrolment has been left, is not to be extended, because, according to the practice of the office, he only receives notice of the docket being left next day. *Ib.*

Notice of appeal motion was served without any signature, though the name of the solicitors serving it appeared on the back. After some days the solicitor of the appellant, having discovered the omission, asked the solicitor of the respondent to allow the error to be corrected. The respondent's solicitor refused this, and stated that every technical advantage would be taken. The appeal motion was set down, and the respondent's solicitor informed of it, but no notice of its being set down was regularly served. The respondent's solicitor, at the earliest possible moment, inrolled the order appealed from:—Held, that as distinct notice that no technicality would be waived had been given, the respondent was entitled to avail himself of the irregularity in the notice of motion and maintain the inrolment, though there had been a correspondence which, standing alone, might have led the court to vacate it. *Limehouse Works Co., In re*, 43 L. J., Ch. 483; L. R. 9 Ch. 266; 30 L. T. 4; 22 W. R. 288.

g. DECLARATORY ORDERS.

Powers of Court—Judicature Act.]—Under Ord. XXV. r. 5, the court has now jurisdiction to make a declaratory order, though no consequential relief is claimed; but such jurisdiction will be exercised with great caution. *Austen* v. *Collins*, 54 L. T. 903.

In cases where a person trespasses on another's land, having done so frequently in the past, and having expressed an intention to do so in the future, the court has power under Ord. XXV. r. 5, to make a declaration that such a person is a trespasser. *Harrison* v. *Rutland (Duke)*, 62 L. J., Q. B. 117; [1893] 1 Q. B. 142; 4 R. 155; 68 L. T. 35; 41 W. R. 322—C. A.

An association of shipowners and others formed for the protection of the shipping trade, but not carrying on such trade or owning goods in its corporate capacity, together with a firm of shipowners, brought an action against a dock company for an injunction to restrain them from imposing certain regulations and charges, as being ultra vires, and for a declaration that they were invalid until confirmed as required by statute:—Held, that the plaintiff firm were not entitled to an injunction without proof of special damage accruing to themselves, but that under the circumstances they were entitled to a declaratory judgment under Ord. XXV. r. 5. *London Association of Shipowners* v. *London and India Docks Joint Committee*, 62 L. J., Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195—C. A.

The court declines to express an abstract opinion on a point of law on the construction of a will when immediate relief is not given. *Hampton* v. *Holman*, 46 L. J., Ch. 248; 5 Ch. D. 183; 36 L. T. 287; 25 W. R. 459.

Where a special case for the opinion of the court is stated in an action pursuant to Ord. XXXIV. r. 1 (1875), and the answers to the special case in fact dispose of the action, the proper course is to take the answers, in the shape of a judgment making declarations to the effect of the answers, the action being, if necessary, set down pro formâ for trial on motion for judgment. *Harrison* v. *Cornwall Minerals Ry.*, 49 L. J., Ch. 834; 16 Ch. D. 66; 43 L. T. 496; 29 W. R. 258.

—— **Before 15 & 16 Vict. c. 86.**]—A court of equity will not make a declaration of right, except as incidental to relief given, semble. *Elliotson* v. *Knowles*, 11 L. J., Ch. 399; 6 Jur. 549.

The court will not, in a suit to carry the trusts of a will into execution, merely declare the rights of the parties, and then leave them to act on that declaration out of court. *Brown* v. *Martyn*, 2 Jo. & Lat. 333.

A court of equity will declare and give effect to a forfeiture, where such forfeiture is incidental to the administration of a trust. *Duncombe* v. *Levy*, 5 Hare, 232; 11 Jur. 262.

Pursuant to an order of reference in a minor matter to report the nature and amount of the fortune of the minor, the master reported according to his construction of a will; the court

refused to make a declaration of the rights of the parties claiming under the will, or to confirm the report. *Corkers. In re*, 3 Jo. & Lat. 377.

Semble, if the devisees of real estates directed to be sold in a creditors' suit, being lunatic, are not trustees for the plaintiff by the effect of the decree, the court cannot make them such trustees by any declaration to that effect; and if the devisees are such trustees by the effect of the decree, an express declaration thereof, if necessary, should be made by decree, and cannot properly be made upon petition. *Jackson* v. *Milfield*, 5 Hare, 538.

Though a person uniting in himself several characters, having distinct conflicting rights in the subject of a suit, may maintain a suit as sole plaintiff, the court will not, in a suit so constituted, decide on the conflicting rights vested in the plaintiff, but by the decree will make provision for the protection of the defendants from any prejudice which may arise from the peculiar constitution of the suit. *Blease* v. *Burgh*, 2 Beav. 221; 9 L. J., Ch. 226.

By this answer, a defendant insisted that a former tenant in tail had paid off certain legacies, which he alleged were charges on the real estate out of the specified fund, and that the sums so paid off were still charges on the real estate. By the interlocutory decree it was referred to the master, to take an account of the sums advanced on foot of the specified fund, in exoneration of the lands, and whatever should appear to be so advanced was thereby declared to be a charge on the lands:—Held, that this amounted to a declaration, that the legacies were a charge on the lands. *Kelly* v. *Lennon*, 1 Jo. & Lat. 305; 7 Ir. Eq. R. 98.

Bond having been cancelled by obligor, lands settled according to bond by decree. *Arnold* v. *Barrington*, Dick. 5.

—— **Under 15 & 16 Vict. c. 86.**]—The court will not express an opinion on a point judicially concluded by orders in the cause which have been acted on for many years, although had the matter been open an important question might have arisen. *Livesay* v. *Harding*, 21 Beav. 227.

Declaratory decree that it is fit and proper that an application should be made to parliament to extend the leasing powers affecting a settled estate. *Savil* v. *Bruce*, 29 Beav. 557.

Where a decree directed a conveyance, but did in form declare the rights of the parties:—Held, that this was defective. *Lambert* v. *Peyton*, 8 H. L. Cas. 2.

Order made containing a declaration of English law for the information of a foreign court. *Hope* v. *Hope*, 4 De G. M. & G. 328; 23 L. J., Ch. 682; 2 W. R. 545.

A bill is not sustainable under s. 50 of the 15 & 16 Vict. c. 86, for a mere declaratory order, when the plaintiff is not entitled to consequential relief. *Rooke* v. *Kensington*, 2 Kay & J. 753; 25 L. J., Ch. 795; 4 W. R. 829.

Where some of the parties interested in the construction of a purely legal devise are infants, the court cannot, at the request of the parties, make a declaratory decree as to their rights under such devise. *Webb* v. *Byng*, 2 De G. M. & G. 633.

By a decretal order made in March, 1862, the rights of E. and C. to participate in a fund in certain proportions were declared; and the receiver in the cause was ordered to pay to them such shares. The chief clerk ascertained the value of their respective shares, and owing to the absence from the country of the plaintiffs, the receiver paid over the moneys due to them to his solicitors. Several suits were subsequently instituted, disputing their rights as declared by the order of March, and the solicitors received notice not to pay the moneys in their hands to E. and C. Proceedings having been commenced by petition on either side, but not prosecuted, they, by their solicitor, without applying to the solicitors of the receiver, caused two writs of fi. fa. to be issued against the receiver. Those writs were, by an order made by the vacation judge, set aside as unlawful; but, as no injunction had been obtained, the judge was of opinion that the receiver was not at liberty to withhold payment of the sums due to them, which payment was accordingly made. Afterwards Romilly, M.R., whilst confirming the order whereby the writs were set aside as irregular and illegal, went on to direct that E. and C., and their solicitor, should repay into court to a separate fund, to be called "the Disputed Fund," the sums which had been received by them:—Held (reversing this order), that the rights of E. and C. having been declared by the order of March, 1862, could not be set aside by subsequent proceedings of less value or quality, and that they were entitled to retain the sums which had been so paid to them. *Whitehead* v. *Lynes, Burrell, In re*, 12 L. T. 332.

The court has no jurisdiction either under s. 50 of the 15 & 16 Vict. c. 86, or otherwise, to make a declaration of right, unless it is one upon which the court could act, if required, by granting consequential relief. *Bristow* v. *Whitmore*, 4 Kay & J. 743; 1 Johns. 96; 7 W. R. 150.

Where the declaration sought is not of that nature, the court has no jurisdiction to entertain the suit. *Ib.*

Where a decree erroneously states that a married woman is entitled to her separate use, the court not having decided what her interest was, that is not binding as a declaration of right, and must be disregarded. *Moore* v. *Walter*, 8 L. T. 448; 11 W. R. 713.

The court of chancery could only decide legal questions so far as is necessary for the exercise of its own jurisdiction, and therefore would not make a decree declaratory of rights under a legal instrument. *Att.-Gen.* v. *Boyle*, 3 N. R. 414; 10 Jur. (N.S.) 309; 10 L. T. 290; 12 W. R. 368.

The plaintiff, on the faith of the regulations of the colonial office, spent money in a colony, so as to entitle himself to large grants of land:—Held, on demurrer to a bill filed by leave of the Lord Chancellor, upon a petition of right against the attorney-general, that the crown had entered into a contract with the plaintiff to grant the land, and that the court was empowered to make a declaration of the plaintiff's right to specific performance, though it could not proceed to a mandatory decree. *Lautour* v. *Att.-Gen.*, 5 N. R. 102, 231.

To save expense, the court declared the construction of executory marriage articles, instead of directing a settlement to be executed in conformity therewith. *Byam* v. *Byam*, 19 Beav. 58; 24 L. J., Ch. 209; 1 Jur. (N.S.) 79; 3 W. R. 95.

A., previously to the marriage of his daughter B., gave to the trustee of her settlement a bond, whereby he bound himself to pay an annuity upon trusts for the benefit of B. and her children,

A. died, leaving C., another of his daughters, his sole devisee and executrix. On a bill filed by B. against C.:—Held, that B. was entitled to a decree declaring that she had a lien on the testator's real estate to the amount of the value of the annuity, but that B. should pay the costs of all parties to the cause. *Norman* v. *Johnson*, 6 Jur. (N.S.) 905; 8 W. R. 300.

When the title of a remainderman is clear, the court will, at his instance, compel the remainderman to produce the title deeds; but if his title is not clear, the court will not, incidentally, decide in favour of the remainderman's title to the estate, in a suit merely for the production of the title deeds. *Pennell* v. *Dysart* (*Earl*), 27 Beav. 542.

The mortgagee of A. (an alleged remainderman) instituted a suit against B. (the alleged tenant for life), for the mere production of the title deeds. B. set up a bonâ fide objection that A.'s estate had become forfeited, and also that, by the terms of the mortgage deed, the estates were not comprised therein. The assignees of A. (who had become bankrupt), though interested in the latter question, were not parties to the suit. The court declined adjudicating, incidentally, on the plaintiff's right, and dismissed the bill, with costs. *Davis* v. *Dysart* (*Earl*), 20 Beav. 405; 24 L. J., Ch. 381; 1 Jur. (N.S.) 743; 3 Eq. R. 599; 3 W. R. 393.

When the interests of the parties to a special case were not of such a nature as to give the court jurisdiction to decide the questions asked in the case, the court gave permission to amend the case by introducing a question as to the right of the plaintiffs to commit waste in order to give the court jurisdiction. *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93; 16 W. R. 290.

Fictitious Suits to Decide Questions.]—The court will entertain a suit to declare the rights of children of a marriage to a fund settled by one of their parents, though the fund be settled with the object of determining, by having the individuals comprising the class ascertained, whether a reputed child is legitimate. *Gurney* v. *Gurney*, 1 Hem. & M. 413; 2 N. R. 106; 32 L. J., Ch. 456; 9 Jur. (N.S.) 514; 8 L. T. 380; 11 W. R. 659.

In December, 1859, a wife eloped from her husband, there being at that time two children of the marriage. Proceedings for obtaining a divorce were immediately commenced by the husband; a decree nisi was pronounced on the 13th February, 1861, and made absolute on the 22nd May, 1861. On the 4th May, 1861, the wife was delivered of a full-grown male child. In order to determine the status of this child, the husband, in January, 1862, vested 2,000*l.* reduced annuities in trustees, for all and every the children then living of his marriage with his wife; and a suit was instituted, seeking that the rights of the parties interested under this settlement might be declared, and the trusts of the settlement might be carried out under the direction of the court:—Held, that although the real object of the settlor might be, and probably was, to obtain a decision from the court that this child was illegitimate, and although the decision might affect property of far greater value, those circumstances were not sufficient to warrant the court in withholding the exercise of its ordinary jurisdiction. *Ib.*

Semble, the court will not so act in the case of a stranger making such a settlement for a purpose of which it disapproves. *Ib.*

A suit being merely manufactured for the purpose of compelling the present trial in an indirect way of an important question affecting the title to large estates, namely, the status of legitimacy or illegitimacy of an infant, was not maintainable. *Cooke* v. *Cooke*, 4 De G. J. & S. 704; 6 N. R. 134; 34 L. J., Ch. 459; 11 Jur. (N.S.) 533; 12 L. T. 468; 13 W. R. 697.

Where a settlement was made to raise a question of a child's legitimacy the court declined to entertain a suit for its execution when the father and mother are living, and had not concurred in the settlement or the suit, and where the guardian of the child (an infant) disclaimed at the bar. *Anon.*, 2 Hem. & M. 124.

Upon a special case to obtain a decision whether persons not in esse would be entitled, under certain circumstances which might never arise, to a share in property, the court declined to decide the question, being of opinion that it would be injurious to the parties to have that decision until the events should happen which would give rise to the question. *Bright* v. *Tyndall*, 4 Ch. D. 189; 25 W. R. 109.

When the interest of the parties to a special case is not of such a nature as to give the court jurisdiction to decide the question, the court will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision. *Ib.*

On a special case raising questions of legal limitations at the instance of a plaintiff not in possession, the court declined to make any order or to entertain any fictitious question as to title deeds or accounts in order to found jurisdiction. *Pryse* v. *Pryse*, 42 L. J., Ch., 253; L. R. 15 Eq. 86; 27 L. T. 575; 21 W. R. 219.

Future Rights or Interests.]—The former practice of the court in refusing to declare the future rights of parties is altered in a case where the rights are vested, where all parties who can become interested are represented at the hearing, and when the number of classes of persons who can possibly become interested may be diminished, but cannot be increased. *Curtis* v. *Sheffield*, 51 L. J., Ch. 535; 21 Ch. D. 1; 46 L. T. 177; 30 W. R. 581—C. A.

Testator gave the remainder of his property to his mother and sisters, to be equally divided among them if living at the time of his decease, then amongst their surviving children:—Held, that the mother and sisters took as tenants in common for life, and that the children who should be alive at the death of their respective parents took the parents' share absolutely:—Held, that the above was a case where the court would declare the future rights of the children under 15 & 16 Vict. c. 86, s. 50. *Fletcher* v. *Rogers*, 10 Hare (App.) xiii.; 1 W. R. 125.

Case in which the court refused to make a declaration as to the interest of parties who might be entitled in reversion. *Greenwood* v. *Sutherland*, 10 Hare (App.) xii.

The court refused to make a declaratory decree on a special case, during the lifetime of the tenant for life, with regard to the interest of parties entitled in reversion. *Garlick* v. *Lawson*, 10 Hare (App.) xiv.

In a special case the court has no power to

make binding declarations of future rights. *Burt* v. *Sturt*, 1 W. R. 145.

No declaration as to future interest will be made upon a special case. *Savage* v. *Tyers*, 20 W. R. 817.

The court will not, on a special case, make any declaration of future rights. *Smith* v. *Gibson*, 25 L. T. 559; 20 W. R. 88.

Mode of framing a special case so as to enable the court, in some cases, to make a declaration, in the lifetime of a tenant for life, with regard to the interest of a party claiming in remainder. Although, in the lifetime of a tenant for life, the court has no jurisdiction, upon a special case, to declare whether an interest limited in remainder is vested or void for remoteness, yet it is competent to the court to declare, "whether the person claiming in remainder takes such an interest in the property in question as to entitle him to file a bill to have it secured for his benefit." *Bell* v. *Cade*, 2 John. & H. 122; 5 L. T. 523; 10 W. R. 38.

The meaning of s. 50 of 15 & 16 Vict. c. 86, is only to remove the objection that a plaintiff, who might have consequential relief, prays merely a declaration of his right. It did not mean to entitle a person to have a declaration as to a claim which may be made by another, under circumstances which may or may not happen. *Jackson* v. *Turnley*, 1 Drew. 617; 1 Eq. Rep. 328; 22 L. J., Ch. 949; 17 Jur. 643; 1 W. R. 461.

The court has no power, either under 13 & 14 Vict. c. 35, or under 15 & 16 Vict. c. 86, to make a declaration, in the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion, unless it shall be necessary to do so for the administration of an estate, or in order to grant the plaintiff the relief to which he is entitled. *Gosling* v. *Gosling*, 1 Johns. 265; 5 Jur. (N.S.) 910.

In a settlement, one of the parties covenanted, "that if he, F., should at any time obtain or become entitled to any property exceeding in value the sum of '——,' he would immediately assign the same to the trustees," upon the same trusts that had been previously declared of another sum. Upon his becoming entitled, in reversion, to some property, he filed a bill to have the settlement corrected by striking out the covenant, and to have it declared that he was entitled absolutely in reversion to the property to which he had become entitled:—Held, that the court would not make a present declaration of right. *Fyfe* v. *Arbuthnot*, 26 L. J., Ch. 646; 3 Jur. (N.S.) 651; 5 W. R. 793—L. C.

The court has no authority, notwithstanding s. 50 of 15 & 16 Vict. c. 86, to declare future rights. *Langdale (Lady)* v. *Briggs*, 8 De G. M. & G. 391; 26 L. J., Ch. 27; 2 Jur. (N.S.) 982; 4 W. R. 703.

The court will not make declarations of future rights in events which have not happened; and, therefore, where a testator, having given copyholds and leaseholds to trustees, to correspond with the uses of the devised freeholds, and by a codicil limited the freeholds differently after the death of the first tenant for life, but was silent as to copyholds or leaseholds:—Held, that during the continuance of the life estate the court would not determine how far the ulterior limitations of the copyholds and leaseholds were affected by the codicil. *Ib.*

Land, as to which a dispute as to the amount of the lessee's interest was pending (viz. whether he had a right of renewal for sixty-one years from 1885, or whether his interest expired altogether at the end of his existing term of sixty-one years, 1890), was taken by a railway company, under an agreement by which it was provided that if the lessee should substantiate his right of renewal, the company would pay him a further sum (the amount, if in dispute, to be settled by arbitration pursuant to the Lands Clauses Act) in addition to the price of the existing term. The company having since bought up the lessor's reversion in fee, the lessee filed a bill against them, praying a declaration of his right to a renewal from 1885, and payment of compensation on that footing:—Held, that the court had jurisdiction to decide this question of future right of renewal, on which the lessee's claim to compensation depended, and for ascertaining which no means were afforded by the Lands Clauses Act. *Bogg* v. *Midland Ry.*, L. R. 4 Eq. 310.

h. Service of Notice on Interested Parties.

Parties out of the Jurisdiction.]—The court has no jurisdiction to order service out of the jurisdiction of an order, affecting the interests of persons not parties to the action so that they may be bound by the proceedings under R. S. C., Ord. XVI. r. 40. *Cliff, In re, Edwards* v. *Brown*, 64 L. J., Ch. 423; [1895] 2 Ch. 21; 13 R. 425; 72 L. T. 440; 43 W. R. 436—C. A.

Where a suit is commenced by summons out of chambers, parties out of the jurisdiction must be served with notice of the decree. *Strong* v. *Moore*, 22 L. J., Ch. 917; 1 W. R. 509.

A bill was, in the presence of and adversely to the cestui que trust, taken pro confesso against a trustee living abroad. The court, under the 86th order of 1845, dispensed with service of the decree on him. *Benbow* v. *Davis*, 12 Beav. 421.

The provision for serving parties with a copy of decree in 15 & 16 Vict. c. 86, s. 41, rule 8, applies to parties out of the jurisdiction. *Chalmers* v. *Laurie*, 10 Hare (App.) xvi., xxiv., xxvii.; 1 W. R. 265.

Directions to Serve.]—Cases in which the directions of the court will be given in chambers on the question of what parties are to be served with the order or decree, and as to which of the parties service may be dispensed with. *De Balinhard* v. *Bullock*, 9 Hare (App.) xiii.

Decree for the appointment of new trustees and conveyance of the trust estate, in a suit by some cestuis que trustent against the devisees of the last survivor of the former trustees, and a direction to serve the other cestuis que trustent with notice of the decree. *Jones* v. *James*, 9 Hare (App.) lxxxix.

Where an estate is to be sold under the decree of the court, the general rule (with a possible exception in some cases of extreme difficulty) is, that all the parties interested in the proceeds must, to secure a proper and advantageous sale, and protect the title of purchasers from being open to inquiry or impeachment, be parties to the suit, or be served with notice of the decree under the 8th rule of the 42nd section of the act 15 & 16 Vict. c. 86. *Doody* v. *Higgins*, 9 Hare (App.) xxxii.

The 51st section of the act 15 & 16 Vict. c. 86, which empowers the court to adjudicate on

questions between some only of the parties, does not render the decision binding on the absent parties, as the 42nd section of the same statute does, when notice of the decree has been served under the 8th rule. *Ib.*

In order to bind remainderman they must be served with the decree; but it is a rule of practice that no such direction should form part of the decree. *Greaves* v. *Smith*, 22 W. R. 388.

As to serving an infant with notice of the decree, under the 8th rule, s. 42, stat. 15 & 16 Vict. c. 86. *Clarke* v. *Clarke*, 9 Hare (App.) xiii.

Leave to attend.]—Only those persons who, under the practice prior to 15 & 16 Vict. c. 86, were necessary parties to a suit before decree can, on being served with notice of the decree, obtain leave to attend the proceedings by an order of course. *Colyer* v. *Colyer*, 32 L. J., Ch. 101; 9 Jur. (N.S.) 294; 9 L. T. 214; 11 W. R. 587, 1051.

Effect of Service.]—The effect of service of a decree under 15 & 16 Vict. c. 86, s. 42, rule 8, is to bind the interest of the party served in the subject-matter of the suit, and not to impose on him any liability to account. *Walker* v. *Seligmann*, 40 L. J., Ch. 601; L. R. 12 Eq. 152; 25 L. T. 294.

The effect of 15 & 16 Vict. c. 86, s. 42, is at most to place persons served with notice of the decree on the same footing as if they were defendants; they cannot be treated as co-plaintiffs, and no inquiries can be obtained in such a suit for their benefit that could not have been obtained between co-defendants. *Whitney* v. *Smith*, L. R. 4 Ch. 513; 20 L. T. 468; 17 W. R. 579.

Death of Person.]—Bill and interrogatories served on E., who took no notice of them. Bill consequently ordered to be taken pro confesso against him. Judgment drawn up accordingly. Upon attempting to serve E. with judgment, it was found that he was dead at date of the decree, leaving no legal representative. Ordered, that, upon filing an affidavit verifying the circumstances under which the application was made, E.'s widow be served with notice that within six weeks from date of such service, the court would appoint a representative, and direct payment, unless in the meantime the widow appeared to contest. *Alforth* v. *Espinach*, 36 L. T. 367.

Order for Payment.] — When notice of an administration judgment has been served on parties interested, and afterwards, on further consideration, it is desired to obtain an order against them personally for payment of money, they should be served with notice of the action having been set down for further consideration, even though they have obtained an order to attend the proceedings. *Rees, In re, Rees* v. *George*, 15 Ch. D. 490.

Setting aside Order for Service.]—In an action for administration, judgment for administration was delivered on the 2nd June, 1883, and in November, 1884, notice of the judgment was served by the plaintiffs, under an order of the court on P., a purchaser of part of the testator's estate in which the plaintiffs were not interested. He was not a party to the action, and it did not appear from the judgment how he was affected. In order to ascertain his position, he entered an appearance on the 22nd November, 1884, under Ord. XVI. r. 41. On finding that he was not affected by the judgment, he served notice of motion on the plaintiffs that the order directing service might be discharged for irregularity, that the service might be declared irregular and set aside, that the appearance entered by him thereupon might be vacated, and that the costs of the application and consequent on the service might be paid by the plaintiffs. The motion was ordered to stand over, and P. was kept in the proceedings till the hearing on further consideration, when Bacon, V.-C., refused to give him any costs:—Held, on appeal, that P. was not a person who ought to have been served under Ord. XVI. r. 40, and that the service was irregular; that P. was right in appearing to the notice, that his appearance must be vacated, and that the plaintiffs must pay the costs in both courts, including the costs of appearance and all costs consequent on the service. *Symons, In re, Betts* v. *Betts*, 54 L. T. 501—C. A.

Service of Copy Bill.]—The attorney-general cannot be proceeded against by service of copy bill, under the 23rd order of August, 1841. *Christopher* v. *Gleghorn*, 8 Beav. 314.

When a party of unsound mind can be proceeded against by service of copy bill. *Pemberton* v. *Langmore*, 8 Beav. 166.

In a suit for administering the real estate of a testator, the devisees of the real estate subject to a power of sale given to trustees by the will, for the purpose of paying debts, are persons against whom "no direct relief" is prayed within the meaning of the 23rd of the orders of August, 1841. *Lloyd* v. *Lloyd*, 1 Y. & Coll. C. C. 181; 6 Jur. 162.

In a suit against the trustees of real estate having the legal fee and full powers of sale, the object being to raise a legacy charged on such estate, the equitable tenant in tail thereof is a necessary party, and it is not sufficient to serve him with a copy of the bill under the 23rd order of August, 1841. *Barkley* v. *Reay* (*Lord*), 2 Hare, 306; 12 L. J., Ch. 320.

A defendant against whom it is prayed that he may be bound by the proceedings on service of a copy of the bill, under the 23rd order of August, 1841, may appear gratis before or after he is so served. *S. C.*, 2 Hare, 309.

Bill by one child entitled with the other children to the residue of real and personal estate against the widow and eldest son of the testator, who were the trustees and executors for the execution of the trusts of the will and administration of the estate, and praying a receiver; the widow claimed a life estate adversely to the children:—Held, that the residuary legatees (who were defendants), other than the executors, were properly served with a copy of the bill under the 23rd order of August, 1841. *Davis* v. *Davis*, 4 Hare, 389.

In a suit respecting the estate of B.:—Held, that notwithstanding the bill alleged that the estate of B. was fully administered, and that the parties beneficially interested in the estate were parties to the suit, yet the executor of B. was a party against whom direct relief was in substance prayed, and he was not therefore a party to be served with a copy of the bill within the 23rd order of August, 1841. *Powell* v. *Cockerell*, 4 Hare, 557.

Bill by a debtor, who had conveyed property to a trustee for the benefit of his creditors, to have the trust of the deed administered by the

court, charging that one of such creditors had forfeited his debt by a breach of his covenant not to sue or molest the debtor:—Held, that the creditors parties to the deed, other than the trustee and the creditor charged with the breach of covenant, were sufficiently made parties by being served with copies of the bill under the 23rd Order of August, 1841. *Duncombe* v. *Levy*, 5 Hare, 232; 11 Jur. 262.

In a suit by some of the members of a class, claiming to be entitled under a conditional limitation by devise in favour of such class, against parties who claimed under a recovery suffered of the estate by the first taker under the same devise, the other members of the class in the same interest as the plaintiffs, who decline to become co-plaintiffs, may be served with the copy of the bill under the 29th Order of August, 1841; and if they are required to appear and answer, their costs must be paid by the plaintiffs. *Abram* v. *Ward*, 6 Hare, 170.

All the trustees named in a will having died, a bill was filed by one of the cestuis que trustent against the others, the heir of the trustee who died last, and certain persons who had been in possession of the estates, praying for an account of the rents received by those persons, for the appointment of new trustees, and that the estates might be conveyed to them by the heir of the trustee who died last:—Held, that the cestuis que trustent, who were defendants, had been rightly served with a copy of the bill under the 23rd General Order of August, 1841. *Johnson* v. *Tucker*, 15 Sim. 485; 11 Jur. 3.

A. and B., the representatives of a surviving trustee, were made parties to a suit respecting the trust property, and were served with a copy bill, and not with subpœna. They objected from the beginning, but did not intervene. New trustees were appointed, and seven years afterwards an order was made, in the absence of A. and B., for the distribution of the fund and delivery out of court of the title-deeds. A petition by A. and B. to discharge the order was dismissed with costs. *Doyle* v. *Doyle*, 12 Beav. 471.

To a bill filed by A. against B. to recover a customary estate, all persons claiming adversely against B. under the custom or by various constructions of custom are necessary parties; nor can A., with respect to those persons, avail himself of the provisions of the 23rd Order of August, 1841. *Marke* v. *Locke*, 2 Y. & Coll. C. C. 500; 12 L. J., Ch. 444.

The plaintiff by original bill claimed to be equitably entitled to certain customary premises, and prayed that the then defendants, the trustees in whom the legal estate was vested, and all other necessary parties, might be decreed to convey and give up the premises and the title-deeds, &c. to him (the plaintiff). At the original hearing, it was objected by the trustees, that certain parties claiming an interest in the premises were not before the court, and the cause was directed to stand over, to give the plaintiff an opportunity of making them parties to the suit. He accordingly made them defendants by supplemental bill; but, on the supposition that no direct relief was prayed against them, served them with a copy of the bill under the 23rd of the Orders of August, 1841:—Held, however, that they were not persons against whom no account, conveyance, or other direct relief was sought within the meaning of the order. *Marke* v. *Turner*, 7 Jur. 1102.

A defendant being out of the jurisdiction when a bill was filed, came within after decree, and after expiration of the twelve weeks within which he could have been served with a copy of the bill as of course, the bill not asking a specific relief against him, an application to serve him with a copy of the bill after decree under the 10th Consolidated Order, rr. 11 and 18, was refused. *Penfold* v. *Kelly*, 9 L. T. 674; 12 W. R. 286.

i. By Consent.

In what Cases.]—A decree may be made by consent in a cause, relating to the separate property of a married woman, in which she and her husband are co-plaintiffs. *Stinson* v. *Ashley*, 5 Russ. 4.

Accounts being directed to be taken by the Master, liberty was by consent given to the parties to submit to his arbitration any question of account. The court also gave liberty to the Master to adopt the conclusions, but would not, even by consent, make it compulsory. *Scale* v. *Fothergill*, 8 Beav. 361.

Persons authorised by the court to defend an action on behalf of others having the same interest cannot consent to the judgment against them; the proper course in case there is no defence is to submit on their behalf to judgment. *Rees* v. *Richmond*, 62 L. T. 427.

Copyhold fines were ascertained at two years' value, and a commission was issued to ascertain the value of the tenements under a decree by consent, the principle of which was disapproved. *Holles* (*Lord*) v. *Hutchinson*, 3 Swanst. 665.

In a creditor's suit, the court, upon motion, with the consent of all parties, directed an account of judgments affecting the lands to be sold prior to and contemporaneous with the filing of the bill. *Montgomery* v. *Southwell*, 3 Dr. & War. 171; 5 Ir. Eq. R. 71.

Interlocutory Order—Final Decree.]—A final decree cannot be made upon an interlocutory order without consent. *Allan* v. *Bower*, 3 Bro. C. C. 149.

An order embracing the whole subject of the suit cannot be made on motion without express consent. *Like* v. *Beresford*, 3 Bro. C. C. 366.

Bankruptcy of Persons Consenting.]—Upon a motion for an injunction, the defendant consented to an immediate decree, but he became bankrupt before the decree had been drawn up, and his written consent to set down the cause could not be obtained. The court made the order for setting down the cause, and dispensed with the consent. *Brighouse* v. *Margetson*, 35 Beav. 303.

Powers of Court and Parties by Consent.]—The owners of the B. sued the owners of the C. for a collision. In the course of the trial a compromise was arrived at, whereupon the court made an order by consent dismissing the action, including a counter-claim, without costs. The owners of the cargo on the B. then sued the owners of the C., and obtained a judgment declaring both ships to blame. The owners of the C. began a suit to limit their liability, and paid the limitation fund into court. Subsequently the owners of the B., with the consent of the owners of the C., obtained on summons, without application to the court, an order in the registry setting aside the first order, and made a claim upon the fund in court:—Held, that the

second order was invalid, and did not operate to set aside the first order, which was a judgment of the court, and therefore that, as the owners of the B. had no claim against the owners of the C., the claim was rightly disallowed. Whether in the absence of fraud the court itself could have set aside the first order, quære. *The Bellcairn*, 55 L. J., P. 3; 10 P. D. 161; 53 L. T. 686; 34 W. R. 55—C. A. See *Hammond* v. *Schofield*, 60 L. J., Q. B. 539; [1891] 1 Q. B. 453.

Where an arrangement is made by consent of the parties to an action, and, in order to carry into effect their intentions, some act remains to be done under the authority of the court, the court has power, notwithstanding such previous consent, to see that such act is proper and allowable. *Wade* v. *Simeon*, 2 D. & L. 658; 13 M. & W. 647; 14 L. J., Ex. 117; 9 Jur. 117.

How far binding.]—Decree by consent not set aside. *Harrison* v. *Rumsey*, 2 Ves. 488.

An order by consent can only be got rid of by consent. *Bernal* v. *Donegal* (*Marquis*), 3 Dow, 146; 1 Bli. (N.S.) 594.

An order by consent, if in conformity with the rules of the court, cannot be varied except by consent. *Glynn* v. *Bell*, 6 L. J., Ch. 201. And see *Thrupp* v. *Goodrich*, 18 W. R. 125.

An order of reference having been made by consent, the court refused to vary it by introducing a new term in consequence of fresh information having come to the knowledge of one of the parties. *Drake* v. *Brown*, 2 C. M. & R. 270; 5 Tyr. 1067; 4 L. J., Ex. 313.

Relief against a consent, sought on special grounds, refused. *Cochrane* v. *Robinson*, 1 Jur. 864.

A decree made by consent cannot be impeached by any of the parties to the cause, or those claiming under them. *Moss* v. *Leatham*, 2 Moore, P. C. 73.

A decree by consent as to a personal estate binds a purchaser for a valuable consideration. *Wyndham* v. *Wyndham*, 3 Ch. Rep. 22; 2 Freem. 127.

Circumstances in which parties were held, after a case had been sent to a court of law, not to be bound by their consent at the re-hearing not to take a case for the opinion of another court of law, and the cause remitted to the court below to hear parties as to the validity of the leases in question. *Sheehy* v. *Muskerry* (*Lord*), Macl. & R. 493; 7 Cl. & F. 1.

Cause may be sent back to the Master, notwithstanding the decree taken by consent did not reserve further directions. *Dolben* v. *Nash*, 1 Jur. 557.

A decree nisi was taken against a defendant who did not appear at the hearing. Judgment was pronounced by the Master of the Rolls, after his appointment to the office of Lord Chancellor, by consent of all the parties to the cause, except the defendant and another party who did not appear at the hearing. The defendant could only shew cause against the decree nisi by setting down the cause to be heard against him; and a petition to stay proceedings to make the decree absolute, on the ground of his being no party to the consent to have the cause decided by the Master of the Rolls after he became Lord Chancellor, was dismissed with costs. *Moore* v. *Frowd*, 2 Keen, 242; 7 L. J., Ch. 113.

—— **Authority of Counsel and Solicitor.**]—*See* BARRISTER—SOLICITOR.

Setting aside.]—*See* infra, col. 591.

Whether Appeal lies.]—A decree or order made by consent cannot be appealed from. *Allanson* v. *Doulben*, Colles's P. C. 299; *Blundell* v. *Macartney*, 2 Ridgw. P. C. 557, 591; *Norcott* v. *Norcott*, 7 Vin. Abr. 398. S. C. nom. *Northcote* v. *Northcote*, Colles's P. C. 287.

An appeal brought, suggesting that decree was said to be made by consent when it was not, was dismissed. *Downing* v. *Cage*, 1 Eq. Abr. 165.

It is a known and established rule that an appeal does not lie against an order made by the consent of parties. *Toder* v. *Sansam*, 1 Bro. P. C. 468.

A decree made by consent cannot be appealed from. *Bradish* v. *Gee*, Ambl. 229; 1 Ken. Ch. 73.

Appeal not barred by consent to an order under the decree; but that order ought to be inserted in the petition of appeal. *Wood* v. *Griffith*, 19 Ves. 550; 1 Mer. 35.

Where, after trials at law, the case was left by consent to the decision of the court, upon the evidence taken at law, the decree made on such evidence was held to be subject to appeal. *Morris* v. *Davies*, 5 Cl. & F. 163.

An order was made upon petition by a vice-chancellor as if upon consent of all parties; it turned out that one of the parties was a married woman, and had not been examined as to her consent, and now appealed upon that ground:—Held, that it was not a subject of appeal, and that the petition should be heard before the court which made the order. *Pearse* v. *Brook*, 14 Jur. 143.

The appearance of counsel, who had been previously engaged at the hearing of a cause, on the cause coming on again upon the reserved question of costs, the proctor who originally instructed him being present, and not objecting to his taking part in the proceedings, and the opposite party being thereby led to suppose he was properly instructed to agree to a final decree:—Held, binding on the party for whom he originally appeared, so as to perempt an appeal previously lodged against the former decree. *Kelly* v. *Bushby*, 3 Knapp, 375.

Where an order is made by consent, neither the court making it nor the appellate court can reverse it. *Dodson* v. *Sammell*, 8 W. R. 252.

Agreement to perform Conditions.]—A judge's order, made by consent, whereby it was ordered that proceedings in an action should be taxed upon certain conditions, does not amount to an agreement to perform those conditions; and a bill for specific performance will not lie. *Thames Iron Works and Shipbuilding Co.* v. *Patent Derrick Co.*, 1 John. & H. 93; 29 L. J., Ch. 714; 6 Jur. (N.S.) 1013; 2 L. T. 208; 8 W. R. 408.

Objection to Order—Infant Party.]—A party to a suit who, knowing that certain other parties are infants, agrees that a certain course should be taken in the suit, cannot afterwards object that his consent does not bind him because the other parties were infants and could not consent. *Pisani* v. *Att.-Gen.* (*Gibraltar*), L. R. 5 P. C. 517.

Fraud or Mistake, Effect of.]—An order consented to in consequence of mistake will be discharged, but not with costs. *Irving* v. *Pritchard*, 3 L. J. (O.S.) Ch. 100.

An order was made on petition and by consent:—Held, that it could only be varied by a proceeding in the nature of one to correct the agreement on the ground of fraud or suppression of facts. *Greenwood* v. *Churchill*, 14 Beav. 160.

Two solicitors, A. and B., dissolved partnership, and it was agreed that B. should be entitled to half the profits of a suit instituted by them. After some time, an order was made, by consent of both, for the taxation of the costs down to the date. Some of the costs had, unknown to B., been already taxed and received by A.:—Held, under the circumstances, that the order comprised all such costs, and, the previous costs having been omitted in the master's certificate, the court, upon a petition to review the taxation, referred the matter back to the master. *Ib.*

Where a party to a suit consents to an order on the faith of a statement made at the bar, which statement afterwards proves to be erroneous, and in the absence of any evidence of unfairness or surprise, the court will not vary the order by striking out the words "by consent." *Cookes* v. *Cookes*, 12 Jur. (N.S.) 244; 14 L. T. 98. Affirmed, 14 L. T. 157—L.JJ.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. *Att.-Gen.* v. *Tomline*, 47 L. J., Ch. 473; 7 Ch. D. 388; 38 L. T. 57; 26 W. R. 188.

Allowed to be a good error in a bill of review, that the decree was made by the consent of the plaintiff's counsel, by which he ought not to be concluded. *Smith* v. *Turner*, 1 Vern. 274.

When a decree has been made by consent, all parties are primâ facie bound, under whatever circumstances that consent is given. It may, however, be impeached when it has been obtained by fraud or on an entire mistake of facts. *Stannard* v. *Harrison*, 24 L. T. 570; 19 W. R. 811.

The court has jurisdiction to discharge an order made on an interlocutory application by consent when it is proved to have been made under a mistake, though that mistake was on one side only. *Mullins* v. *Howell*, 48 L. J., Ch. 679; 11 Ch. D. 763.

Where on motion for a mandatory injunction an order was made by consent pursuant to the terms of a previous agreement, by which the defendant gave an undertaking to remove certain obstructions, and it appeared that the defendant had by mistake consented to a more extensive undertaking than he intended to do, the court refused to enforce that part of the undertaking which had been given by mistake. *Ib.*

Withdrawal of Consent.]—When an order is made by consent, such consent may be withdrawn at any time before the order is passed and entered. *Rogers* v. *Horn*, 26 W. R. 432.

When the counsel and solicitors of a defendant, being aware of all the facts on which an order ought to be made, consented in court, in the defendant's presence, to an order against him, he was not allowed to withdraw his consent, on the grounds that his advisers mistook their instructions, and had no sufficient authority to bind him. Aliter if the consent is given through inadvertence. *Holt* v. *Jesse*, 46 L. J., Ch. 254; 3 Ch. D. 177; 24 W. R. 879.

A defendant in an action had undertaken by his counsel at the hearing to make certain payments which had been agreed upon as the measure of damages. After the order had been passed and entered, i.e. at least two weeks after judgment, the defendant moved to be discharged from the undertaking on the ground of its having been given under a misapprehension of facts:—Held, that the application came too late, the defendant having had ample time between the delivery of the judgment and the drawing up of the order in which to ascertain the state of facts. *Att.-Gen.* v. *Tomline*, 47 L. J., Ch. 473; 7 Ch. D. 388; 38 L. T. 57; 26 W. R. 188.

An action was brought against a local board to restrain them from pulling down certain houses of the plaintiff's, and for damages. On a motion for an injunction coming on, the defendants' counsel, by the authority of his clients, consented to an order for a perpetual injunction, with costs, and an inquiry as to damages, and such order was taken by consent without opening the case to the court. Before the order had been passed, the defendants formally withdrew their consent, and the registrar thereupon declined to pass the order without the direction of the court. The plaintiff moved that he might be directed to proceed to perfect the order. The defendants alleged that their instructions to consent had been given under a misapprehension, but did not enter into any evidence in support of that allegation:—Held, that where counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, and that the registrar must be directed to proceed to perfect the order, without prejudice to any application which the defendants might make to the court below to be relieved from their consent on the ground of mistake or surprise, or for other sufficient reason. *Harvey* v. *Croydon Union Rural Sanitary Authority*, 53 L. J., Ch. 707; 26 Ch. D. 249; 50 L. T. 291; 32 W. R. 389—C. A.

An action was brought for an injunction to restrain the defendant from selling certain buttons alleged to be an infringement of the plaintiffs' registered trade-mark. The defendant, believing that he had no defence to the action, consented to an order for a perpetual injunction with costs. Before the order was drawn up, he received a letter from the manufacturer of the buttons, which were made in Germany, wherefrom it appeared that the buttons had been sold in this country long before the registration of the plaintiffs' trade-mark. On motion by the defendant that he might be relieved from the consent so given:—Held, that a party who has deliberately consented to a perpetual injunction cannot be permitted to withdraw his consent merely because he has subsequently discovered that he might have a good defence to the action; that the case was not one of mistake; and that the motion must be refused. *Elsas* v. *Williams*, 54 L. J., Ch. 336; 52 L. T. 39.

Form of Order.]—Where, by arrangement, any order which is not according to the course of the court is inserted in a decree, such order must in the decree be stated to be by consent. *Bartlett* v. *Wood*, 30 L. J., Ch. 614; 4 L. T. 692; 9 W. R. 817.

Where an order has been agreed to and arranged between the parties to an action, and has not been sanctioned or directed by the court, it should appear on the face of the order that it is an order by consent. *Michel* v. *Mutch*, 55 L. J., Ch. 485; 54 L. T. 45; 34 W. R. 251.

An order directing an issue "with the consent of all parties in the cause" is erroneous so far as it purports to be with the consent of an infant party. *Malone* v. *Malone*, 8 Cl. & F. 179; West, 637; 3 Ir. Eq. R. 536.

The plaintiff's farms had been injuriously affected by some works of the defendant, which resulted in certain actions and a suit in equity. An order had been made in the latter by consent declaring that the valuation of the farms ought to be calculated upon the basis of the existing state of the farms after the damage:—Held, that such declaration ought to be omitted from the consent order. *Houghton* v. *Bankart*, 7 Jur. (N.S.) 57; 3 L. T. 606; 9 W. R. 215.

—— **Amendment of.**]—If an order made by consent is, through mistake, capable of an interpretation contrary to the real intention, it will be amended by the court, so as to make it plainly and clearly represent that intention. *Oldershaw* v. *King*, 26 L. J., Ex. 384.

—— **Consent Order by Mistake not enforced.**]—Where on motion for a mandatory injunction an order was made by consent, pursuant to the terms of a previous agreement, by which the defendant gave an undertaking to remove certain obstructions, and it appeared that the defendant had by mistake consented to a more extensive undertaking than he intended to do, the court refused to enforce that part of the undertaking which had been given by mistake. *Ib.*

Consent Judgment — Motion on Notice.]—There is no fixed rule in the chancery division that judgment by consent must, in all cases, be obtained by motion on notice for judgment. *Pneumatic Tyre Co.* v. *Grappler Pneumatic Tyre Co.*, [1897] 1 Ir. R. 467.

j. INTERLOCUTORY ORDERS.

Orders held to be Interlocutory on Appeal.]—*See* APPEAL.

Application by Defendant.]—Defendant not being the party seeking relief, therefore is not entitled to apply for an interlocutory order for his own security or relief as to the subject matter of the suit, unless the object of his motion may be imposed as a condition on an order applied for by the plaintiff. *Wynne* v. *Griffith*, 1 Sim. & S. 147; 1 L. J. (O.S.) Ch. 110.

Title to Fund in Court.]—When a fund, the title to which is litigated in the cause, has been brought into court, it is contrary to the practice of the court to determine the question of title upon interlocutory applications so far as to direct that the interest of the fund shall be paid to one of the parties claiming it until further order. *Nedby* v. *Nedby*, 4 Myl. & C. 367; 3 Jur. 18. Reversing 8 L. J., Ch. 23.

Rent—Receiver.]—The court will not by an interlocutory order before the hearing charge a party who is in possession of an estate, and who has been ordered to pay an occupation rent to the receiver, with the amount of such rent for any period antecedent to the date of the order for fixing the rent and appointing the receiver. *Lloyd* v. *Mason*, 2 Myl. & C. 487.

See RECEIVER.

Evidence at Hearing.]—The court will not, upon an interlocutory application, after the cause is set down for hearing, declare that at the hearing a particular document may be produced and read as evidence. *Att.-Gen.* v. *Fishmongers' Co.*, 4 Myl. & C. 1; C. P. Coop. 385.

The court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing. *Smith* v. *Peters*, 44 L. J., Ch. 613; L. R. 20 Eq. 511; 23 W. R. 763.

The court will make interlocutory orders for production only for security or discovery, and will not anticipate the decree. *Lingen* v. *Simpson*, 6 Madd. 290.

Final Decree.]—Final decree cannot be made upon an interlocutory order without consent. *Allan* v. *Bower*, 3 Bro. C. C. 149.

Question in Cause.]—The court, in dealing with interlocutory applications, will confine itself strictly to the immediate object sought, and, as far as possible, abstain from prejudging the question in the cause. *Skinners' Co.* v. *Irish Society*, 1 Myl. & C. 162.

Questions of Law.]—The court will not give its decision upon important questions of law upon interlocutory application. *Bates* v. *Brothers*, 2 Eq. R. 327; 23 L. J., Ch. 922.

Orders for Sale.]—In an action to enforce a charge on real estate, the plaintiff is, under ordinary circumstances, entitled to an order for sale before the trial on shewing a case upon which such an order would be made at the trial. *Davis* v. *Ashwin*, 47 L. J., Ch. 70; 26 W. R. 139.

Interlocutory Injunction.]—*See* INJUNCTION.

k. ORDERS EX PARTE OR OF COURSE.

Nullity until Service.]—An order obtained ex parte is a nullity till service. *Ballard* v. *Catling*, 2 Keen, 606; 7 L. J., Ch. 186.

When irregularly obtained.]—An order of course alleged to have been irregularly obtained cannot be treated as a nullity. It operates until, by a proper application, it is discharged. *Blake* v. *Blake*, 7 Beav. 514.

A party who has served and proceeded on an irregular order of course is not at liberty to abandon it upon tender to his adversary of the costs. The order must be considered as a valid and subsisting order until it is disposed of in some regular course, and when costs are due to a party the amount must be ascertained in a regular course. *Pearce* v. *Gray*, 4 Beav. 127; 10 L. J., Ch. 353.

Where an irregular order has been obtained, no subsequent order to the same effect can be had until the former has been discharged. *Ib.*

Knowledge but no Service.]—An order of the court of which the party affected by it has notice, though not formally served upon him, is not to be disregarded or treated by him as a nullity, however certain it may be that the order is erroneous, and would, upon a proper application for that purpose, be discharged. *Chuck* v. *Cremer*, 2 Ph. 113; 1 Coop. C. C. 338; 16 L. J., Ch. 92.

An order made by the Master, although obtained irregularly, and ex parte as to some of

the parties in the cause, cannot be treated by them as a nullity; and therefore, where one defendant had, without notice to his co-defendants, obtained an order from the Master to enlarge publication, and before the enlarged time expired another defendant, knowing of the order, set down the cause for hearing, the cause was ordered to be struck out of the registrar's book, with costs to be paid by the defendant who had set it down. *Hughes* v. *Williams*, 6 Hare, 71; 16 L. J., Ch. 200; 11 Jur. 237. Affirmed by Lord Chancellor, 26th March, 1847.

Proof of Title.]— In ex parte applications seeking to affect the ownership of property, the strictest proof of title will be required, and the bar are expected to assist the court with any authorities that may exist upon the point. *Chorley, In re*, 16 Jur. 233.

Material Facts must be stated.]—An order obtained as of course to enlarge publication, upon an allegation that he has witnesses to examine, will, if it can be shewn that, from the nature of the suit, the party can have no witnesses to examine, be discharged, as being grounded on a false allegation. *Brunt* v. *Wardle*, 3 Y. & Coll. 503; 8 L. J., Ex. Eq. 64.

An order for an injunction was obtained ex parte after an appearance had been entered by the clerk in court, who had instructions from the solicitor for the railway company to enter an appearance immediately to every bill which should be filed against them; but the fact of the defendant's having appeared was not known to the plaintiff's solicitor when the injunction was obtained:—Held, that the order must be discharged; for, although the court might grant an injunction ex parte, under such circumstances, even after appearance, yet the fact of such appearance having been entered must be stated when the application is made; and if not known at the time, then the plaintiff must take his chance whether he obtain a good or bad order. *Randall* v. *Commercial Ry.*, 3 Jur. 381.

An application for an order of course should state the material facts. If there be any suppression, the order will be discharged, and the court will not, on the application to discharge it, support it on the special merits then for the first time appearing. *St. Victor* v. *Devereux*, 6 Beav. 584; 13 L. J., Ch. 102; 8 Jur. 26.

Parties resorting to the summary jurisdiction of the court by claim are bound to state all the facts of the case which are within their own knowledge, and are not justified in merely stating those facts which they may consider material in the case they take as to the relief to which they may be entitled. *Goode* v. *West*, 9 Hare, 378; 21 L. J., Ch. 127; 15 Jur. 1025.

Therefore, where the cestui que trust of an aliquot share of a trust fund, being aware that the trustees had severed the share, and paid it into court under the trustee indemnity acts, retaining only a sum in respect of costs, filed a claim suppressing the fact of the severance and payment into court of the aliquot share, and seeking to have the whole trust fund administered by decree of the court, the claim was dismissed with costs. *Ib.*

Although a claim must state the whole of the case of the plaintiff, yet it need not state the defence expected to be raised by the defendant. *Jacobs* v. *Richards*, 23 L. J., Ch. 557; 18 Jur. 527; 2 W. R. 174.

A party obtaining an order of course is bound to state truly every fact which is material to the question, whether an order ought to be granted as of course or not. Upon a motion to discharge an order obtained as of course, which ought to have been the subject of a special application, the order is to be discharged on that ground, although there may be merits on which it might have been proper to grant the order. *Holcombe* v. *Antrobus*, 8 Beav. 405; 14 L. J., Ch. 378.

An order obtained ex parte upon motion discharged on account of the suppression of material facts. *De Feuchères* v. *Dawes*, 11 Beav. 46.

A party applying for an order of course should state everything which can have a bearing on the matter, otherwise the order will be discharged. *Walker, In re*, 14 Beav. 227.

A petition for an ex parte order, suppressing any fact which would be material to the officer in drawing up the order, and without which the order would not be drawn up:—Held, irregular; and the motion refused with costs. *Lewis* v. *Cooper*, 2 Ph. 178; 16 L. J., Ch. 265.

It is essential to an order of course that it should be made upon a true statement of facts. *Brignall* v. *Whitehead*, 30 Beav. 229; 8 Jur. (N.S.) 183; 5 L. T. 301; 10 W. R. 69.

The rule upon applications for ex parte orders is the same as that upon ex parte application for injunctions, and in both cases the suppression of a material fact is fatal to the order. *Gedye, In re*, 15 Beav. 254.

An order obtained ex parte was discharged on the ground of the suppression of material facts. *Atkin* v. *Moran*, Ir. R. 6 Eq. 79.

—— On obtaining Ex parte Injunction.]—*See* INJUNCTION.

Amendment.]—An order of course may be amended before service; but semble that after service it cannot be amended in the absence of the party to be affected thereby. *Wool* v. *Townley*, 9 Beav. 41; 15 L. J., Ch. 143.

Application where made.]—When under the rules under the judicature act an order is to be obtained ex parte on application to the court or a judge, the application need not be made in court, but an order of course may be obtained. *Roffey* v. *Miller*, 24 W. R. 109.

Discharge of.]—Though an ex parte order has been drawn up and entered, the party affected thereby is at liberty to apply for its discharge to the judge who made the order; the order being ex parte, such an application does not include a rehearing. *Boyle* v. *Sacker*, 58 L. J., Ch. 141; 39 Ch. D. 249; 58 L. T. 822; 37 W. R. 68—C. A.

A plaintiff having obtained an order of course to amend after the time limited for that purpose had expired, and the defendant being in a condition to move to dismiss for want of prosecution:—Held, that a single notice of motion to discharge the irregular order, and to dismiss the bill, was not irregular on the ground of multifariousness. *Traile* v. *Bull*, 1 Beav. 475; 3 Jur. 624.

Where an application is made at the rolls to discharge an order of course, obtained in a vice-chancellor's cause, the court can only consider the regularity of the order as an order of course, and will not enter into the merits. The rule is

general, that the court will not, on an application to discharge an order of course for irregularity, sustain it as an order obtained adversely on merits. *Brooks* v. *Purton*, 4 Beav. 494; 11 L. J., Ch. 73.

Where an irregular order has been obtained, no subsequent order to the same effect can be had until the former has been discharged. *Pearce* v. *Gray*, 4 Beav. 127; 10 L. J., Ch. 353.

An order of course, though obtained within the time limited by the General Orders, discharged on the ground of the inexcusable delay of the plaintiff in proceeding and getting in the answer of a defendant under her control, and because it had been obtained for the purpose of defeating a motion to dismiss for want of prosecution. *Foreman* v. *Gray*, 9 Beav. 200; 16 L. J., Ch. 233; 11 Jur. 483.

l. Setting Aside and Impeaching.

1. Practice.

Notice of Motion.]—Notice must be given of a motion made to the court of appeal, under Rules of Supreme Court, 1875, Ord. XL. r. 4, to set aside the judgment entered at the trial before a jury and enter judgment. *Jones* v. *Davis*, 36 L. T. 415—C. A.

An order discharged for irregularity, with costs, though the notice of motion was general. An order may be impeached for irregularity, although the notice of motion do not specify that as the ground for it, the omission being material only as to costs, and not always even as to them. *Brown* v. *Robertson*, 2 Ph. 173.

The Application.]—When under Ord. XL. r. 4, a motion is made to the court of appeal to set aside a judgment and enter any other judgment, it must be shewn that the judgment was entered wrongly with reference to the findings of the jury, otherwise the motion would be to a divisional court to set aside the verdict and for a new trial. *Davies* v. *Felix*, 48 L. J., Ex. 3; 4 Ex. D. 32; 39 L. T. 322; 27 W. R. 108—C. A.

See also Cases sub tit. Appeal.

A suit to set aside a decree at the rolls on the ground of fraud might be heard by the vice-chancellor. *Archer* v. *Slater*, 10 Sim. 624.

The rule that an application to vary or discharge an order made on petition must, if made on the merits, be the subject of a regular rehearing, applies even though all parties consent to a different course. *North Wales Slate Supply Co., In re*, 21 L. T. 818; 18 W. R. 403.

It is irregular for a party complaining of one part of an order only to move that it be discharged altogether. *Beadles* v. *Birch*, 9 L. J., Ch. 348.

Application, by whom made.]—If a person, who is not a party to the record, seeks to set aside a judgment by which he is injuriously affected, which the defendant in the action has allowed to go by default, he ought by summons, taken out in the name of the defendant, or if not entitled to use the defendant's name then taken out in his own name, but in that case served on both the plaintiff and the defendant, to apply for leave to have the judgment set aside, and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right, or to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5. Ord. XXVII. r. 15, is designed to enable judgments by default to be set aside by those who have or who can acquire a locus standi, and does not give a locus standi to those who have none. *Jacques* v. *Harrison*, 53 L. J., Q. B. 137; 12 Q. B. D. 165; 50 L. T. 246; 32 W. R. 471—C. A.

A person who is not a party to a cause cannot, in general, apply to discharge an order made in that cause. *Houghton* v. *Godschall*, 2 Coop. C. C. 89.

A party may move to discharge an order, though he is in contempt for not obeying it. *Hill* v. *Bissel*, Mos. 258.

An order discharged, on the objection of the Bank, as being unauthorised by the trustee act; and another order substituted, under the 1 Will. 4, c. 65, s. 32. It is the duty of the Bank of England to bring an erroneous order, upon which it is asked to act, under the notice of the court. *Westwood, In re*, 6 N. R. 316.

On a motion to discharge an alleged irregular order, no parties can be heard in support of the application but those who have joined in the motion to discharge it. *Stubbs* v. *Sargon*, 3 Beav. 408.

Time to make Application.]—When no irreparable wrong will be done to a plaintiff who has obtained judgment by default, lapse of time is not a bar to an application to set it aside. *Atwood* v. *Chichester*, 47 L. J., Q. B. 300; 3 Q. B. D. 722; 38 L. T. 48; 26 W. R. 320—C. A.

A married woman was sued on a cheque and two promissory notes which she had signed along with her husband, who had received the money advanced by the plaintiff upon them. The plaintiff knew all the circumstances. The wife gave the writ to her husband, and he to his solicitors, who allowed judgment to go by default. After various interlocutory proceedings, all of which were unknown to the defendant, an application to attach her was made, upon which she applied for leave to set aside the judgment:—Held, that the delay was no bar to the application, the action having been improperly brought against the defendant, and the plaintiff being aware of the impropriety, and having suffered no irreparable mischief. *Ib.*

An action having been brought in the names of twelve persons who had formerly been shareholders in a mine, upon instructions given to the attorney by one who alleged himself to be purser, and as such authorised to sue on behalf of the adventurers, three obtained judges' orders to strike out their names, on the ground that they had no interest in the matter, and that their names had been used without their knowledge or consent. These orders were obtained on the 19th of September, 1854, after the cause had been taken down for trial, and the defendant had consequently become entitled to costs of the day on the withdrawal of the record. On the 5th of May, 1855, the defendant obtained a rule calling upon the three plaintiffs, whose names had been struck out, to shew cause why the orders for that purpose should not be rescinded:—Held, that the application was too late. *Collins* v. *Johnson*, 16 C. B. 588; 3 C. L. R. 1285; 24 L. J., C. P. 231.

A decree to all appearance just in itself when pronounced, and strengthened, moreover, by constant possession and unvarying recognition for more than two centuries, requires the strongest grounds to warrant its impeachment, the great

principle applicable to such a case being omnia præsumuntur à judice rite et solennitur acta. *Lee* v. *Johnstone*, L. R. 1 H. L. (Sc.) 426.

This principle was deemed peculiarly imperative in a case where a decree, with its warrant and register, was shewn to have perished in a great fire so far back as 1700, nothing remaining but an extract. *Ib.*

An application to set aside a judgment on the ground of mistake must be made within a reasonable time after the discovery of the mistake. *Cannan* v. *Reynolds*, 5 El. & Bl. 301; 26 L. J., Q. B. 62; 1 Jur. (N.S.) 873.

An application to set aside proceedings alleged to have been instituted without the applicant's authority must be made as soon as he is aware of their pendency. *The Bellcairn*, 54 L. T. 544; 5 Asp. M. C. 582.

An application to set aside a judgment for irregularity must be taken advantage of promptly. *Stopford* v. *Fitzgerald*, 4 D. & L. 725; 11 Jur. 454.

An application to set aside a judgment, on the ground that the signing of it was contrary to good faith, must be made promptly. *Saunders* v. *Jones*, 3 D. & L. 770; 15 L. J., Q. B. 272.

Applications to discharge orders for irregularity must be made without delay. *Joseph* v. *Simpson*, 10 Price, 25.

—— **Order by Consent—Passed and entered.**]—Where a judgment taken by consent has been passed and entered, the court has no jurisdiction, without consent, to entertain a motion in the action by one of the parties to set aside the judgment on the ground that the consent was given under a mistake, and that the judgment does not express the true intention of the parties. *Ainsworth* v. *Wilding*, 65 L. J., Ch. 432; [1896] 1 Ch. 673; 74 L. T. 193; 44 W. R. 540.

The fact that a consent order has been passed and entered, and that the party complaining has, before he found out his mistake, sought to enforce it in the sense in which he understood it, does not prevent him from taking steps to have it set aside. *Hickman* v. *Berens* (64 L. J., Ch. 785; [1895] 2 Ch. 638) and *Stewart* v. *Kennedy* (15 App. Cas. 75, 108) applied. *Wilding* v. *Sanderson*, 66 L. J., Ch. 684; [1897] 2 Ch. 534; 77 L. T. 57; 45 W. R. 675—C. A.

Frivolous Applications — Form of Order.]—Repeated frivolous applications for the purpose of impeaching a judgment having been made by the same parties, the court of appeal made an order prohibiting any further application without leave of the court. *Grepe* v. *Loam*, 57 L. J., Ch. 435; 37 Ch. D. 168; 58 L. T. 100—C. A.

Jurisdiction of Chancery Division—Judgment of Queen's Bench Division.]—Upon an application to remove a person's name from the register of a company the court confirmed the allotment. The instalments payable on allotment had not been paid. The company had commenced an action in the Queen's Bench Division to recover them, and applied for judgment under Ord. XIV. Leave was given to defend upon paying 100*l.* into court. The defendant made default, and leave to sign judgment against him was given on the 17th January. Judgment was signed early in February, and on the 9th April the defendant took out a summons to set aside the judgment, which was transferred and came on with the motion:—Held, that the court had jurisdiction to set aside the judgment. *Portuguese Consolidated Copper Mines, In re, Badman's case*, 2 Meg. 65; 62 L. T. 179.

Affidavit of Merits.]—Where the defendant, in an action for the recovery of land and for arrears of rent, failed to comply with an order that if he did not within three days file an affidavit in answer to interrogatories his defence should be struck out and judgment signed:—Held, that the plaintiffs were entitled to sign judgment under the order without previously serving it upon the defendant, and that a judgment so signed, being a regular judgment, could not be set aside in the absence of an affidavit of merits. *Farden* v. *Richter*, 58 L. J., Q. B. 244; 23 Q. B. D. 124; 60 L. T. 304; 37 W. R. 767.

Discretion of Court.]—A defendant against whom a judgment had been signed, and who had a good legal defence, having refused equitable terms of compromise, the court denied him the indulgence of setting aside the judgment and permitting him to plead. *Anon.*, 4 Taunt. 885.

The court will not set aside a judgment so as to allow the defendant to plead the statute of limitations. *Willett* v. *Allerton*, 1 W. Bl. 35.

But the court will set aside a regular interlocutory judgment on affidavit of merits, though it is the defendant's intention to plead his infancy. *Delafield* v. *Tanner*, 1 Marsh. 391; 5 Taunt. 856.

So on an affidavit of merits, though bankruptcy is intended to be pleaded. *Evans* v. *Gill*, 1 Bos. & P. 52.

Waiver.]—Where an order had been obtained, that service of a subpœna on the attorney of the defendant, who resided abroad, and had brought an action at law against the plaintiffs, should be good service, but such order was obtained, and the subpœna issued and served two days before the filing of the bill, the court refused to discharge the order for irregularity, holding that the irregularity, if any, had been waived by a subsequent appearance of the defendant. *Royal Exchange Assurance Co.* v. *Short*, 1 Y. & J. 570.

Costs.]—An order to "discharge an irregular order with costs" carries the costs of the application to discharge it. *West* v. *Smith*, 3 Beav. 492; 10 L. J., Ch. 218.

2. In what Cases.

Irregularity.]—The signing judgment for debt and taxed costs, without any notice of taxation, is not an irregularity for which the court will set aside the judgment. *Field* v. *Partridge*, 7 Ex. 689; 21 L. J., Ex. 269; 16 Jur. 413.

Judgment entered upon a warrant of attorney for a larger sum than is authorised is an irregularity. *Stopford* v. *Fitzgerald*, 4 D. & L. 725; 11 Jur. 454.

A plaintiff signed an irregular judgment, and on the defendant taking out a summons to set it aside he was informed that the judgment was withdrawn:—Held, that the defendant had no right to get an order drawn up for setting aside the judgment, and that therefore he was liable to pay the expense of it. *Hargrave* v. *Holden*, 3 D. P. C. 176.

Where the sum indorsed on the writ has been reduced by payment before judgment in default of appearance has been entered, and judgment is nevertheless entered for the whole sum indorsed,

the defendant is entitled ex debito justitiæ to have the judgment set aside, notwithstanding that execution has only issued for the amount actually due. *Hughes* v. *Justin*, 63 L. J., Q. B. 417; [1894] 1 Q. B. 667; 9 R. 212; 70 L. T. 365; 42 W. R. 339—C. A.

An order dispaupering the plaintiff, obtained on affidavit of service on his solicitor at his office, discharged, but without costs, on the ground of a misnomer of the solicitor in the notice of motion. *Moody* v. *Hebberd*, 17 L. J., Ch. 24; 11 Jur. 941.

An order, obtained on affidavit of service, discharged with costs, on the ground of a misnomer of a party in the affidavit. *Salomon* v. *Stalman*, 4 Beav. 243; 10 L. J., Ch. 327.

It is irregular for a plaintiff's attorney, whose judgment has been set aside as irregular, with costs, to go and strike it out, and sign judgment again, so as to avoid payment of costs. *Curling* v. *Bingham*, 10 W. R. 628.

It is not of necessity that an order shall be discharged because obtained irregularly. *Anon.*, 4 L. J. (o.s.) Ch. 101.

Upon the motion of B., the court ordered that, upon his paying the purchase-money into court, he should be substituted as purchaser in the place of A., and that A. thereupon should be discharged from his purchase. B. having omitted to draw up the order, the plaintiffs in the cause did so, and caused a direction to be inserted for payment of the purchase-money by B. within twelve days after service of the order, in which form (after notice to B. to attend at the registrar's office) the order was passed. On the motion of B., the court discharged the order with costs. *Miller* v. *Smith*, 6 Hare, 609.

Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiæ to have such judgment set aside; and the court has only power to impose terms upon him as a condition of giving him his costs. *Anlaby* v. *Prætorius*, 57 L. J., Q. B. 287; 20 Q. B. D. 764; 58 L. T. 671; 36 W. R. 487—C. A.

In setting aside a judgment for irregularity, the court, if satisfied that there has not been any breach of faith, has power to impose upon the defendant the terms that no action shall be brought in respect of an execution on the judgment. *Gailey* v. *Conlan*, Ir. R. 9 C. L. 514.

Consent Order—Power of Court.]—The owners of the B. sued the owners of the C. for a collision. In the course of the trial a compromise was arrived at, whereupon the court made an order by consent dismissing the action, including a counter-claim, without costs. The owners of the cargo on the B. then sued the owners of the C., and obtained a judgment declaring both ships to blame. The owners of the C. began a suit to limit their liability, and paid the limitation fund into court. Subsequently the owners of the B., with the consent of the owners of the C., obtained on summons, without application to the court, an order in the registry setting aside the first order, and made a claim upon the fund in court:—Held, that the second order was invalid, and did not operate to set aside the first order, which was a judgment of the court, and therefore that, as the owners of the B. had no claim against the owners of the C., the claim was rightly disallowed. Whether in the absence of fraud the court itself could have set aside the first order, quære. *The Bellcairn*, 55 L. J., P. 3; 10 P. D. 161; 53 L. T. 686; 34 W. R. 55—C. A.

The court has jurisdiction to discharge an order made on an interlocutory application by consent when it is proved to have been made under a mistake, though a mistake on one side only. *Mullins* v. *Howell*, 48 L. J., Ch. 679; 11 Ch. D. 763.

A consent order which has been passed, drawn up, and acted upon can be set aside (provided that the rights of other parties have not been affected) not only on the ground of fraud, but upon any ground which would invalidate the agreement on which it is based; therefore, it may be set aside on the ground of common mistake of material facts. *Huddersfield Banking Co.* v. *Lister*, 64 L. J., Ch. 523; [1895] 2 Ch. 273; 12 R. 331; 72 L. T. 703; 43 W. R. 567—C. A. See *Parker* v. *Simpson*, 18 W. R. 204.

A consent order based on and intended to carry out an agreement come to between parties to litigation ought to be treated as an agreement which can be set aside on any ground on which an agreement not contained in an order can be set aside. Mistake as to the meaning of the words used in drawing up the agreement, whether common to both parties, or to one party only, but induced by the conduct of the other, is such a ground. So also is the fact that the parties were not ad idem as to the subject-matter of the negotiation. *Wilding* v. *Saunderson*, 66 L. J., Ch. 684; [1895] 2 Ch. 534; 77 L. T. 57; 45 W. R. 675—C. A.

An estate having been sold in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give a brief to counsel to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that in fact a good title could be made, and thereupon petitioned the court that the order might be discharged. The court discharged the order, giving the purchaser his costs, and referred it to the Master to inquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the inquiry. *Butter* v. *Ommanney*, Taml. 344.

If an order made by consent is, through mistake, capable of an interpretation contrary to the real intention, it will be amended by the court, so as to make it plainly and clearly represent that intention. *Oldershaw* v. *King*, 26 L. J., Ex. 384.

An application was made, by consent of the plaintiff and defendant, to set aside a judgment, and to add as a party to the suit another person alleged to be a joint contractor with the defendant:—Held, that, the plaintiff's rights against the defendant's joint contractor having been extinguished by the judgment, the consent of the parties thereto could not be allowed to revive them, and that the application must be refused. *Hammond* v. *Schofield*, 60 L. J., Q. B. 539; [1891] 1 Q. B. 453.

Prejudice of Creditors.]—A court of equity will not entertain a motion to discharge an order of court on the ground that such order was based on a contract made by a provisional assignee to the prejudice of the creditors. *Butterworth's Trusts, In re*, 1 N. R. 114—L.JJ.

Who precluded from objecting.]—If a person takes the benefit conferred by a judge's order, he must also bear the burden imposed by it; he must take the order in its entirety. *Hayward* v. *Duff*, 12 C. B. (N.S.) 364; 6 L. T. 433; 10 W. R. 562.

A party who has accepted costs under an order cannot subsequently question its validity. *Tinkler* v. *Hilder*, 7 D. & L. 61; 4 Ex. 187; 18 L. J., Ex. 429; 13 Jur. 684.

Or move to rescind it. *Simmons* v. *King*, 2 D. & L. 786; 14 L. J., Q. B. 195; 9 Jur. 250.

But when a judge makes an order out of term, to set aside a judgment by default on an affidavit of merits, and on payment of the plaintiff's costs, the defendant, by complying with such order, for the purpose of getting rid of the judgment, does not so acquiesce in the order as to prevent his applying to the court in the next ensuing term to alter its terms. *Connelly* v. *Bremner*, 35 L. J., C. P. 319; L. R. 1 C. P. 557; 1 H. & R. 612.

Nullity.]—The commencing and prosecution of an action against a nonexisting person amounts to a nullity; the judgment even of a court of record in such a case is not conclusive. *Matthey* v. *Wiseman*, 18 C. B. (N.S.) 657; 34 L. J., C. P. 216; 11 Jur. (N.S.) 603; 12 L. T. 846; 13 W. R. 914.

Mistake.]—The court will, in furtherance of justice, set aside a judgment in an action, at the instance of the plaintiff, on the ground of a mistake having been made in the amount claimed and recovered, although the amount of the debt and costs in the action has been paid. *Cannan* v. *Reynolds*, 5 El. & Bl. 301; 26 L. J., Q. B. 62; 1 Jur. (N.S.) 873.

When an allegation of a matter of fact has been once fairly investigated between the litigating parties, before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident, or any subsequent discovery of a material kind, the investigation should be considered sufficient and the judgment thereupon conclusive as between those parties. *Waters* v. *Waters*, 2 De G. & S. 591.

An order was made on a petition, which was expressed to be made by consent of one of the respondents, who was throughout the proceedings treated as an adult, although in fact she was under age, and the order was inrolled. On attaining her majority, the respondent filed her bill to set aside the order. It appearing that another infant in the same interest as the plaintiff had been a party to the petition, on whose behalf the court had ascertained that the order was one which ought properly to be made, having regard to the interests of the latter infant, the court refused to set aside the order, on the ground of the misstatement as to the age of the plaintiff. *Fadelle* v. *Bernard*, 19 W. R. 555.

Where a decree has been made by consent, all parties are primâ facie bound, under whatever circumstances that consent is given. It may, however, be impeached, when it has been obtained on an entire mistake of facts. *Stannard* v. *Harrison*, 24 L. T. 570; 19 W. R. 811.

In a foreclosure action, where judgment had been obtained against the alleged eldest son and heir-at-law of the mortgagor, who had died intestate, and a contract for sale had been entered into subject to the sanction of the judge in chambers, it having been found that there was no evidence of the heirship, on motion by the plaintiff it was ordered that the judgment be set aside, and the action dismissed without costs. *Lancaster Banking Co.* v. *Cooper*, 9 Ch. D. 594; 27 W. R. 164.

Proceedings instituted without Authority.]—Where a shipowner applied to the court to set aside an order condemning him in the costs of unsuccessful legal proceedings taken in his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, and that the first intimation he had of the proceedings was a notice received by him about a month previous to the present application, condemning him in the costs of such proceedings:—The court refused to grant the application, as it did not appear that the applicant, though he had no knowledge of the institution of, was not aware of the pendency of, the proceedings. *The Bellcairn*, 54 L. T. 544; 5 Asp. M. C. 582.

See also SOLICITOR.

Suppression of Material Facts.]—An order obtained ex parte was discharged, on the ground of the suppression of material facts. *Atkin* v. *Moran*, Ir. R. 6 Eq. 79. *See also Cases* ante, col. 585.

Admission by Counsel—Fraud—Collusion.]—D., the residuary legatee of Mrs. Y., brought an action for administration of Mrs. Y.'s estate against R., the surviving executor. Mrs. Y. had been the surviving executrix of her husband. V., one of the residuary legatees of the husband, shortly afterwards brought her action against R. as sole defendant, for administration of the husband's estate, alleging breaches of trust by Mrs. Y., and asking administration of her estate, if R. as her representative did not admit assets to pay what should be found due from her estate to the husband's estate. On the 28th February V. moved for judgment. There was no evidence before the court that Mrs. Y. was indebted to her husband's estate, or that she had been guilty of wilful neglect or default. R. by his counsel admitted that she was so indebted, and he submitted to a judgment, directing an account of personal estate of the husband, which she had received with an inquiry as to the balances in her hands, and directing administration of her estate. It appeared that from information R. had received, he felt sure that Mrs. Y. would be found a debtor to her husband's estate, and that it would be advisable to submit to the judgment, so as not to incur costs. D. on the 26th of June moved to discharge or vary the judgment of 28th February:—Held, that although R. might have acted injudiciously in submitting to an order which went further than any order that could have been made adversely on the materials before the court, the order could not be discharged unless the court was satisfied that R. had submitted to it fraudulently in collusion with V., and in this case the court was satisfied that R. had acted bonâ fide. *Youngs, In re*; *Doggett* v. *Revett*, 30 Ch. D. 421; 53 L. T. 682—C. A.

Fraud of Solicitor.]—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client:—Held, that the court had jurisdiction to set aside the judgment and permit the client to withdraw the defence, and put in a fresh defence. *Williams* v. *Preston*, 51 L. J., Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555—C. A.

When a decree has been made by consent, all parties are primâ facie bound, under whatever circumstances that consent is given. It may, however, be impeached when it has been obtained

by fraud. *Stannard* v. *Harrison*, 24 L. T. 570 ; 19 W. R. 811.

Obtained by Fraud.]—The plaintiffs commenced an action to restrain the defendants from infringing their patent, and obtained a judgment which was reversed by the court of appeal, who dismissed the action on the ground that the defendant's process was no infringement of the plaintiff's patent. After the order on appeal was passed and entered, the plaintiffs applied to have the appeal reheard with fresh evidence, on the ground that when an expert sent down by the court, and whose evidence was in fact the only material evidence before the court as to the nature of the defendants' process, examined their works, they had fraudulently concealed from him parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the plaintiffs :—Held, that the court of appeal had no jurisdiction to rehear the appeal, and that the remedy of the plaintiffs was by original action analogous to a suit under the old practice to set aside a decree as obtained by fraud. *Flower* v. *Lloyd*, 46 L. J., Ch. 838 ; 6 Ch. D. 297 ; 37 L. T. 419 ; 25 W. R. 793.

The plaintiffs in the above case afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, the defendants having made misstatements to and misled the inspector :—Semble, that an action to impeach a judgment on such grounds was not maintainable. *Flower* v. *Lloyd*, 10 Ch. D. 327 ; 39 L. T. 613 ; 27 W. R. 496—C. A.

The judgment of a court of competent jurisdiction may be avoided on the ground of fraud, but by this must be understood either a fraud in the procuring of the judgment, such as collusion or the like, or fraud in the court itself. *Cammell* v. *Sewell*, 3 H. & N. 617 ; 27 L. J., Ex. 447 ; 4 Jur. (N.S.) 978.

Where a judgment has been obtained by fraud, and more especially by the collusion of both parties, such judgment, although confirmed by the house of lords, may, even in an inferior tribunal, be treated as a nullity. *Shedden* v. *Patrick*, 1 Macq. H. L. 535.

But the allegations of fraud and collusion must be specific, pointed and relevant, otherwise they cannot be admitted to proof. *Ib.*

To set aside a judgment procured by fraud, the proper course, when such judgment has been confirmed by the house of lords, is to apply to the house of lords. Therefore it is wrong to ask the court below, upon proof of the fraud or collusion, to set aside a judgment confirmed by the house of lords. *Ib.*

A judgment or a decree obtained by fraud upon a court binds not such court, nor any other court, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding. *Reg.* v. *Saddlers' Co.*, 10 H. L. Cas. 404.

Of former Cause in subsequent Proceeding.]—After a decree, referring it to the master to inquire whether an annuity had been properly inrolled, the master having reported against the inrolment, it was objected by the defendant (the annuitant), on a rehearing, that the decree had been obtained after two several orders made in this court in another cause, for the payment of the annuity, and after a rule to shew cause in favour of the annuity in the Court of King's Bench had been discharged : — Held, not a sufficient ground for setting aside the decree, the former cause in which those orders had been obtained, not having been instituted for the purpose of setting aside the annuities, and this court having jurisdiction, after the failure of the attempt to set aside the annuity at common law. *Angell* v. *Hadden*, 2 Mer. 164.

Semble, the existence of an order for the maintenance of an infant out of the income of a fund does not prevent the court in a subsequent proceeding in which the title to the principal comes directly in question, from making an order negativing the infant's title to the fund. *Saunders* v. *Vautier*, Cr. & Ph. 240 ; 10 L. J., Ch. 354. Affirming 4 Beav. 115.

When a judge has made an interlocutory order which does not decide the rights of the parties, the same judge or his successor may, on new facts being disclosed which shew that to follow the precise directions of the order will cause injury or inconvenience, direct that, notwithstanding the former order, a different mode of carrying out what has in substance been thereby directed shall be adopted. *Prestney* v. *Colchester Corporation*, 52 L. J., Ch. 877 ; 24 Ch. D. 385 ; 48 L. T. 749 ; 31 W. R. 757.

The court will not rescind an order in consequence of an event which has subsequently occurred, if the order was right at the time it was made. *Borradaile* v. *Nelson*, 14 C. B. 655 ; 2 C. L. R. 740 ; 23 L. J., C. P. 159 ; 18 Jur. 431 ; 2 W. R. 470.

Order Supplemental to Previous Order.]—The court has no jurisdiction to set aside or alter an order which has been drawn up, but it has jurisdiction to make a supplemental order upon new facts which have come to its knowledge, directing that something which has been ordered to be done shall not be done except on certain terms. *Scowby, In re, Scowby* v. *Scowby*, 66 L. J., Ch. 327 ; [1897] 1 Ch. 741 ; 76 L. T. 363—C. A.

By an order of the court made in 1892 certain costs were ordered to be paid to trustees out of a trust estate, and it subsequently appearing that the trustees were in default in the payment into court of money which they had, by an order made in 1887, been directed to raise in respect of costs and pay into court, and had by their carelessness allowed their solicitor to receive the same without his costs coming under the cognizance of the court—the court, upon a summons by new trustees, directed that, until the old trustees brought this money into court, no part of their costs were to be paid to them under the order of 1892 :—Held, that there was jurisdiction to make such an order, and the jurisdiction was properly exercised, although the effect of it might be to deprive the solicitors who had acted for the old trustees on the order of 1892 of costs properly incurred. *Ib.*

m. Varying and Amending.

1. Accidental Slip.

In what Cases.]—Upon a motion under Ord. XLI. A., an order made on petition under the Settled Estates Act, 1877, which had been passed and entered, was directed to be varied so as to dispense with the consents of tenants for life to the exercise of leasing powers granted by the order. *Riley's Trusts, In re*, 30 W. R. 78.

The court has jurisdiction to correct an error in a judgment arising from an accidental slip, although the time for appealing from the

judgment has expired. At the trial the judgment allowed the defendant to set off a sum named for interest paid on account of the plaintiff. The amount was arranged between the parties on the faith of a statement made bonâ fide by the defendant, and accepted by the plaintiff as accurate, that the defendant had made the payments of interest from a certain date. After the judgment had been drawn up and the time for appealing had expired, the plaintiff found that the interest allowed by the judgment had for two years already been allowed to the defendant in account:—Held, that there was jurisdiction under Ord. XXVIII. r. 11, to correct the error. *Barker* v. *Purvis*, 56 L. T. 131—C. A.

Where in a former suit L. filed a charge, claiming the principal sum of 1,800*l.*, with interest thereon at 6 per cent., from the 11th May, 1818, and the defendant, T. M., the debtor, filed a discharge thereto, admitting the debt, and that same was due with interest at 6 per cent. from the 11th May, 1818; but by a mistake in the master's report, it appeared that the interest due on the said principal sum of 1,800*l.* was only from the 24th April, 1824; and the account having been taken, and the report made without controversy, the mistake was unobserved, and the final decree followed the report. L. received the principal sum of 1,800*l.*, with interest from the 24th April, 1824. Afterwards, when after several years from the date of the final decree, the residue of the fund in the cause had been transferred to the present, which was a suit for administering T. M.'s assets, L. having discovered the mistake in the report of the master in the former cause, applied to be paid the interest at 6 per cent. on the said principal sum of 1,800*l.*, from the 11th May, 1818, to the 24th April, 1824, out of the fund so transferred to the credit of the cause:—Held, that L. was so entitled, and should be paid accordingly. *Hackett* v. *Donnelly*, 1 Ir. Eq. R. 231.

Correction of a clerical error in a decree passed and entered. *Tomlins* v. *Palk*, 1 Russ. 475.

The court will allow the amendment of clerical mistakes in a judgment, on payment of costs, although one term has elapsed since the judgment was entered up, and although a writ of error has been sued out, and error assigned, on those clerical mistakes. *Paddon* v. *Bartlett*, 5 N. & M. 384; 1 H. & W. 286; 3 A. & E. 887.

Where the clerk entered judgment de bonis propriis, instead of de bonis testatoris; on error brought, the court ordered the entry to be amended. *Green* v. *Rennet*, 1 Term Rep. 782. See *Burdon and Reynoldson, In re*, 6 W. R. 522.

In a charity case, an omission in the original decree not declaring the nature of the charity, corrected on further directions without rehearing. *Att.-Gen.* v. *Whiteley*, 11 Ves. 241.

An order which had been drawn up for payment of a share of a fund to a married woman described under her previous name and as discovert, was corrected on her ex parte application. *Robinson's Trusts, In re*, 42 L. J., Ch. 354; 28 L. T. 101; 21 W. R. 356.

Where errors in a decree are obvious, the court will rectify them, even after it is inrolled. *Fearon* v. *Desbrisay*, 21 L. J., Ch., 511.

The court will not set aside an order which was made in a matter properly within its cognizance and which has not been appealed against, provided the facts were duly laid before the court when the order was made; except where the error of the court is so broad and palpable, that it is manifest that the court must have miscarried. *Howard* v. *Shrewsbury (Earl)*, 36 L. J., Ch. 283; L. R. 3 Eq. 218; 15 W. R. 301.

Where an order of this court, made in pursuance of an order of the house of lords, reversing the decree below and dismissing the bill with costs, had omitted to direct repayment of a sum of money which had been paid by the defendant to the plaintiff, under the decree pending the appeal, the court, on the petition of the defendant, made a further substantive order for such repayment. *Thorpe* v. *Mattingley*, 1 Ph. 443.

An accidental slip in a decree, directing a sale, if certain persons "and the heir-at-law" should be found parties, corrected by substituting the words "other than the heir-at-law." *Turner* v. *Hodgson*, 9 Beav. 265.

An attorney cannot file a bill in equity to recover the amounts of his bill of costs; but where an attorney had commenced proceedings at law against his client, which were stopped by the client's proceedings in equity, and ultimately a compromise was had between the parties, which by consent of both was made the subject of an order of a court of law:—Held, that the attorney could maintain a bill in equity for the purpose of rectifying the order of the court on the ground of mistake. *Fyson* v. *Pole*, 3 Y. & Coll. 266; 8 L. J., Ex. Eq. 17; 3 Jur. 122.

Where it appeared that a direction to regard settled accounts had inadvertently been omitted from a decree, and that such omission had possibly worked injustice, an order for rehearing was made, although more than five years had elapsed from the date of the decree. *Buckeridge* v. *Whalley*, 3 N. R. 179; 10 L. T. 222; 12 W. R. 593.

After inrolment of a decree, errors appearing upon the face of schedules permitted to be corrected upon motion without a bill of review; but the court would not permit an affidavit, introducing a new fact, to be used for that purpose. *Weston* v. *Haggerston*, G. Coop. 134.

Where, by an error, the bill in the statement and prayer set forth the sum due to the plaintiff as less than he was entitled to under a deed, and the decree followed the prayer, the court, on motion, altered the decree, the defendants by their answer having admitted the larger sum, and no objection being made by any of the parties. *Molloy* v. *Burke*, 12 Ir. Eq. R. 18.

Mistake in title of order for sequestration, by omission of the words "and others," allowed to be rectified by amendment, inserting the words omitted. *Lowten* v. *Colchester Corporation*, 2 Mer. 395; 16 R. R. 187.

A mistake in the title of an order amended, though to charge a surety that gave a recognizance to abide the order for hearing. *Spearing* v. *Lynn*, 2 Vern. 376; Pre. Ch. 115.

Where, in consequence of erroneous spelling in the orders of the court, the names of reports has been mis-spelled in the entries of transfers in the books of the Bank of England, the court will amend its own orders, but will not make an order on the bank to correct the entries in their books. *Newton* v. *Clark*, 1 L. J. (o.s.) Ch. 166.

The costs of an interlocutory application and order were reserved, but by inadvertence on the final decree, ordering the defendant to pay all the costs of the suit, no provision was made for these costs. The defendant inrolled the decree, but upon the plaintiff's petition, the defendant was ordered to pay these reserved costs. *Viney* v. *Chaplin*, 28 L. J., Ch. 164; 7 W. R. 159—L.JJ.

Time for Application.]—Under rule 11 of Ord. XXVIII. of the Rules of the Supreme Court, Ireland, 1891, the court has power at any time to amend an accidental omission in a decree. Therefore in an action on a bond with a penalty an amendment was allowed after the lapse of forty years from the date of the decree by inserting words limiting the sum recoverable for principal and interest to the amount of the penalty. Semble, per Lord Herschell, an amendment would not be allowed in cases in which the rights of third parties had intervened. Semble, per Lord Macnaghten, an application for such an amendment is never too late so long as the fund intended to be dealt with remains in the hands of the court. *Hatton* v. *Harris*, 62 L. J., P. C. 24; [1892] A. C. 547; 1 R. 1; 67 L. T. 722—H. L. (Ir.)

By a decree, dated in 1825, an obvious error was made in declaring who were the parties entitled to a fund in court. The error was not discovered for many years, and the delay in applying for a rehearing to rectify the mistake being accounted for:—Held, that the cause might be reheard, notwithstanding the lapse of time (thirty years). *Brandon* v. *Brandon*, 7 De G. M. & G. 365; 25 L. J., Ch. 896; 2 Jur. (N.S.) 981; 4 W. R. 533; 5 W. R. 1.

On the dissolution of the partnership previously existing between the plaintiff and the defendant the lease of the house, No. 10, Tichborne Street, in which the partnership business had been carried on, was assigned to the plaintiff, and the defendant entered into a covenant with the plaintiff that he would not "during the remainder of the term of the lease" carry on the business of a hairdresser within a mile from the house. In 1870 a suit was commenced by the plaintiff to restrain the defendant from violating his covenant. On the hearing of the cause, on the 20th Dec., 1871, a decree was made granting an injunction "perpetually to restrain" the defendant from doing certain specified acts, "and further to restrain the defendant from selling any perfume, or in any way carrying on the business of a hairdresser or perfumer within the distance of one mile from No. 10, Tichborne Street." The plaintiff having served the defendant with notice of motion to commit him for breach of the injunction, the defendant served the plaintiff with a cross-notice of motion under the "slip order" to amend the decree by inserting in it (after the words "and further to restrain the defendant") the words "during the remainder of the term of the lease." The term of the lease expired in 1881:—Held, that the court had jurisdiction under the "slip order" to accede to the defendant's application, the words which the defendant desired to have inserted in the decree having been clearly omitted by mistake. *Shipwright* v. *Clements*, 63 L. T. 160; 38 W. R. 746.

Mistake in a decree corrected under the 45th Order of 1828, notwithstanding it had been pronounced seven years, and the cause had been heard for further directions. *Askew* v. *Peddle*, 14 Sim. 301; 14 L. J., Ch. 10.

After a lapse of twenty-four years the court rectified an error in an order, though the records had been deposited in the Tower. *Essex JJ., Ex parte*, 22 L. J., Ch. 328.

It was directed by the decree in 1811 that, if a good title could be shewn, the master was to charge the vendor with interest on the purchase-money, and the purchaser with the rents from the time of the contract (1800). In 1836, whilst the inquiries were proceeding, the purchaser presented a petition, alleging, that he had not taken possession of the property until 1814, and that the vendor had remained in possession until that time, and praying that in taking the accounts the vendor might be charged with the rents from 1800 to 1814:—Held, that as the decree could not be reheard after twenty years, no variation could be made in it on petition. *Newton* v. *Woodrow*, 5 L. J., Ch. 380.

2. In Other Cases.

Order Passed and Entered.]—The plaintiffs in a foreclosure action applied by summons under Ord. XV. r. 1, for an account. The chief clerk pronounced the usual order for an account and foreclosure. The defendants objected to the direction for foreclosure. and the plaintiffs assenting, the order was drawn up for an account only, and was passed and entered in that form. When the parties came before the chief clerk to proceed with the account, he objected to the order as not being the one he had pronounced, and refused to proceed with the account. Subsequently the registrar at the instance of the chief clerk, without any motion or summons, altered the order by adding the usual directions for foreclosure. The defendants moved to strike out the additions. Kay, J., declined to do so, as he considered that the parties were not at liberty to have an order drawn up, different from the order pronounced, without applying to the court for the purpose; but being of opinion that the addition had been irregularly made, he stayed proceedings under the existing order, giving the plaintiffs liberty to apply for a fresh order for accounts and foreclosure. The defendants appealed:—Held, that assuming the order as passed and entered to contain an error arising from an accidental slip or omission, an alteration made in it without any motion or summons for the purpose was irregular, and must be discharged, and that the plaintiffs must pay the costs, as they ought to have applied to the judge when the chief clerk refused to proceed with the accounts. *Blake* v. *Harvey*, 29 Ch. D. 827; 53 L. T. 541; 33 W. R. 602—C. A.

The court has no jurisdiction to rehear or alter an order after it has been passed and entered, provided the order as drawn up expresses the decision of the court, nor to entertain any application proceeding on the footing that the order is wrong, even though the order may have been obtained by misrepresentation or fraud. *Staniar* v. *Evans* (34 Ch. D. 470) considered. *Preston Banking Co.* v. *Allsup*, 64 L. J., Ch. 196; [1895] 1 Ch. 141; 12 R. 51; 71 L. T. 708; 43 W. R. 231—C. A.

Where a wrong order has been made by reason of misrepresentation or mistake of fact, the error may be corrected by a new order made notwithstanding the former order. *Staniar* v. *Evans*, 56 L. J., Ch. 581; 34 Ch. D. 470; 56 L. T. 87; 35 W. R. 286.

Judgment Passed and Entered.]—The court has inherent jurisdiction to correct mistakes in the record of its judgments. Where the judgment does not correctly represent what was actually decided by the court, the court has jurisdiction to amend the judgment, although it has been passed and entered. But the proper course is to move to vary the minutes after they have been settled, and before they have been passed and entered; and if this course is

not followed, the judgment will be afterwards amended only under special circumstances, and on the terms of the applicant paying all the costs. *Swire, In re, Mellor* v. *Swire*, 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785—C. A.

An application to correct an order ought to be made to the court below, the judge having jurisdiction to correct an order, though passed and entered, if it does not express what he intended. *Tucker* v. *New Brunswick Trading Co.*, 59 L. J., Ch. 551; 44 Ch. D. 249; 63 L. T. 69; 38 W. R. 741—C. A.

Amendment as to Costs.]—A motion for an interim injunction was adjourned to the trial of the action; no provision was made for the costs of the motion. The judgment at the trial contained no reference to the costs of the motion, and the master refused to allow the plaintiff the costs. The plaintiff then applied to the court by motion, asking that the judgment might be varied by giving him the costs of the adjourned motion:—Held, that the court had jurisdiction to make the order. *Fritz* v. *Hobson*, 49 L. J., Ch. 735; 14 Ch. D. 542; 42 L. T. 677; 28 W. R. 722. Comp. *Walker* v. *Budden*, 49 L. J., Q. B. 159; 5 Q. B. D. 267; 28 W. R. 665—C. A.

On the 31st Jan., the defendants in an action obtained an ex parte injunction against the plaintiffs until the 4th Feb. On the 4th Feb. a motion was made to commit the plaintiffs. The order on the motion to commit as drawn up by the registrar recited the ex parte injunction and the affidavits in support of it, but contained no order as to costs, except that the plaintiffs were to pay the costs of the motion, and the taxing-master disallowed the costs of the ex parte motion accordingly:—Held, that the court had power under Ord. XXVIII. r. 11, to correct the order made on the 4th Feb. by adding thereto a direction for taxation and payment by the plaintiffs of the defendants' costs of the ex parte order of the 31st Jan. *Blakey* v. *Hall*, 56 L. J., Ch. 568; 56 L. T. 400; 35 W. R. 592.

Where a party has obtained an order to set aside a judgment upon payment of costs, he cannot, if he has drawn up and served the order subsequently, procure the rescission of so much of it as relates to costs. *Giraud* v. *Austen*, 1 D. (N.S.) 703; 4 Scott (N.R.) 750.

Striking out Parties instead of Rescission.]—A petition for the appointment of new trustees and a vesting order was presented in the names of several co-petitioners, and an order made. Upwards of a year afterwards an application was made to the court by persons who had been joined as co-petitioners that the order might be rescinded on the ground that they had only recently heard of the petition, which was in no way authorised by them:—Held, that the order made could not be rescinded by the court, but should be amended by striking out the names of the applicants as co-petitioners, and treating them as not having been served with the petition. *Savage, In re*, 15 Ch. D. 557; 29 W. R. 348.

Allowed on Terms.]—Where a verdict was found for the plaintiff on the general issue, and no notice taken of a second issue on the statute of limitations, on error brought on this point, the court allowed it to be amended by the judge's notes, on payment of costs. *Petrie* v. *Hannay*, 3 Term Rep. 659.

According to Amended Postea.]—The court after error brought, and argument in the court of error, having amended a postea by entering the verdict for the plaintiff on the first count, and for the defendant on the others, amended the judgment roll remaining in that court by the amended postea, after the judgment had been reversed. *Mellish* v. *Richardson*, 1 B. & C. 819. *S. C.*, nom. *Richardson* v. *Mellish*, 11 Moore, 104; 3 Bing. 334; 4 L. J. (O.S.) C. P. 68.

By Arrest of.]—Where judgment on a record of the queen's bench is pronounced at the assizes, under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, the court, on motion, may, if they see fit, amend the judgment by ordering it to be arrested. *Reg.* v. *Nott*, 4 Q. B. 768; D. & M. 1; 12 L. J., M. C. 143.

Where Verdict not Specific.]—Where a defendant, in replevin, made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, without finding either the amount of the rent in arrear or the value of the cattle distrained, and judgment was entered for the damages assessed, the court permitted the defendant to amend his judgment, and to enter a judgment pro retorno habendo, after a writ of error brought. *Rees* v. *Morgan*, 3 Term Rep. 349.

Erroneous Entry.]—Erroneous entry of judgment amended. *Laing* v. *Whaley*, 3 H. & N. 901—Ex. Ch.

A declaration contained two breaches; the defendant pleaded not guilty to the first breach, which involved the whole cause of action. The finding was for the plaintiff, and the damages were assessed thereon, and judgment was entered upon that finding. On the second breach there was a finding of not guilty. No entry of eat sine die was made on this finding:—Held, that there should have been such an entry, but that the house of lords had power to amend the record, by directing such an entry to be made. *Hooper* v. *Lane*, 6 H. L. Cas. 443; 27 L. J., Q. B. 75; 3 Jur. (N.S.) 1026; 6 W. R. 146.

As to Time, when no Injustice done.]—Where an executor pleads plene administravit, and the plaintiff does not take issue on it, but takes a judgment of assets quando acciderint, and sues out a sci. fa. on such judgment, if the executor receives assets between the time of suing out the writ in the first action and judgment, the court will permit the plaintiff to amend his judgment as to the time, by making it a judgment as of that term when he could at the soonest have entered it up; unless the defendant can shew that in point of fact some injustice will be done by it in the particular case. *Mara* v. *Quin*, 6 Term Rep. 1.

When Judgment of Six Years' Standing.]—But where an executor pleaded a false plea of judgment recovered against himself; on which judgment was entered up against him for the debt and damages de bonis testatoris, et si non de bonis propriis, and words were afterwards interlined on the judgment roll, by which the judgment de propriis was confined to the damages only; the court refused to amend, by striking out the words which had been interlined, where it did not appear by whom the interlineation had been made, and the judgment was of six years' standing. *Burroughs* v. *Stephens*, 1 Marsh. 211; 5 Taunt. 554.

After Alteration in Position of Parties.]—An action having been brought against one of two executors, he died, after the assizes, and before trial. The verdict was for the plaintiff, and the judgment was entered de bonis propriis within two terms afterwards, but error was brought by the defendant's executor, and the exchequer chamber altered the judgment by entering it de bonis testatoris, et si non, &c., as to costs, instead of a judgment de bonis propriis. The plaintiff, as it appeared on the record that the original defendant had died, and the final judgment was beyond the two terms after verdict, applied to the court to amend its own judgment, in accordance with that of the court of error, and to allow him to abandon the proceedings in error on payment of all costs. The court, doubting whether it had power to grant such a rule, and also whether it was necessary, refused it, as the position of the parties had altered. *Garton* v. *Hall*, 11 W. R. 281.

After Judgment in Error.]—Semble, that the court out of which a record issues has no power to amend the record after the judgment of a court of error. *Jackson* v. *Galloway*, 2 D. & L. 839; 1 C. B. 281; 14 L. J., C. P. 141; 9 Jur. 373.

Cannot be made False.]—When an infant had appeared as the defendant in an action by attorney instead of by guardian, and a verdict was given against him, and error was brought, upon motion to set aside the writ of error, and to amend the record:—Held, that the court could not amend the record by substituting an appearance by guardian for an appearance by attorney; the court cannot, in exercise of its power of amendment, render the record false. *Carr* v. *Cooper*, 1 B. & S. 230; 4 L. T. 323; 9 W. R. 611.

Judgment Rolls—Mere Irregularity.]—The date of a judgment in the judgment roll did not correspond with the date in a ca. sa. issued on the judgment, but was anterior to the ca. sa.:—Held, a mere matter of irregularity, which the court will amend. *Cobbett* v. *Wheeler*, 5 L. T. 285; 10 W. R. 40.

The date of a judgment, as entered in the judgment roll, did not correspond with the master's book:—Held, a mere matter of irregularity, which the court will amend. *Ib.*

—— **When not requiring Amendment.**]—A scire facias to repeal letters-patent was issued out of chancery, returnable there, appearance entered, declaration filed, plea pleaded, and issue joined in the petty bag office. The cause was then sent to the queen's bench for trial, and the entry here was, that the chancellor with his own hand delivered a "record." On motion (by a party being in error) to amend, by substituting the words "transcript of a record":—Held, that the entry did not require amendment. *Reg.* v. *Bynner*, 9 Q. B. 529, n.

Variation inconsistent with or to Complete Judgment.]—The 45th order of 1828 only enables the court to supply something which may make an existing direction complete, and not to make a new direction; therefore, where a decree directed an account of the real estates of a testator sold since his death, and of those which remained unsold, but had omitted to direct an account of the proceeds of such estates as had been sold:—Held, that such an omission could not be supplied upon petition under that order. *Whitehead* v. *North*, Cr. & Ph. 78.

The accidental omission of an unusual term or direction in a decree or order is an error which may be corrected by petition, under the 45th Order of April, 1828, but not so the omission of any term or direction which would only have been introduced under the express judgment of the court. *Bird* v. *Heath*, 6 Hare, 236.

In December, 1865, the plaintiff transferred to the defendant stock, to secure a loan for three months. The defendant sold the stock, but when the three months expired and the loan was paid off, he transferred to the plaintiff the like amount of the same stock, which, subsequently to his sale, he had purchased in the market. He had sold at a high and bought at a lower price, and the plaintiff filed a bill claiming the profits thus made, on the ground that he was entitled to have the identical stock returned to him; he offered by his bill to retransfer to the defendant the stock which the defendant had bought and transferred to him. On this footing a decree was made. During proceedings under that decree, it appeared that, before an amendment of his bill, the plaintiff had sold the whole of the stock, and was therefore unable to retransfer it, and he then obtained an order upon a petition for liberty to transfer to the defendant other stock to the same amount, or to account for the value of it. On an appeal by the defendant against both the decree and the order on the petition:—Held, that such a variation as was made in the decree by the order in the petition was inconsistent with the decree, and beyond the power of the court to make; and that the petition must be dismissed. *Langton* v. *Waite*, L. R. 4 Ch. 402; 20 L. T. 337; 17 W. R. 475.

A direction that the parties should be examined before the master upon interrogatories, added to a decree upon motion. *Clarendon* (*Lord*) v. *Barham*, 12 L. J., Ch. 215.

Omission in decree, if perfectly of course, supplied on motion with notice. In this instance, the common direction to examine all parties upon interrogatories being omitted, an order was made, that master should be at liberty to examine, &c. *Wallis* v. *Thomas*, 7 Ves. 292.

So also in the usual decree upon creditors' bill, against executors, the direction for account of personal estate. *Pickard* v. *Mattheson*, 7 Ves. 293.

An application to rectify a decree on suggestion, made in aid of the decree, which would have been embodied in it almost as of course, as if it had been an omission, may be made by motion, without the formality of petition. *Davies* v. *Morris*, 13 Price, 766.

Decree slightly varied, on motion, in a matter of costs where the merits were clear. *Connell* v. *Frith*, 1 Ir. Eq. R. 82.

Substantial variations in order cannot be effected by motion, but only on petition to rehear. *Soper, Ex parte, Salter, In re*, 4 Deac. & C. 275; 2 Mont. & Ayr. 55; 4 L. J., Bk. 45.

Decree made on motion allowed to be varied on motion, and without a petition of appeal. *Hughes* v. *Jones*, 26 Beav. 24.

An addition to a decree involving a complete variation will not be allowed by the court on motion. *Jones* v. *Evans*, 1 W. R. 275.

By the decree in a suit by a client against his solicitor, it was referred to the taxing-master to take an account of certain bills of costs, and to the master in ordinary to take an account of the general money transactions between the plaintiff and defendant. Afterwards the plaintiff applied on motion for an order that, notwithstanding the decree, the general money transactions should be referred to the taxing-master :—Held, that this was a variation of the decree, and could not be made on motion. *King* v. *Savery*, 25 L. J., Ch. 564 ; 2 Jur. (N.S.) 431 ; 4 W. R. 471.

An order adding to a decree under 15 & 16 Vict. c. 86, s. 42, r. 8, does not form part of the decree so as to require a petition of appeal to vary it ; but may be appealed from by motion. *Foster* v. *Foster*, 37 L. J., Ch. 168 ; L. R. 3 Ch. 330 ; 17 L. T. 403 ; 16 W. R. 238.

An addition to a decree cannot be made under the above rule, except as to something raised upon the pleadings. The allowing proceedings to go on for a length of time under directions added to a decree, is not a bar to appealing against the order making the addition, but makes it incumbent on the appellant to shew that there is a substantial error in the addition, and is to be considered on the question of costs. *Ib.*

Where defence failed in consequence of unsatisfactory and incomplete evidence having been tendered, the court, at the request of the defendants, ordered the decree to be qualified by the introduction of a provision that it should not prejudice the right of the defendant to question any future claim of the like subject-matter by the complainants. *Wolley* v. *Brownhill*, M'Clel. 317, 324 ; 13 Price, 500.

When further proceedings in an administration suit became necessary, the court allowed a decree to be varied by inserting a direction that any of the parties be at liberty to apply. *Warman* v. *Zeal*, 25 L. T. 739.

Where counsel are instructed to state that which, upon inquiry, is found to be incorrect ; on such discovery being made, the court will order the decree to be amended. *Moye* v. *Sparrow*, 22 L. T. 370.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. *Att.-Gen.* v. *Tomline*, 47 L. J., Ch. 473 ; 7 Ch. D. 388 ; 38 L. T. 57 ; 26 W. R. 188.

The fact of a decree having been made upon consent, will not be a reason for permitting it to be amended. *Reed* v. *Cussen*, 2 Con. & L. 384 ; 4 Dr. & War. 199.

Decree being, amongst other things, that "the parties should produce, before the master, all books, paper, &c.," the words "as the master shall direct," were added, on motion for that purpose. *Punderson* v. *Dixon*, 5 Madd. 121.

Where a decree directing an act to be done has been drawn up, without fixing a time within which the act is to be done, the decree is not rendered ineffectual by the operation of the 11th and 12th Orders of August 1841, but the court will, upon motion for that purpose, fix a time for the performance of the act. *Needham* v. *Needham*, 1 Hare, 633. Affirmed, 12 L. J., Ch. 378 ; 7 Jur. 336.

Semble, the court will not, upon motion, amend a decree by inserting therein, for a minor defendant, a day to shew cause. *Tilson* v. *Lawder*, 2 Dr. & War. 285 ; 1 Con. & L. 392.

The court refused, on motion, to amend a decree by striking out the day to shew cause, which had been given to a minor defendant, the first tenant in tail of the lands sold. *Mahon* v. *Dawson*, 2 Dr. & War. 286.

Where, in the interval between the pronouncing of an order by the court and the time of its being drawn up, a circumstance occurs which renders the order in part nugatory, the court will not vary the date to suit the happening of events, but will make a supplemental order. *Havelock's Trusts, In re*, 35 L. J., Ch. 228 ; 11 Jur. (N.S.) 906 ; 13 L. T. 272 ; 14 W. R. 26, 174.

The court will not vary an order on the ground that an authority which was cited when the case was heard, was not brought prominently to the attention of the court. *St. Sepulchre (Vicar), In re*, 11 W. R. 456.

Where a party dies since order for distributing the fund the court will not vary the order without proof of death. *Bell* v. *Bell*, 2 W. R. 135.

An order directing a contract of sale to be carried out, and the costs to be paid out of a fund in court, but not indicating the parties by whom the conveyance is to be executed, may be amended by inserting a direction that the conveyance be executed by such persons as the chief clerk shall certify to be the proper parties. *Clough, In re*, 32 L. T. 194.

Court will not, on motion after an order for reference, direct master to inquire (if he have found that good title can be made to premises, the subject of suit for specific performance) when such good title could be first made. Such direction should have been applied for at hearing. *Lubin* v. *Lightbody*, 8 Price, 606.

The testator in this case appointed his wife guardian of his three children, and appointed her also executrix, together with two others, whom he appointed executors. An order for maintenance of the infant had been made out of a fund in court standing to the credit of the suit generally, which order had been acted on for about two years, and directed that an allowance for the maintenance of two of the infants should be paid to the mother alone, and that the allowance for the maintenance of the third infant, who was an apprentice, should be paid to the two executors and the executrix jointly, one of the executors having gone out of the jurisdiction. On motion to have the order amended, by directing all future payments on account of such last-mentioned maintenance to be made to any two of such executors and executrix, instead of to all three, the vice-chancellor at first doubted whether, as the matter had arisen subsequently to the date of the order, any amendment could be made except by supplemental order ; but he ultimately directed the amendment to be made in the original order. *Windsor* v. *Cross*, 16 Jur. 1008.

Omitting Addition.]—Upon a bill of sale to set aside the mortgage of a reversion obtained unduly from an expectant heir, after a decree that the deeds should stand as a security for the money advanced only, it was asked, in accordance with the prayer of the bill, that certain policies of insurance on the life of the mortgagor, and which formed part of the security, might be assigned, or that the produce for which they had been sold might be paid to the plaintiff. The court made the addition requested ; but on taking the accounts, which were directed, as to the payment of the premiums by the defendant, it was found that the receipts upon the policies were far less

than the payments for the premiums. Leave was then obtained to rehear the cause :—Held, on the rehearing, that the addition made to the decree ought to be omitted ; and the decree was rectified, but without costs. *Pennell* v. *Millar*, 23 Beav. 172 ; 26 L. J., Ch. 699 ; 3 Jur. (N.S.) 850 ; 5 W. R. 215.

Facts known before Trial.]—On the hearing of a partnership action judgment was pronounced declaring the dissolution of the partnership, and directing the usual accounts to be taken, but no direction as to return of the premium paid by the plaintiff was given or asked for by him. The plaintiff subsequently applied to the court that an inquiry should be made or direction given as to return of premium. It did not appear that any further facts had come to the knowledge of the plaintiff other than those which were known to him and put in evidence on the hearing of the action :—Held, that the relief sought was supplemental relief in the nature of equitable damages, and that, in the absence of evidence that new facts had come to the knowledge of the plaintiff, the court, in the exercise of its discretion, ought not to entertain the application. *Edmonds* v. *Robinson*, 54 L. J., Ch. 586 ; 29 Ch. D. 170 ; 52 L. T. 339 ; 33 W. R. 471.

Removing Stay of Execution.]—The plaintiffs having obtained a verdict in an action, under Lord Campbell's Act, for 50*l.* damages, the judge at the trial (without the consent of the plaintiffs, as they alleged), directed judgment to be entered for the plaintiffs, but that the damages and costs should be paid by yearly instalments of 20*l.*, the damages to be paid into the hands of one of the plaintiffs, in trust for herself and her co-plaintiffs (who were infants), and to be paid in priority to the costs. Judgment was entered in accordance with these directions. The defendant failed to pay the first instalment, and was, as the plaintiffs by affidavit alleged, disposing of all his available property. The court, on the application of the plaintiffs and on notice to the defendant, ordered the judgment to be amended by striking out the qualification, so as to stand for a judgment in the ordinary form for the damages awarded and costs, and directed that the order as to suspending execution should be entered as a separate order of the judge at the trial, and as of the date of the trial ; and, having regard to the circumstances disclosed on the application, gave liberty to the plaintiffs, notwithstanding such order, to issue immediate execution for the full amount of the judgment. *Brien* v. *Sullivan*, 14 L. R., Ir. 391.

Notice of Motion.]—Where a motion is to be made for any variations in a decree, the notice of motion must express the proposed variations. *Wright* v. *Howard*, 1 L. J. (O.S.) Ch. 154 ; 24 R. R. 169.

On Motion by Consent.]—Directions omitted in decree by mistake, introduced on motion by consent of all parties. *Skrymsher* v. *Northcote*, 1 Swanst. 572 ; 18 R. R. 142.

No substantial addition can be made to a decree on motion without consent. *Willis* v. *Parkinson*, 3 Swanst. 233.

After decree merely directing inquiries, such an order as could be had on further directions may, by consent, be made on motion, as in this instance, to dismiss bill with costs. *Anon.*, 11 Ves. 169.

A decree may be added to without a rehearing, where all the parties to the suit consent, although the additions principally affect persons not represented in the suit, upon whom the decree, as added to, is intended to be served. *Hales* v. *Cox*, *Hales*, *In re*, 1 N. R. 344 ; 8 L. T. 134 ; 11 W. R. 331.

Order on motion, with consent, to rectify a clear mistake in a decree. *Newhouse* v. *Mitford*, 12 Ves. 456. S. P., *Lane* v. *Hobbs*, id. 458.

The court will, upon motion, with the consent of all parties, vary a decree, so as to rectify an accidental omission. *Collins* v. *Shirley*, 9 L. J. (O.S.) Ch. 111.

Where a decree has been had against several defendants with costs, and one of them had been compelled to pay the whole costs, the court will, by consent, decree contribution between the co-defendants, on motion, in the same suit. *Pitt* v. *Bonner*, 1 Y. & Coll. C. C. 670 ; 6 Jur. 636.

A suit was instituted by a client against his solicitor for an account, and by a decree it was referred to the taxing-master to tax the solicitor's bill of costs, and it was referred to the master in ordinary to take an account of all dealings and transactions between the client and the solicitor. The plaintiff afterwards moved to have the whole account taken by the taxing-master :—Held, that such a variation of the decree could not, without consent, be made upon motion. *King* v. *Savery*, 25 L. J., Ch. 564 ; 2 Jur. (N.S.) 431 ; 4 W. R. 471—L.JJ.

On Petition.]—A direction for the master to settle a conveyance, omitted in a decree, was supplied by petition. *Trevelyan* v. *Charter*, 9 Beav. 140.

Semble, an order upon petition is the proper mode of supplying any omission in the directions which the decree has given to the master. *Winter* v. *Innes*, 4 Myl. & C. 101 ; 2 Jur. 981.

All applications to rectify decree must have been made by petition. *Grey* v. *Dickenson*, 4 Madd. 464.

After an order made on petition has been drawn up in conformity with the prayer of the petition, the court will not allow the petition and the order to be amended, but a new petition must be presented, praying that the order may be varied. *Marrow*, *In re*, Cr. & Ph. 142 ; 10 L. J., Ch. 340.

The rule that an application to vary or discharge an order made on petition must, if made on the merits, be the subject of a regular re-hearing, applies, even though all parties consent to a different course. *North Wales Slate Supply Co.*, *In re*, 21 L. T. 818 ; 18 W. R. 403.

In a suit for specific performance, a defective decree was on petition rectified in accordance with the prayer of the bill. The defect having arisen through the plaintiff's omission, he was ordered to pay the costs of the petition. *Williams* v. *Carmarthen and Cardigan Ry.*, 19 L. T. 762 ; 17 W. R. 346.

Order on Further Consideration.]—Under the Judicature Act, 1873, s. 50, an order made on further consideration in chambers may be varied on an adjourned summons. *Hodges*, *In re*, *Davey* v. *Ward*, 47 L. J., Ch. 335 ; 7 Ch. D. 754 ; 26 W. R. 390.

Jurisdiction.]—Where one of the judges of the court of chancery has made an order on petition

for payment out of court of moneys deposited by the committee of management of a railway company, under the standing orders of the house of commons, one of the other judges of the court has jurisdiction, upon a bill filed, to grant an injunction to restrain the company from receiving the money. *Castendieck* v. *De Burgh*, 15 L. J., Ch. 425.

Although one judge may in vacation make an order for another, the lord chancellor only has power to vary it, and application to the master of the rolls refused with costs. *Man* v. *Rickets*, 9 Beav. 4.

n. Varying Minutes.

In what Cases.]—Where minutes were drawn up, omitting to direct issue at law to be tried by special jury, and decree in consequence contained no such order, court refused to amend minute by insertion thereof. *Stuart* v. *Greenall*, 9 Price, 480.

Where the court directed an issue to be tried at the next assizes, and the decree was not drawn up or passed in sufficient time, the minutes were varied by directing the trial of the issue at the subsequent assizes. *Grange* v. *Cass*, 2 Y. & J. 241.

Clear mistake in a decree in minutes following the pleadings which were defective, when of such a nature that the point of sale or no sale of defendant's estate turns upon it, as where bill of revivor was by a slip at the suit of four of the co-plaintiffs, instead of the five co-plaintiffs, cannot be corrected on motion without consent. *Armstrong* v. *Potts*, 1 Moll. 257.

Court will order minutes of decree, declaring stock "not to be part of personal estate of intestate," on general claim by some of next of kin, against a particular claim by others, to be varied by adding the words, "together with the dividends which have accrued due thereon," on a special motion without a rehearing, where the amount is small, and the alteration is reasonable and consonant with the tenor of original decree. *George* v. *Howard*, 7 Price, 661 ; 21 R. R. 775.

The court will not, upon motion, amend the minutes of a decree, by striking out the day which had been thereby given to minor defendants to show cause. Quære, whether the old practice of giving a minor defendant a day to show cause is affected by the 11 Geo. 4 & 1 Will. 4, c. 47. *Esmonde* v. *Cooke*, 1 Dr. & Wal. 250.

Where facts are stated in the answer which are not contradicted, and which, if true, would lead to a material alteration in the frame of the suit, the court will, on motion, permit the minutes of the decree to be amended, with a view to ascertain the truth of those facts. *Harwood* v. *Fisher*, 1 Y. & Coll. 110 ; 4 L. J., Ex. Eq. 10.

Notice of Motion.]—A notice of motion to vary minutes does not prevent their being drawn up. *Bell, Ex parte, Brown, In re*, 2 Mont. & Ayr. 578 ; 1 Dea. 690.

The Application.]—An application to the court in bankruptcy to vary the minutes of an order before they have been settled in the secretary's office, is irregular. *Vittery, Ex parte, Pomeroy, In re*, Mont. & M'Ar. 435.

The court will not vary the minutes of an order on the application of persons not parties to or bound by it. *De Begnis, Ex parte, Chambers, In re*, 1 Mont. & Ayr. 277 ; 4 Deac. & Ch. 225 ; 3 L. J., Bk. 43.

Rule of practice as to varying the minutes of decrees. The register must first complete the minutes, and any party dissatisfied must give notice of motion specifying the subject of complaint. *Prince* v. *Howard*, 14 Beav. 208.

The minutes of an order having been once settled by the registrar, cannot be altered in the absence of any of the parties interested. *Major* v. *Major*, 13 Jur. 1.

When, at the hearing, liberty is given to mention a case again on the minutes, it must be done at least within a fortnight, otherwise the parties must give notice of motion, specifying the alterations. *Hood* v. *Cooper*, 26 Beav. 373.

A party who is dissatisfied with the minutes of decree as prepared by the registrar, may move to have them varied, but the lord chancellor will not allow a cause to be set down to be spoken to on the minutes. *Tennant* v. *Trenchard*, 38 L. J., Ch. 169 ; L. R. 4 Ch. 537.

Where any party is dissatisfied with an order as settled by the registrar, and desires to bring the matter before the court, he must, whether the order be an order of the court of appeal, or of a court of first instance, give notice of motion to vary the minutes. *General Share and Trust Co.* v. *Wetley Brick and Pottery Co.*, 51 L. J., Ch. 464 ; 20 Ch. D. 130 ; 46 L. T. 70 ; 30 W. R. 695—C. A.

On the hearing of a motion to vary the minutes of an order, the solicitor of the moving party ought to produce a copy of the registrar's note of what took place when the order was made. *Robinson* v. *Barton Local Board*, 21 Ch. D. 631.

Judgment Passed and Entered.]—Until a decree has been passed and entered, it is in the power of the judge, who heard the cause, to reconsider what has been done and to vary the minutes, without any of the formalities required for a rehearing. *Griffin* v. *Hamilton*, Ir. R. 7 Eq. 141.

The court has inherent jurisdiction to amend a judgment, although it has been passed and entered. But the proper course is to move to vary the minutes after they had been settled, and before they have been passed and entered. *Swire, In re, Mellor* v. *Swire*, 30 Ch. D. 239 ; 53 L. T. 205 ; 33 W. R. 785—C. A.

Refusal of Order—Appeal.]—The minutes of an order made in the trial of an action as settled by the registrar did not mention certain documents that the plaintiff contended were admitted during the trial. The judge refused to alter the minutes :—Held, that the court of appeal would not entertain an appeal from the judge's refusal. The proper course is for the plaintiff to appeal from the judgment as it stands and apply at the hearing for leave to use the documents alleged to have been omitted as evidence on the appeal. *James* v. *Jones*, 67 L. T. 584—C. A.

o. Rehearing.

1. Since the Judicature Acts.

Generally.]—Under the system of procedure established by the Judicature Acts, no judge of the high court has any jurisdiction to rehear an

order, whether made by himself or any other judge, the power to rehear being part of the appellate jurisdiction, which is transferred by the acts to the court of appeal. *St. Nazaire Co., In re*, 12 Ch. D. 88 ; 41 L. T. 110 ; 27 W. R. 854—C. A.

After final judgment had been pronounced by the court of appeal, it is not competent for that court to rehear the appeal on the ground of the discovery of fresh facts. *Flower* v. *Lloyd*, 46 L. J., Ch. 838 ; 6 Ch. D. 297 ; 35 L. T. 454 ; 25 W. R. 793—C. A.

Whether the court of appeal has jurisdiction to rehear a bankruptcy appeal, quære. *Banco de Portugal, Ex parte, Hooper, In re*, 49 L. J., Bk. 21 ; 14 Ch. D. 1 ; 42 L. T. 210 ; 28 W. R. 433 —C. A.

The shareholders in a company passed an extraordinary resolution to wind up the company voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the chancery court of the duchy of Lancaster for a supervision order or for a compulsory winding-up order, and as the court and the petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards the petitioner discovered the invalidity of the resolution, and then moved before the vice-chancellor that the supervision order might be discharged, and a compulsory winding-up order made. This motion having been refused by the vice-chancellor on the ground of want of jurisdiction to rehear the petition, the petitioner appealed from the refusal of the motion, and also applied to the court of appeal for leave to appeal against the original order notwithstanding the lapse of time. Semble, the vice-chancellor had no power to rehear the petition himself. *Manchester Economic Building Society, In re*, 53 L. J., Ch. 115 ; 24 Ch. D. 488 ; 49 L. T. 703 ; 32 W. R. 325—C. A.

Order made but not drawn up.]—Whether a judge can rehear in chambers an order which he has previously made in chambers, but which has not been drawn up, quære. *Adam Eyton, In re, Charlesworth, Ex parte*, 57 L. J., Ch. 127 ; 36 Ch. D. 299—C. A.

Order made and drawn up.]—A charging order under the Solicitors Act, made by a judge of the high court, sitting in bankruptcy is not an order made by him under his bankruptcy jurisdiction, within s. 104 of the Bankruptcy Act, 1883, and therefore cannot be reviewed, rescinded or varied by him after it has been drawn up. *Brown, Ex parte, Suffield and Watts, In re*, 20 Q. B. D. 693 ; 58 L. T. 911 ; 36 W. R. 584 ; 5 Morrell, 83—C. A.

Though an ex parte order had been drawn up and entered, the party affected thereby is at liberty to apply for the discharge to the judge who made the order ; the order being ex parte, such an application does not involve a rehearing. *Boyle* v. *Sacker*, 39 Ch. D. 249 ; 58 L. T. 822 ; 37 W. R. 68—C. A.

Re-argument, when allowed.]—The court declined to allow a case to be re-argued on the ground that an enactment in the Conveyancing and Law of Property Act, 1881, had been overlooked. *Birmingham Land Co.* v. *L. & N. W. Ry.*, 56 L. J., Ch. 956 ; 34 Ch. D. 261 ; 55 L. T. 699 ; 35 W. R. 173—C. A.

2. Previous Practice.

In what Cases.]—The true effect of a petition of rehearing is, that the decree or order complained of is to be upheld or varied according to the circumstances at the time when the decree or order was pronounced. *Horne* v. *Barton*, 8 De G. M. & G. 587 ; 26 L. J., Ch. 225 ; 2 Jur. (N.S.) 1032 ; 4 W. R. 821.

—— **Varying Order.**]—Where legal interests have been created under the decree of the court, and have been subsequently dealt with, the decree and subsequent orders cannot be corrected and varied upon a petition of rehearing, but to obtain relief a bill must be filed. *Ib.*

Where the court is asked to make an order which amounts, in fact, to the variation of an order made by a former vice-chancellor, it must be by way of rehearing. *Att.-Gen.* v. *Croft*, 15 Jur. 1028.

Decretal order for payment of interest to creditors generally cannot be varied by confining the payment of interest to particular creditors, without rehearing. *Fyler* v. *Fyler*, 1 Colly. 93 ; 8 Jur. 211.

Court cannot give interest unless reserved by decree ; but cause reheard for that purpose. *Herle* v. *Greenbank*, Dick. 370.

Substantial variations in order cannot be effected by motion, but only on petition to rehear. *Soper, Ex parte, Salter, In re*, 4 Deac. & C. 569.

A rehearing will not be granted where the object is not to correct an error in decree, but to remedy a grievance consequent upon it, resulting from circumstances ex post facto, not making part of the case as it originally stood. *Bowyer* v. *Bright*, 13 Price, 316.

—— **Mistake or Omission.**]—If a fact be mistaken at the hearing of the decretal order, it must be rectified by rehearing, and not by bill of review. *Combs* v. *Proud*, 1 Ch. Ca. 54 ; 2 Freem. 182.

Mistake in decree, unless a mere numerical error apparent on the decree itself, cannot be rectified but by rehearing. *Brookfield* v. *Bradley*, 2 Sim. & S. 64.

Where, by mistake, balances reported due from defendant were included in sums paid into court under decree ; and decree, on further directions, ordered those balances to be paid into court :—Held, that mistake could not be rectified without rehearing cause on latter decree. *Ib.*

Semble, that if the error be apparent on the face of the decree, the court will not take into its consideration the conduct of any of the parties as a ground for refusing the rehearing. *Ashland* v. *Braddick*, 3 Y. & Coll. 237 ; 3 Jur. 39.

Omission in a bill of review to make one defendant a party is no cause of rehearing, the proceedings having been in the said defendant's name. *Peachy* v. *Vintner*, 1 Ch. Rep. 252.

Facts which occurred since the decree, and which therefore were not comprehended in the pleadings, may be proper grounds for a rehearing, if they show error in the decree. *Story* v. *Johnson*, 2 Y. & Coll. 586.

Where a party is before the court when a decree is made by which a trustee is so seriously affected as to have committed a breach of trust, if the decree is wrong he cannot be relieved without having a rehearing, bringing forward in

a supplemental bill, if necessary, any additional facts. *Head* v. *Godlee*, 1 Johns. 536 ; 29 L. J., Ch. 633 ; 6 Jur. (N.S.) 495 ; 8 W. R. 141.

—— **Law Altered.**]—Where since making an order the law has been altered on which the order was founded, the proper course is to present a petition for rehearing, the order to be heard with the cause. *Fleming* v. *Fleming*, 9 W. R. 757.

—— **Point not raised.**]—A decree having been made in a suit for foreclosure, the mortgagor was afterwards desirous of impeaching the validity of one of the securities. Upon filing a cross bill for that purpose, the decree was set up against him ; he then presented a petition of rehearing, to have the decree of foreclosure varied by inserting a reservation of his right to institute proceedings to set aside the security ; the mortgagor had not either on the pleadings or at the hearing, raised any question as to the validity of the security. The court dismissed the petition for rehearing. *Ford* v. *Tynte*, 10 L. T. 492.

Petition of rehearing dismissed because it suggested, as the grounds of rehearing, facts not alleged in the pleadings. *Nevinson* v. *Stables*, 4 Russ. 210.

Petition for rehearing ordered to be taken off the file, on the ground of its making a different case from that on which the decree was pronounced. *Wood* v. *Griffith*, 1 Mer. 35.

When counsel at the original hearing abandon an objection as to parties or as to proof of a document, the same objection cannot be made on the rehearing. *Malone* v. *Geraghty*, 2 Con. & L. 235 ; 3 Dr. & War. 252 ; 5 Ir. Eq. R. 549.

Bill by a lady, who was tenant for life of a trust fund settled on marriage upon herself and her children, against trustees, to make them liable for a breach of trust, associated with her as co-plaintiffs her children. There was no evidence in the cause that these co-plaintiffs were her children, but the answer did not deny it or raise the issue :—Held, that it was too late at the rehearing to raise the objection ; but that if the objection was good, an affidavit would have been received to prove the fact. *Fowler* v. *Reynal*, 3 Macn. & G. 500 ; 21 L. J., Ch. 121 ; 15 Jur. 1019. Affirming 2 De G. & Sm. 749 ; 13 Jur. 649, 650, n.

Where a party omitted to take advantage of any of the opportunities of raising an objection to a bond in preceding inquiries :—Held, that it was not now competent for him to harass the other party by a new suit in which no new evidence could be produced. *Nicol* v. *Vaughan*, 1 Cl. & F. 495 ; 5 Bli. (N.S.) 505. Reversing *Winchelsea (Earl)* v. *Garretty*, 1 Myl. & K. 253 ; 2 L. J., Ch. 115.

—— **Consent Order.**]—An agreement was signed by the parties, and by consent made an order of court to submit to such decree as the court should make, and neither party to bring his appeal ; yet the cause was allowed to be reheard. *Buck* v. *Fawcett*, 3 P. Wms. 242.

—— **Decree acted on.**]—The having acted under a decree is no objection to its being reheard on the petition of the party having so acted under it. *Brophy* v. *Holmes*, 2 Moll. 1.

Further Evidence—When Admitted.]—On a rehearing, depositions taken on part of defendant may be read, though not read at original hearing. *Cunyngham* v. *Cunyngham*, Ambl. 90 ; Dick. 145.

On a rehearing evidence in the cause may be read which was not read at the original hearing. *Williams* v. *Goodchild*, 2 Russ. 91.

The plaintiffs sued as devisees of A., but omitted to prove his will ; and the bill was dismissed. They afterwards presented a petition of rehearing, and moved for leave to exhibit interrogatories to prove the will, which was granted, the omission having arisen from the inadvertence of counsel, and the will not being the subject of dispute in the cause. *Hood* v. *Pimm*, 4 Sim. 101 ; 9 L. J. (O.S.) Ch. 63.

A party, on a special application, may obtain an order to prove vivâ voce, on a rehearing, documents which were not in evidence at the former hearing, but he must pay the costs of the application. *Higgins* v. *Mills*, 5 Russ. 287.

On appeal and rehearing, additional evidence permitted in some instances. If the rule is so, it must be subject to costs. *White* v. *Fussell*, 1 Ves. & B. 153.

New evidence admitted on a rehearing, and a petition of rehearing permitted to be amended to state the discovery of such new evidence. *Wyld* v. *Ward*, 2 Y. & J. 381.

The court will not, on petition for rehearing, allow evidence to be read of matters which occurred before the hearing of the cause, but were not put in evidence. *Ford* v. *Tynte*, 10 L. T. 492.

Application by defendant for liberty to file a supplemental bill in aid of a rehearing, to put in issue evidence discovered during and since the hearing, refused, the evidence discovered being a deed and proceedings in suits to which the defendant was a party, and must have been apprised of their nature, and by negligence lost the benefit of them as a defence, and the object of the supplemental bill being to abandon the original defence and rely on a new one. *Blake* v. *Foster*, 2 Ball & B. 457.

On a bill by the assignees of a bankrupt to set aside a settlement made in favour of his children, on the ground that he was insolvent at the time of the execution of it ; the court held, at the hearing of the cause, that the settlor was not insolvent within the meaning of the Bankrupt Act, 6 Geo. 4, c. 16, s. 75, when he executed the settlement. The plaintiff afterwards presented a petition for leave to present a petition for a rehearing, on the ground that he had since discovered further evidence, establishing the fact of insolvency, which he might have discovered before the hearing, if he had not considered the evidence already produced sufficient. The court dismissed the petition, on the ground that it was against the order of the court, which had for its object to compel persons to bring forward their whole case in the first instance ; if this evidence was allowed, a general examination would be let in to explain it. *Cutten* v. *Sanger*, 3 Y. & J. 374. See the report on the hearing of the cause, 2 Y. & J. 459.

The general rule is, that no evidence can be adduced at a rehearing, which a party was not prepared with and entitled to produce at the hearing. Therefore an order, which had been obtained as of course to prove vivâ voce at a rehearing a document which the party had not obtained an order to prove at the hearing, was

discharged for irregularity; but leave will generally be given on special application, under such circumstances, to prove a document at the rehearing. *Lovell* v. *Hicks*, 2 Y. & Coll. 472; 6 L. J., Ex. Eq. 85; 2 N. R. 435; 11 W. R. 1248.

Affidavits relating to matters which have occurred since decree, cannot be used on a rehearing of the decree. *Lambe* v. *Orton*, 33 L. J., Ch. 81; 2 N. R. 435; 11 W. R. 1243.

Although the court may in special cases permit new evidence to be given upon an appeal (e.g. where the evidence sought to be introduced is documentary, and cannot have been tampered with), it will not allow fresh affidavits made by persons who have given evidence at the original hearing to be read on a rehearing. *Glover* v. *Daubney*, 32 L. J., Ch. 547; 9 Jur. (N.S.) 90; 1 N. R. 186—L.JJ.

F., the executor, in India, of S., a Scotchman, long resident there, paid a legacy of 3,000*l.* out of his pocket. By the decree in a suit instituted for carrying into effect the trusts of a settlement made on the marriage of S., the shares of two of his children, who died in his lifetime, were carried over to a separate account, and his personal representative in England, who took out administration to them, presented a petition for payment out of court. The Crown objected that the domicil of S. was Scotch, and claimed legacy duty. The court on the hearing of the petition, held that the domicil was Scotch, and the money was subsequently paid out of court, but was by agreement retained in medio pending this application. F. was not a party to the suit, and had no notice of the petition; and it appeared that he was the only person interested in supporting an Indian domicil. He offered fresh evidence, tending to show an Indian domicil, and applied for a rehearing. Rehearing granted. *Jopp* v. *Wood*, 3 N. R. 404; 33 Beav. 372; 12 W. R. 393.

Where, after the decision of an appeal, which turned in a measure upon the absence of all invoices, delivery orders, &c., affecting the title to certain iron in dispute between the parties, documents of that nature were discovered by one of the claimants, an order was, upon his application, made for a rehearing, although he offered no explanation of the fact of their non-production, or in any way accounted for the oversight. *Wiltshire Iron Co., In re, Pearson, Ex parte*, L. R. 3 Ch. 443; 18 L. T. 40; 16 W. R. 444.

Parties.]—On an appeal none but the parties to the appeal can be heard, but the case is different on a rehearing. *Hughes* v. *Turner*, 4 L. J., Ch. 141.

New plaintiff by supplemental bill may impeach a decree upon rehearing, on petition of former parties. *Hill* v. *Chapman*, 1 Ves. J. 495.

Person not a party to the suit is desirous of obtaining a rehearing; he must apply for leave to present a petition to rehear. *Gwynne* v. *Edwards*, 9 Beav. 22; 15 L. J., Ch. 84.

A bill may be sustained for the rehearing of a decree, alleged to have been made fraudulently in a suit to which the plaintiff was no party. *Morris* v. *Landon*, 2 L. J. (O.S.) Ch. 140.

Where a party, not being a party to the suit, desires to have the same reheard, he must apply to the court in the first instance for permission to present a petition of rehearing. *Berry* v. *Att.-Gen.*, 3 Macn. & G. 16; 1 H. & Tw. 520; 19 L. J., Ch. 232.

A decree was made ex parte against A., to pay one moiety of a sum of money said to be due from A. and B. to C. upon a stated account between B. and C., but to which A. was neither party or privy. Some years passed before A. knew of this decree, but on being informed of it he applied by petition for rehearing. On appeal a rehearing was directed. *Hamilton* v. *Manby*, 6 Bro. P. C. 347.

A party had been made a defendant by virtue of his office, which he resigned before the decree, but continued to be a party to the suit, and was entitled to a retiring pension:—Held, that he was entitled to present a petition of rehearing. *Att.-Gen.* v. *Stamford* (*Earl*), 12 L. J., Ch. 297; 6 Jur. 117.

A party who is made a defendant by supplemental bill after a decree, and who has appeared to the bill, is not entitled to present a petition of rehearing, unless he has put in his answer. *Ib.*

Where a petition of rehearing is presented by different defendants, some of whom are not entitled to present such a petition, the court will allow the other petitioners to amend the petition, by striking out the names of those parties who are not entitled to join therein. *Ib.*

No one but the party objecting is entitled to be heard on a petition of rehearing. *Buckeridge* v. *Whalley*, 10 L. T. 222; 12 W. R. 593.

An order having been made by one of the vice-chancellors on a petition in a cause, leave was given to a person, not a party to the cause, nor served with the petition, to present a petition of rehearing by the same vice-chancellor, without signature of counsel, or payment of any deposit. *Leete* v. *Jenkins*, 14 W. R. 489.

Leave given to a person who was not a party to the cause to intervene and present a petition of rehearing of an order in which he was materially interested, and which had been made upon petition in the cause. *Jopp* v. *Wood*, 33 Beav. 372; 3 N. R. 404; 12 W. R. 393.

When a decree has been made against several defendants, the bill may be dismissed against all on a petition of rehearing presented by one defendant only. *Kent* v. *Freehold Land and Brick-making Co.*, L. R. 3 Ch. 493.

Semble, that a person brought before the court by service of notice of the decree under 15 & 16 Vict. c. 86, s. 42, is entitled to present a petition of rehearing. *Ellison* v. *Thomas*, 32 L. J., Ch. 2; 1 De G. J. & Sm. 18; 1 N. R. 37; 7 L. T. 342; 11 W. R. 56.

Costs—Undertaking.]—It seems to be the modern practice, that, upon a rehearing, an undertaking should be entered into to pay such costs subsequent to the decree as the court shall think proper. See *Vowles* v. *Young*, 9 Ves. 173.

—— **Taxation.**]—By the decree the costs of all parties were ordered to be taxed as between solicitor and client. Upon a rehearing the decree was affirmed, and the deposit was ordered to be returned but, nothing was said as to costs. By a subsequent order the costs of all parties were ordered to be taxed, as between solicitor and client, from the last taxation:—Held, that this did not include the costs of the rehearing. *Agabeg* v. *Hartwell*, 5 Beav. 271.

The costs of rehearings are not carried by the words "costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation. *Ib.*

p. ACTION OF REVIEW.

1. In what Cases.

Inrolment.]—The proper course, in order to have a rehearing, or to obtain an alteration of a decree, or an order which has been inrolled, is to file a bill of review. *Knierim* v. *Schmauss*, 8 Jur. (N.S.) 692; 7 L. T. 189; 10 W. R. 860.

To oblige a man to sign and inrol a decree made against himself, in order to entitle him to bring a bill of review, is altogether unnecessary. *Standish* v. *Radley*, 2 Atk. 177.

Where decree has not been signed and inrolled, a bill in the nature of a bill of review is a proper one. *Ib.*

Distinction between a bill of review, and a supplemental bill in nature of it. If the decree is inrolled, it is strictly a bill of review, and prays that the decree may be reviewed and reversed; if not inrolled, the prayer is, that the cause may be reheard. In either, matter of supplement or revivor may be introduced, with the proper prayer. *Perry* v. *Phelips*, 17 Ves. 173.

Supplemental bill in nature of review is proper where decree is not inrolled. *Lewellen* v. *Mackworth*, 2 Atk. 40; Barnard. 445.

Title directly in Question.]—A bill of review, or a supplemental bill in the nature of a bill of review, is necessary where the title or subject-matter of the claim has been directly adjudicated upon in a former suit by a decree declaring or assuming a right, or, in the case of a dismissal of a bill, negativing it; but an order of dismissal is a bar only when the court has thereby determined that the plaintiff had no title to the relief sought by his bill, and therefore the dismissal of so much of a bill as relates to an issue raised by it, which is irrelevant to the relief prayed, is no bar to a new bill by the same party for a different object depending upon the same issue. *Bainbrigge* v. *Baddeley*, 2 Ph. 705. Reversing 9 Beav. 538; 10 Jur. 765.

Mistake and Ignorance.] — If a fact be mistaken at the hearing and decretal order, it must be rectified by rehearing. *Combs* v. *Proud*, 1 Ch. Ca. 54; 2 Freem. 182.

Where the matters mentioned in the decree as proved were, in fact, not proved, it is not error to found a bill of review; for if the fact should be mistaken, it should be remedied by rehearing before inrolment. *Ib.*

Bill of review of a decree of foreclosure was dismissed, where it appeared the defendant's agent, attorney, and solicitor had attended the master on his behalf, in taking the account under the decree. *Gould* v. *Tancred*, 2 Atk. 532.

A legatee, who, from ignorance of the contents of a will, sued for and obtained payment of less interest upon her legacy than she was entitled to:—Held, entitled, on a supplemental claim in the nature of a bill of review, to a decree for payment of the difference, or for the administration of the testator's estate. An admission of assets in the original suit for the smaller amount claimed, held not binding as regarded the larger. *Matthews* v. *Pincombe*, 4 De G. & Sm. 485; 20 L. J., Ch. 395.

Fraud.]—A bill purporting to be an original bill, sought to review a prior decree in a suit between the same parties, on the ground of the decree having been obtained by fraud; the fraud alleged was, that the defendants had in their answer concealed certain facts from the plaintiffs and the court, but it appeared that those facts might have been elicited by exceptions:—Held, that was not such fraud as to justify an original bill, without leave of the court, to review a decree. *Henderson* v. *Cook*, 4 Drew. 306; 6 W. R. 831.

Allowance of a debt in the master's report which had been obtained by fraud, rectified, the proper mode of proceeding being by original bill, not by bill of review; and held, that it was not necessary to pray specifically, that the act of the court should be set aside, plaintiff having made a sufficient case to obtain that relief under the prayer for general relief. *Manaton* v. *Molesworth*, 1 Eden, 18.

Trustee Relief Act.]—Trustees of a fund to which a lady was entitled for life, with remainder to her children, on her death paid the fund into court under the Trustee Relief Act, and under orders of the court three-fourths were paid out. One child then claimed the fund as the only legitimate child, and presented a petition for leave to file a bill of review:—Held, that orders under the Trustee Relief Act stood, pro hâc, on the same footing as a decree in a suit, and a probable case being put forward, founded on facts discovered since the date of the orders, leave was given. *Smyth and Arnold's Estates, In re*, 32 L. J., Ch. 779; 8 L. T. 599; 11 W. R. 850.

Omissions.]—Where a decree has been made against a party at the hearing, and he omits to present a petition for rehearing, within the limited time, an order made on a petition subsequently presented, complaining of some omissions in the decree to supply them, is irregular. The proper course would be by a bill of review. *Champernowne* v. *Brooke*, 3 Cl. & F. 4; 9 Bli. (N.S.) 199.

Other Cases.] — The primary intention of granting a review is a reconsideration of the subject by the same judge, in contradistinction from an appeal, which is a hearing before another judge. *Maharajah Moheshur Sing* v. *Bengal Government*, 7 Moore Ind. App. 283.

A review before another judge is an exception, and is only allowed, ex necessitate, as in case of death or removal. *Ib.*

A court of equity may, by additional orders, without a bill of review or a rehearing, deal with a fund which is still in court. *Montefiore* v. *Browne*, 7 H. L. Cas. 241.

Bill of review of a decree by consent, dismissed. *Webb* v. *Webb*, 3 Swanst. 658.

A decree taken pro confesso in the ordinary course after appearance, not under the statute 5 Geo. 2, c. 25, can be impeached as any other decree only by a bill of review, or a bill to set it aside for fraud; not collaterally by original suit seeking decree inconsistent with it; such a bill, therefore, dismissed with costs. *Ogilvie* v. *Herne*, 13 Ves. 563.

An annuitant having filed a bill to enforce his security, a decree was made on that and several other incumbrancers' suits, directing accounts and inquiries as to incumbrances, giving a receiver liberty to keep down the interest on incumbrances and the annuity in question, and any other annuities which should be certified,

and declaring that the plaintiffs and the defendants who should be ascertained to be incumbrancers should be at liberty to add their costs to their incumbrances. The owner of the estate afterwards filed a bill to set aside the annuity:—Held, that the decree was a bar to this bill. *Tynte* v. *Hodge*, 5 N. R. 104; 2 H. & M. 287; 11 L. T. 490; 13 W. R. 172.

2. Grounds for.

General Principles.]—There are two grounds for review; one, error on decree apparent; and the other, new matter arising after decree, or which could not have been proved when decree passed, and was unknown to either party. *Le Neve* v. *Norris*, 2 Bro. P. C. 73.

If a decree be obtained and inrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review; which must be on error appearing on the face of the decree, or on some new matter, as a release or a receipt discovered since. *Taylor* v. *Sharp*, 3 P. Wms. 371.

Grounds for a bill of review; error apparent; or new evidence since publication as to a material fact. *Young* v. *Keighley*, 16 Ves. 350.

Error Apparent on Decree.]—Error in decree must appear in the body of it. *Grice* v. *Goodwin*, 1 Eq. Abr. 165.

Matter of abatement is not error upon which to found a bill of review. *Slingsby* v. *Hale*, 1 Ch. Ca. 122; *Cramborne* (*Lady*) v. *Dalmahoy*, 1 Ch. Rep. 231; 2 Freem. 169.

Upon a bill of review, the party cannot assign for error, that any of the matters decreed are contrary to the proofs in the cause, but must show some error appearing in the body of the decree, or new matter discovered since the decree. *Williams* v. *Mellish*, 1 Vern. 166.

Error discovered after report confirmed, ground for bill of review. *Worge* v. *Bradley*, Dick. 570.

Where bill of review is filed without leave for reversing former decree, specifies errors in decree, and contains original matter, it is irregular. *Houghton* v. *West*, 2 Bro. P. C. 88.

Mere injustice is no ground for bill of review. There must be injustice apparent on record to a party to suit, for neither assignee nor devisee can have relief by such bill. Though plaintiff is confined to errors on record defendant is at liberty to allege every matter relevant to his defence, whether in or out of record, by way of release, &c., to prevent disturbing decree. And when pleaded, the court is to judge whether the matter alleged is sufficient to preclude the plaintiff from the review he seeks. *Hartwell* v. *Townsend*, 2 Bro. P. C. 107.

An erroneous result in point of law drawn by the court from facts apparent on the record is the proper subject of a bill of review for error apparent on the decree. A fact misunderstood by the court, and not introduced into the decree, may be ground for an appeal, but not for a bill of review. *O'Brien* v. *Connor*, 2 Ball & B. 154.

Error apparent, to support a bill of review, must be plain and obvious; as a decree against an infant without a day to show cause; not merely an erroneous judgment, which might be the subject of a rehearing. *Perry* v. *Phelips*, 17 Ves. 173.

Error to support a bill of review must appear on the decree itself. A demurrer was allowed where the errors assigned, if errors at all, were only errors of fact, and did not necessarily appear to be such on the face of the decree. *Farrell* v. *Crosbie*, Wall. Lyn. 154, 156.

To support a bill of review for error in a decree the pleadings in the cause cannot be referred to. Nothing can be looked at but the decree itself. *Trulock* v. *Robey*, 15 Sim. 265, 277. Affirmed 2 Ph. 395; 11 Jur. 999.

To sustain a bill of review for error apparent on the decree complained of, it is not enough that it contains allegations that the decree is erroneous, but error must be shown on the face of it. *Tommey* v. *White*, 1 H. L. Cas. 160.

The mere propriety of a former decree cannot be questioned by bill of review: it is only where there is error on the face of it that such a bill can be sustained. *Haig* v. *Homan*, 8 Cl. & F. 320.

It is error apparent on the face of a decree, if it declare that legacies were charged upon real estate by will (which was set out in the pleadings), when, according to its true construction, the real estate was not charged by it with the legacies, but if the decree merely declare that the legacies are charges on the real estate it is not apparent, for the court may have come to that conclusion from circumstances not apparent on the face of the decree. *Kelly* v. *Lennon*, 1 Jo. & Lat. 305; 7 Ir. Eq. R. 98.

To sustain a bill of review there must be error apparent upon the face of the decree. A mere error in judgment does not furnish a sufficient foundation for such a bill. The bill cannot be maintained unless the decree sought to be reversed is contrary to some statutory enactment, or some principle or rule of law or equity recognised or settled, by decision, or is at variance with the forms and practice of the court. *Green* v. *Jenkins*, 1 De G. F. & J. 454; 29 L. J., Ch. 505; 6 Jur. (N.S.) 515; 2 L. T. 311; 8 W. R. 380.

Upon a bill of review, the plaintiff is confined to error that he has specifically assigned. *Ib.*

The reformed practice, of not setting out in extenso all the proceedings in a suit, was not meant to vary the effect of bills of review. Semble. *Ib.*

The correctness of the proposition laid down by Lord Cottenham, in *Trulock* v. *Robey* (2 Ph. 395), that bills of review are confined to cases in which the decree is contrary to the forms and practice of the court, doubted. *Ib.*

An improper decree, or a refusal to withhold specific performance where the title is alleged to be doubtful, is not an error of law, but an improper exercise of the discretion vested in the judge, and a fit subject of rehearing by a court of appeal, but not by bill of review. *Ib.*

Matter Subsequent to Decree.]—There can be no bill of review for any matter subsequent to the decree, as the plaintiff's confession. *Curtis* v. *Smallbridge*, 2 Freem. 178; 1 Ch. Ca. 43.

A bill of review, with matter come to the party's knowledge since the hearing, lies, where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court. For if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill. *Manaton* v. *Molesworth*, 1 Eden, 25.

It is irregular to file a supplemental bill to rectify a decree in a previous suit to which the

same party was plaintiff. The proper course, on discovery of new matter, is to file a bill of review. *Dynely* v. *Hartley*, 2 Jur. 22.

Fresh Evidence.]—It is in the discretion of the court to give leave to file a bill of review on the discovery of new evidence. It was refused in this case, as it tended to deprive creditors of payment of their just debts. *Wilson* v. *Webb*, 2 Cox, 3.

Mere negligence or forgetfulness of matter, &c., is no ground for a bill of review. *Ludlow* v. *Macartney*, 2 Bro. P. C. 67. See *Phosphate Sewage Co.* v. *Molleson*, 4 App. Cas. 801.

Bill of review granted on new matter discovered. *Portsmouth* v. *Effingham*, 1 Ves. 430.

Bill of review, or a supplemental bill in nature of review, where the decree has not been inrolled upon new evidence discovered since publication, not permitted to introduce a new case of which the party was sufficiently apprised, to enable him with reasonable diligence to have put it upon the record originally. *Young* v. *Keighley*, 16 Ves. 348. S. P. *Morrall* v. *Pritchard*, 14 W. R. 172.

Petition for leave to file bill of review, after a decree, affirmed on rehearing, pending an appeal to the house of lords, for the purpose of introducing evidence, in answer to evidence admitted by surprise, viz., not in answer to an interrogatory, nor the subject directly in issue, the decree not being made upon that evidence, was refused with costs. *Willan* v. *Willan*, 16 Ves. 72.

The new matter to found a bill of review ought to be such as may be used as evidence of what was in issue in the cause. *Patterson* v. *Slaughter*, Ambl. 293. But see *Anon.*, 2 Freem. 31.

Bill of review after two trials, and a decree to establish the will. Upon discovery of new matter another trial ordered, and a verdict for the heir-at-law and the former decree reversed. *Att.-Gen.* v. *Turner*, Ambl. 587.

The discovery of new matter in being at the time of the decree, but not known till after, entitles the party to a review. *Standish* v. *Radley*, 2 Atk. 177.

It is sufficient to entitle a party to a bill of review, if the new proof did not come to his knowledge till after publication; or when, by the rules of the court, he could not make use of it. *Norris* v. *Le Neve*, 3 Atk. 35; Ridgw. 322. S. P., *Ord* v. *Noel*, 6 Madd. 127.

—— **Must be Relevant.**]—Upon application for new bill upon new matter discovered after decree, it must be shown to be relevant; for being new matter merely, will not entitle them to such a bill. *Bennet* v. *Lee*, 2 Atk. 529.

—— **Must be Material and Discoverable by reasonable Diligence.**]—Where it is sought to rescind a final and valid judgment on the ground of the discovery of new evidence, it must be shown that such evidence is both new and material. Although evidence may have been withheld from the court at the original trial by one of the parties to the suit with an improper intention, such conduct is not sufficient to set aside the judgment unless the evidence withheld would have had a material effect upon the decision of the court. *Boswell* v. *Coaks*, 6 R. 167—H. L. (E.)

The grounds for obtaining the leave were precisely the same as existed before the Judicature Acts; namely, the evidence discovered must be shown to be material, and must have been discovered since the decision, and it must be shown that it could not with reasonable diligence have been discovered before. *Falcke* v. *Scottish Imperial Insurance Co.*, 57 L. T. 39; 35 W. R. 794.

Where a good title has been declared on a summons under the Vendor and Purchaser Act, 1874, the purchaser is not at liberty to reopen the question by way of review, unless he can prove that since the order on the summons he has discovered material facts, which he could not with reasonable diligence have discovered earlier, showing that the title is defective. *Scott* v. *Alvarez*, 64 L. J., Ch. 376; [1895] 1 Ch. 596; 72 L. T. 455.

Leave to file a supplemental bill in the nature of a bill of review to introduce new evidence, refused, where the proper means of searching for it had not been used previously to the decree. *Bingham* v. *Dawson*, Jac. 243.

To entitle party to file a supplemental bill in nature of review, it is necessary that the new matter should be discovered after time when it could have been introduced into the cause; and the matter should be not only new but material, and such as if unanswered in point of fact would clearly entitle plaintiff to decree, or would raise question of so much nicety and difficulty, as to be a fit subject of judgment in a cause. *Ord* v. *Noel*, 6 Madd. 127.

Application by defendant for liberty to file a supplemental bill, in aid of a rehearing, to put in issue evidence discovered during and since the hearing, refused, the evidence discovered being a deed, and proceedings in suits to which the defendant was a party, and must have been apprised of their nature, and by negligence lost the benefit of them as a defence, and the object of the supplemental bill being to abandon the original defence, and rely on a new one. *Blake* v. *Foster*, 2 Ball & B. 457.

The act of incorporation of a railway company required that all resolutions come to at meetings of the proprietors should be entered in a book, and the entries were made evidence of the resolutions to which they referred. In a suit against the company for the specific performance of an agreement, the defendants were ordered to produce their books, with the usual liberty to seal up such parts as did not relate to the matters in question. The books were produced accordingly, but the pages left open furnished no evidence of the agreement. After the bill had been dismissed for want of evidence, the plaintiffs, on an affidavit of having recently discovered that the agreement had been recognised by a resolution passed at a meeting of the proprietors, applied for leave to file a supplemental bill, in the nature of a bill of review, for the purpose of making the resolution part of their case. And the court, although of opinion that the plaintiffs might, with due diligence, have made the discovery soon enough to have availed themselves of it in the original suit, nevertheless granted the motion, on the ground that if the defendants had entered the resolution in their books, as they ought to have done, the consequence of any want of care and attention on the part of the plaintiffs or their agents would have been obviated. *Sheffield Canal Co.* v. *Sheffield and Rotherham Ry.*, 1 Ph. 484; 14 L. J., Ch. 25; 8 Jur. 1107.

Matter discovered after a decree has been

made, though not capable of being used as evidence of anything which was previously in issue in the cause, but constituting an entirely new issue, may be subject of a supplemental bill in the nature of a bill of review. *Partridge* v. *Usborne*, 5 Russ. 195 ; 7 L. J. (O.S.) Ch. 49.

On a petition for leave to file a bill of review, it is necessary to make out a primâ facie case of facts discovered since the proceedings sought to be impeached, and that there is a claim. *Smyth and Arnold's Estates, In re*, 32 L. J., Ch. 779 ; 8 L. T. 599 ; 11 W. R. 850.

The court directed the validity of three codicils to be tried at law ; and the result was, that after much litigation three successive trials were had, in which the plaintiff succeeded once and the defendant twice, the codicils being ultimately found to be forgeries. The cause came back to be heard on the equity reserved, when a decree was made dismissing the bill. Just before that hearing of the cause, two other documents were alleged to have been discovered by the plaintiff, which, if genuine, would have gone far to substantiate the defeated codicils. A petition was accordingly presented by the plaintiff, after the decree dismissing the bill was passed and entered, but before it was enrolled, praying for leave to file a supplemental bill in the nature of a bill of review, on the footing of the last discovered documents :—Held, that such petition must be dismissed. *Creswell* v. *Jackson*, 11 L. T. 530.

Upon an application to file a bill of review on the discovery of new evidence, the question is whether the new evidence would have induced the court to make a different decree : and, secondly, if the application is made with due diligence after the discovery. *Thomas* v. *Rawlings*, 34 Beav. 50 ; 10 Jur. (N.S.) 1192 ; 11 L. T., 721 ; 13 W. R. 248.

A party who applies for permission to file a bill of review on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself or his agents for the first time since the period at which he could have made use of it in the suit, and that it could not with reasonable diligence have been discovered sooner, and that the evidence is of a character that if it had been brought forward in the suit it might have altered the judgment. *Hosking* v. *Terry*, 15 Moore, P. C. 598 ; 8 Jur. (N.S.) 975 ; 7 L. T. 52 ; 10 W. R. 884.

To obtain leave to file a bill of review on the ground of new matter discovered, the matter must be not only material, but such that by employing reasonable diligence could not possibly have been used at the hearing. *Michael* v. *Fripp*, 18 W. R. 423.

An infant petitioning for leave to file a bill of review will not be required to give evidence that the knowledge of the facts relied upon could not have been previously obtained by reasonable diligence. *Hoghton, In re, Hoghton* v. *Fiddey*, 43 L. J., Ch. 758 ; L. R. 18 Eq. 573 ; 22 W. R. 854.

To permit a supplemental bill in the nature of a bill of review, after reversal of the decree in parliament, to be filed, the court must be satisfied that the new matter discovered is such as will materially affect the ground of the lords' order. *Blake* v. *Foster*, 2 Moll. 357.

Upon an application to file a bill of review on the ground of discovery of fresh evidence, the question is not merely whether such be material, but whether, had it been adduced before the hearing, it would have been likely to have turned the scale. *Hungate* v. *Gascoyne*, 2 Ph. 25 ; 15 L. J., Ch. 382 ; 10 Jur. 625.

The party making the application for leave to file a bill of this description, must satisfy the court that the mere evidence could not, by any reasonable diligence on the part of himself or his solicitor, have been brought forward at the hearing of the cause. *Ib.*

The new evidence must be of a kind that, combined with the former evidence, would, if it could have been brought forward at the hearing, probably have induced the court to make a different decree. *Ib.*

The new evidence must not only be relevant, but it must be material ; it must be such that the court shall think might have produced a decision favourable to the party bringing it forward. *Ib.*

A decree was made in favour of cestuis que trustent upon an original bill, and without a bill of review, upon the discovery of fresh evidence, although a decree had previously been made as to the same matter against their trustees, but in a suit to which the cestuis que trustent were not parties. *Pierce* v. *Brady*, 23 Beav. 64.

A party petitioning to be allowed to file a supplemental bill in the nature of a bill of review, on the ground that since the decree was made he has discovered new facts, must not only show that the facts are new, but that they could not with reasonable diligence have been discovered before ; and also that the facts discovered are material, and such as would have affected the former decision of the court. *Wason* v. *Westminster Improvement Commissioners*, 4 L. T. 80.

3. Practice.

Leave of Court—Since Judicature Act.]—The old chancery practice as to bills of review necessitating a preliminary application to the court is not now in use. An action to set aside a judgment may now be commenced without leave, but the defendant may move to stay the proceedings as frivolous and vexatious. On such a motion the court should receive evidence on either side as to whether there has been a discovery since the judgment of new and material evidence. *Boswell* v. *Coaks*, 6 R. 167—H. L. (E.). See *Scott* v. *Alvarez*, 64 L. J., Ch. 376 ; [1895] 1 Ch. 596 ; 72 L. T. 455 ; *Falcke* v. *Scottish Imperial Insurance Co.*, 57 L. T. 39 ; 35 W. R. 794.

If a petition is heard on its merits, and is dismissed on the ground that the petitioner has failed to make out his case, he cannot on the subsequent discovery of fresh evidence in support of his case present a fresh petition for the same object, without leave of the court previously obtained. *House, Ex parte, May, In re*, 54 L. J., Ch. 338 ; 28 Ch. D. 516 ; 52 L. T. 78 ; 33 W. R. 917—C. A.

—— **Former Practice.**]—For a bill of review on newly discovered facts, the leave of the court necessary. *Perry* v. *Phelips*, 17 Ves. 177.

Liberty to file a bill of review, after a former petition for the same object had been refused on the ground of a deficiency of evidence. *Thomas* v. *Rawlings*, 34 Beav. 50 ; 10 Jur. (N.S.) 1192 ; 11 L. T. 721 ; 13 W. R. 248.

Leave of the court must be asked, before a bill of review for new matter can be filed; otherwise, if brought to reverse a decree upon error appearing on the face of it. *Gould* v. *Tancred*, 2 Atk. 534.

The filing of a bill of review or a supplemental bill in the nature of a bill of review, grounded upon the discovery of new evidence, is in the discretion of the court. *Hungate* v. *Gascoigne*, 2 Coop. C. C. 405; 2 Ph. 25; 15 L. J., Ch. 382; 10 Jur. 625.

After decree in a suit against the heir of A., the plaintiff petitioned for leave to file a bill of review, alleging error apparent on the face of the decree, and also that the plaintiff had discovered since the decree that the defendant was the executor of A., and that it was essential to the establishment of the plaintiff's rights to bring the defendant before the court in his executorial character. Petition dismissed, because a bill of review for error apparent may be filed without leave of the court, and because the defendant had admitted in his answer that A.'s will was in his possession. *Trulock* v. *Robey*, 15 Sim. 265. Affirmed, 2 Ph. 395; 11 Jur. 999.

Property was held by A., B. and C. in trust for D. for life, with remainder to her children. The children filed a bill against the trustees for a breach of trust, and, by the decree, the trustees were ordered to replace the fund. C., afterwards, being in contempt for non-performance of the decree, filed a bill against the other trustees, and the tenant for life, alleging that they had received and retained the produce of the breaches of trust, and seeking to make them and the life estate liable to indemnify C.:—Held, that such a bill was not in the nature of a bill of review, and therefore that it might be filed without leave of the court. *Taylor* v. *Taylor*, 12 Beav. 220.

Circumstances under which relief sought by a bill was held a variation of a former decree, which could not be given without rehearing the cause. And semble, it was a bill of review, which should not have been filed without leave of the court. *Chute* v. *M'Gillicuddy*, 11 Ir. Eq. R. 312.

Where a bill seeks a declaration that certain orders of the court were fraudulently obtained, and also seeks to alter or vary such orders, the relief sought being grounded not only on allegations of fraud, but on matters which had been recently discovered, it is not a bill of review, or bill in the nature of a bill of review, within the terms of the 31st Gen. Ord. r. 11, and the special leave of the court for its admittance is not therefore necessary. *Pearse* v. *Dobinson*, 13 L. T. 518.

Where a bill, which was in part a supplemental bill in the nature of a bill of review, and in part a bill of revivor, had been filed without leave of court, the whole was ordered to be taken off the file, though as a mere bill of revivor it would have been regularly filed without leave. *Hodson* v. *Ball*, 1 Ph. 177; 11 Sim. 456; 12 L. J., Ch. 80; 7 Jur. 475.

Defendant filed supplemental bill in nature of review without leave and without deposit, rectified by subsequent order and payment cy près of deposit. *Loubier* v. *Cross*, Dick. 223.

A bill by the representative of a deceased partner against the surviving partner for an account of the partnership dealings and transactions, contained an allegation that the defendant had employed, and intended to employ, the assets of the late partnership in carrying on the business on his own account, but prayed no relief in respect of such allegation: and the decree merely directed the ordinary partnership accounts, reserving further directions. But on the death of the defendant some years afterwards, and before the master had made his report under the decree, the same plaintiff filed a bill of revivor and supplement against the representatives of the late defendant, repeating the allegation above mentioned as to the employment of the partnership funds, and praying an account of the profits made thereby, in addition to the usual prayer for carrying on the accounts directed by the former decree:—Held, that such bill was not, in reference to the decree in the original suit, a supplemental bill in the nature of a bill of review, the new relief founded upon the allegation above mentioned not being inconsistent with that decree, but so far from it, that the accounts directed by the decree were necessary to raise the case for such new relief, and must have been directed if both claims had been united in one suit. *Toulmin* v. *Copland*, 2 Ph. 711. Reversing 4 Hare, 41; 14 L. J., Ch. 92; 8 Jur. 1160.

The question in such cases turns upon the matter of the decree, and not upon allegations in the original bill to which the decree does not apply. *Ib.*

In order to try whether a bill is a bill of review or a supplemental bill in the nature of a bill of review, and therefore requiring the leave of the court before it can be filed, the first question is, whether it is inconsistent with or impeaches the decree to which it refers, and one test of this is whether, if the decree had not been referred to in the bill, it could have been pleaded in bar to the relief prayed. *Taylor* v. *Taylor*, 1 Macn. & G. 397; 1 H. & Tw. 437.

A contract was entered into for the sale of the vendor's interest in a lease and premises at Doncaster, known as the betting-rooms, for the remainder of the lease granted by A. A bill for specific performance was filed by the purchaser, in which and in the decree the agreement was treated as comprising the premises held of A., and an account of the rents was directed. It turned out that the rooms and premises were partly under A. and partly under B., whereupon the vendor filed a second bill praying a declaration that the whole was comprised in the agreement:—Held, however, that the plaintiff could not, upon a rehearing, obtain the relief asked by the second bill, nor could he, by such second bill, obtain the relief thereby prayed whilst the decree stood in its present form; that to obtain the relief asked the original cause must be reheard with the second, and, consequently, that the second bill was a supplemental bill in the nature of a bill of review, which ought not to be filed without leave of the court. *Davis* v. *Bluck*, 6 Beav. 393; 7 Jur. 805.

A supplemental claim in the nature of a bill of review cannot be filed without leave. A motion of the defendant to take such a claim, filed without leave, off the file for irregularity, was adjourned to the hearing of the claim, and leave to file the claim was then given on payment of costs. *Matthews* v. *Pincombe*, 4 De G. & Sm. 485; 20 L. J., Ch. 395.

A bill was filed by a defendant to an administration suit alleging wilful default against the executors, who were plaintiffs in the administration suit:—Held, that inasmuch as the present

plaintiff might have raised the question of wilful default by answer in the original suit, this was a supplemental bill in the nature of a bill of review, and could not be filed without the leave of the court. *Harvey* v. *Bradley*, 15 W. R. 527.

Terms on which Leave granted.]—The plaintiff not allowed to bring a bill of review unless he performed the decree, or would swear he was unable to do it, and would surrender himself to the Fleet, to lie there till the matter on the bill of review was determined. *Williams* v. *Mellish*, 1 Vern. 117.

Plaintiff allowed to bring a bill of review without paying the costs decreed in the original cause, upon making oath he was not worth 40*l.* besides the matter in question. *Fitton* v. *Macclesfield*, 1 Vern. 264 ; 2 Freem. 88.

Order for dispensing with costs upon bringing a bill of review ought to be set out in the bill. *Id.* 292.

In a bill of review all things that do not extinguish the right are to be performed according to the former decree, otherwise the non-performance is a good plea in bar, as if writings are to be brought into court or costs paid, but not to release the right or make a conveyance, as that would destroy the right. *S. C.*, 2 Freem. 88. And see *Anon.*, 12 Mod. 343.

After decree for payment of money, money must be paid before bill of review can be brought. *Durham (Bishop)* v. *Liddell*, 2 Bro. P. C. 63.

But court dispensed with rule upon defendant giving good security for payment of money decreed. *Savile* v. *Darcy*, 1 Ch. Ca. 42 ; 2 Freem. 172.

A party may obtain leave to file, and may file, a supplemental bill in the nature of a bill of review, though he has not performed the decree in the original cause, if the proceedings under the decree are not at the time in such a state as to enable the adverse party to bring him into default for not having done what the decree orders. A party will not be allowed, except under very special circumstances, to file a bill of review or a supplemental bill in the nature of a bill of review, or to prosecute it after he has obtained leave to file it, unless he performs at the proper time all that the decree commands him to do. *Partridge* v. *Usborne*, 5 Russ. 195 ; 7 L. J. (o.s.) Ch. 49.

Plaintiff moved, on his solicitor's affidavit of new matter being discovered since the decree, for leave to file a bill of review without first paying the costs agreed, but the court refused it, for payment of costs ought to be performed rather than any other part of the decree. And the court thought the affidavit of the party himself necessary, and that of the solicitor not sufficient ; or that if the party himself should, under particular circumstances, be excused, there ought at least to be an affidavit corroborating that of the solicitor. *Durham (Bishop)* v. *Lyddal*, 2 Eq. Abr. 175 ; 4 Vin. Abr. 415. Affirmed, 2 Bro. P. C. 22.

On every bill of review the plaintiff must deposit 50*l.* in order to answer costs. *Anon.*, 2 P. Wms. 283. *S. C.*, nom. *Davies* v. *Larmar*, cited, 11 Sim. 464. And by Order 17th October, 1741, this rule is extended to supplemental bills in nature of bills of review. See *Astel* v. *Montgomery* (2 Atk. 138), which led to the last-mentioned order. Also *Moore* v. *Moore* (2 Ves. 597 ; Dick. 66), where Lord Hardwicke states his reasons for making it ; and Mr. Dickens' observations in *Gartside* v. *Isherwood* (Dick. 612), where he draws the distinction between a bill of review and a bill in nature of one.

Jurisdiction since Judicature Acts.]—A defendant took out a summons asking that, notwithstanding the order made in the action, he might be at liberty to commence an action against the plaintiff in the nature of a bill of review grounded upon new matter discovered after the making of the orders :—Held, that the old jurisdiction of the court of chancery to entertain an action in the nature of a bill of review was unaffected by the Judicature Act. *Falcke* v. *Scottish Imperial Insurance Co.*, 57 L. T. 39 ; 35 W. R. 794. S. P., *Scott* v. *Alvarez*, 64 L. J., Ch. 376 ; [1895] 1 Ch. 596 ; 72 L. T. 455.

Application to High Court.]—An application to institute an action in the nature of a bill of review is part of the original jurisdiction of the high court, and such an application should be made to the high court and not to the court of appeal, which has no original jurisdiction of that kind. *Falcke* v. *Scottish Imperial Insurance Co.*, 57 L. T. 39 ; 35 W. R. 794.

Time for Application.]—No limitation of time for bringing a bill of review ; yet after a long acquiescence under a decree the court will not reverse it but upon very apparent errors. *Fitton* v. *Macclesfield*, 1 Vern. 287.

Demurrer of length of time to bill of review after twenty-seven years allowed. *Sherrington* v. *Smith*, 2 Bro. P. C. 62.

As to length of time in general, in bar to bill of review, see *Edwards* v. *Carrol*, 2 Bro. P. C. 98.

Though a bill of review cannot in general be brought to reverse a decree after twenty years, that bar does not apply to persons having contingent interest, and then not existing or under disabilities. *Lytton* v. *Lytton*, 4 Bro. C. C. 441.

Bill of review for error apparent will not lie after twenty years from the making of the decree. The time runs from the decree, not from the inrolment. *Smith* v. *Clay*, Ambl. 645.

Plea to bill of review of length of time since inrolment of decree, under which part of estate had been sold to bonâ fide purchaser who had had possession twenty-seven years. On argument of plea and appeal, leave given to withdraw plea, with liberty to plead and demur, answer or demur alone, without introducing new matter. *Gorman* v. *M'Culloch*, 5 Bro. P. C. 597.

Statements of the practice of the court of chancery as to the time within which petitions for rehearing and bills of review may be filed. *Scarisbrick* v. *Skelmersdale (Lord)*, 4 Y. & Coll. 78.

The time for filing a bill of review is regulated by analogy to the time limited by 6 Geo. 1, c. 6, for bringing a writ of error, i.e., twenty years after the judgment and five years after the disability of the plaintiff in error, if any, has been removed. *Kelly* v. *Lennon*, 1 Jo. & Lat. 305 ; 7 Ir. Eq. R. 98.

Parties.]—Parties to decree must all be parties to bill of review. *Hartwell* v. *Townsend*, 2 Bro. P. C. 107.

The plaintiff in the original suit is a proper party to the bill of review, although no relief is prayed against him. *Talbot* v. *Minnett*, 6 Ir. Eq. R. 83.

A bill of review will not lie against those who were not parties to the original bill. *Carlisle (Earl)* v. *Goble*, 3 Ch. Rep. 94 ; Nel. 52 ; 2 Freem. 148.

A bill of review may be sustained by the party in whose favour the decree is made, and who inrolled it. *Vandebende* v. *Levingston*, 3 Swanst. 625.

A bill of review cannot be filed by the party in favour of whom the decree was pronounced. *Glover* v. *Portington*, 2 Freem. 182. But see *S. C.*, 1 Ch. Ca. 53, where the demurrer is said to have been overruled, and the bill consequently allowed. *See also* 3 Swanst. 625.

A person not a party to the suit, and aggrieved by a decree made in his absence, and afterwards served upon him, so as to attempt to bind him in subsequent proceedings, must move on notice, for leave to file a bill in the nature of a bill of review. *Kidd* v. *Cheyne*, 2 Eq. Rep. 475 ; 18 Jur. 348 ; 2 W. R. 316.

A suit was instituted by the trustee of a policy of assurance to obtain payment for the benefit of his cestuis que trustent, who were not parties to the suit. Their interests, however, were held to be sufficiently represented, and a decree was made giving the money to the assignee of the original holder of the policy, who had become a bankrupt, on the ground that no sufficient notice of the assignment of the policy had been given to the office when it was purchased by the settlor. Positive evidence was afterwards produced of such notice having been given, and the executors of the purchaser of the interests of some of the cestuis que trustent filed another bill to arrest the fund :—Held, that in point of form they were not compelled to get the plaintiff in the first suit to ask leave to file a bill of review, and that upon the merits they were entitled to arrest the fund, and have it transferred to the credit of the suit for the benefit of the cestuis que trustent ; but the costs of all parties were paid out of the fund. *Pierce* v. *Brady*, 26 L. J., Ch. 257 ; 4 W. R. 736.

Proof.]—Where a plaintiff having taken a common decree for an account, either on administration summons or bill, presents a petition for leave to file a bill of review to take a decre for wilful default, he is only bound to make a primâ facie case, and need not go into detail. *Partington* v. *Reynolds*, 6 W. R. 615.

A petition for leave to file a bill of review on newly discovered evidence cannot be sustained if supported merely by an affidavit of the petitioner upon his information and belief. *Thomas* v. *Raulings*, 34 Beav. 50 ; 10 Jur. (N.S.) 1192 ; 11 L. T. 721 ; 13 W. R. 248.

Counter-claim.]—If the vendor has brought an action for specific performance, the purchaser may bring his action of review by way of counter-claim to the vendor's action. Form of judgment on such counter-claim. *Scott* v. *Alvarez*, 64 L. J., Ch. 376 ; [1895] 1 Ch. 596 ; 72 L. T. 455.

Pleadings.]—Distinction between a bill of review, and a supplemental bill in nature of it. If the decree is inrolled, it is strictly a bill of review ; and prays, that the decree may be reviewed and reversed ; if not inrolled, the prayer is, that the cause may be reheard. In either, matter of supplement or revivor may be introduced, with the proper prayer. *Perry* v. *Phelips*, 17 Ves. 177.

To sustain a bill of review proceeding on facts discovered subsequent to the decree complained of, it must be shown that leave of the court to file it was regularly obtained. *Tommey* v. *White*, 1 H. L. Cas. 160.

A petition in the nature of a bill of review must be, and state that it is, filed with leave of the court, or it will be dismissed at the hearing. *Connor* v. *Reeves*, 16 Ir. Ch. R. 386.

A bill of review must state on the face of it that it is filed with the leave of the court ; if it does not, it is demurrable. *Henderson* v. *Cook*, 4 Drew. 306 ; 6 W. R. 831.

When supplemental bill is brought for new matter discovered since hearing of cause, but before decree is inrolled, if defendant is able to show that there is no new matter discovered, he must take advantage of it by plea, &c., and cannot insist on it merely at the hearing. *Lewellen* v. *Mackworth*, 2 Atk. 40 ; Barnard. 445.

q. Enforcing Performance.

By Action.]—An action will not lie upon an undertaking, contained in a judge's order, though the order was made by consent, and the undertaking was founded on a good consideration. *Hookpayton* v. *Bussell*, 10 Ex. 24; 2 C. L. R. 1081; 23 L. J., Ex. 267.

No action lies for the disobedience of a judge's order made for the delivery, by the attorney to his client, of his bill of costs. *Dent* v. *Basham*, 9 Ex. 469 ; 2 C. L. R. 989 ; 23 L. J., Ex. 161 ; 18 Jur. 295 ; 2 W. R. 201.

But an action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. *Lievesley* v. *Gilmore*, 1 H. & R. 849 ; 35 L. J., C. P. 351 ; L. R. 1 C. P. 570 ; 12 Jur. (N.S.) 874; 15 L. T. 386.

An order, made by consent, whereby it was ordered that proceedings in an action should be taxed upon certain conditions, does not amount to an agreement to perform those conditions ; and a bill in equity for a specific performance will not lie. *Thames Iron Works and Shipbuilding Co.* v. *Patent Derrick Co.*, 1 Johns. & H. 93 ; 29 L. J., Ch. 714 ; 6 Jur. (N.S.) 1013 ; 2 L. T. 208 ; 8 W. R. 408.

—— **Action in Queen's Bench Division—Order of Probate Division to pay Costs.**]—In an action in the probate division an order was made by the registrar that proceedings should be discontinued, and that the defendant should pay the plaintiff's taxed costs. The costs were taxed, and an order was made by the president of the probate division that the defendant should pay to the plaintiff 127*l.*, the amount of the taxed costs. The plaintiff sued the defendant in the queen's bench division, upon a specially-indorsed writ, to recover that sum of 127*l.*, and obtain leave to sign final judgment under Ord. XIV. :—Held, that an action could be brought in the queen's bench division upon the order of the probate division, and that leave to sign final judgment under Ord. XIV. was properly given. *Norton* v. *Gregory*, 14 R. 735 ; 73 L. T. 10—C. A.

Compromise of Divorce Action—Power to make Agreement an Order of Queen's Bench Division.]—An action for judicial separation in the divorce division was compromised by the parties, and an agreement of compromise signed

by them which provided that a separation deed should be executed; that the agreement might be made a rule of the high court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the queen's bench division for the purpose of enforcing payment:—Held, that there was power to make the agreement an order of court in the queen's bench division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the court to make the order had been rightly exercised. *Smythe* v. *Smythe*, 56 L. J., Q. B. 217; 18 Q. B. D. 544; 56 L. T. 197; 35 W. R. 346.

Enforcing Undertaking.]—At the trial of an action for specific performance of an agreement to make a road, the defendant gave an undertaking that he would complete the road in question. An order was subsequently made, fixing a date by which the road was to be completed. This not having been done, the plaintiff moved, under Ord. XLII. r. 30, for an order that he might be at liberty to complete the road himself at the cost of the defendant:—Held, that the case did not fall within the rule, but nevertheless, the court would enforce the undertaking by permitting the plaintiff to do the works, with liberty to apply that the defendant should pay the expenses so incurred in completing the road. *Mortimer* v. *Wilson*, 33 W. R. 927.

The court relieved a party from an undertaking to make an admission upon a trial at law, the law on the point having, since the undertaking, been placed in a state of uncertainty, by reason of conflicting decisions of different courts. *Cocks* v. *Purday*, 12 Beav. 451.

Non-Reservation of Further Consideration.]—An order was made in a suit, and no further consideration was reserved; one of the parties by whom the order was to have been carried out afterwards died. On a summons by the survivor for the purpose of carrying out the order:—Held, that as no further consideration was reserved, no order could be made on the summons, and a petition must be presented. *Lewis* v. *Allenby*, 25 L. T. 785; 20 W. R. 198.

Erroneous Orders.]—When a court of equity is called upon to carry into execution a former decree, it is not bound to do so, if upon inquiry into the merits it appears to have been erroneous. *White* v. *Panther*, 1 Knapp, 179.

The court will not carry into execution an erroneous decree. *Montgomery* v. *Southwell*, 2 Con. & L. 363; 3 Dr. & War. 171. *O'Connell* v. *Macnamara*, 2 Con. & L. 266, n.; 3 Dr. & War. 411.

The court will not continue a manifest error in a decree, either upon a hearing for further directions, or upon a supplemental bill to carry the decree into execution; and where the decree to account, the report, and decree for sale, in the original cause, were erroneous, the court would not correct them in a suit to carry the final decree into execution. *Stamer* v. *Nisbitt*, 3 Jo. & Lat. 447; 9 Ir. Eq. R. 96.

Of Foreign Court.]—Though the court of chancery will not enforce a decree of a foreign court obtained against a party in his absence and without notice, yet where it finds that the proceedings in the foreign court were rendered necessary by his resistance to a proper demand it will order him to pay the costs of those proceedings by way of damages. *Griffin* v. *Brady*, 39 L. J., Ch. 136. *See* INTERNATIONAL LAW.

Of County Court.] — A judgment being recovered in the county court, and execution issued, there being no goods, nothing could be recovered; and the debtor's only property being an equitable interest in leaseholds in the hands of trustees in trust to pay him an annuity thereout, the creditor files his bill for payment of the debt out of the leaseholds in aid of the judgment of the county court:—Held, that he was entitled to such relief. Semble, the aid of a court of equity to enforce the judgment of a county court is a totally different thing from an action on such judgment in a superior court of law. *Bennett* v. *Powell*, 3 Eq. Rep. 1023; 1 Jur. (N.S.) 719; 3 W. R. 618, 640. *See* COUNTY COURT.

Service of Order and Certificate.]—A. obtained a common order for taxation of the costs of his former solicitor B., the order directing payment by A. to B. of the amount of the taxed costs within twenty-one days after the service of the order and of the certificate of taxation. The order and certificate were served, not on A. personally, but on the solicitor then acting for him in the taxation. A. failed to pay the amount within twenty-one days after service of the order and certificate on the solicitor, and B. applied for the issue of a writ of fi. fa. against A. for the amount, but the officer of the court refused to issue the writ, on the ground that A. had not been personally served with the order and certificate:—Held, that B. might have the writ at his own risk, without service of the order and certificate on A. personally. *Solicitor, In re*, 33 W. R. 131.

Attachment.]—An order made by the chief clerk in chambers cannot be enforced by writ of attachment until after entry. *Ballard* v. *Tomlinson*, 52 L. J., Ch. 656. *See* ATTACHMENT.

Effect of Assignment of Property.]—A., being decreed to pay a sum of money, or deliver possession of a house to B. by a certain day, conveys the house to a creditor in satisfaction of a real debt. This shall not defeat B. of the benefit of the decree. *Self* v. *Madox*, 1 Vern. 456.

Where legal interests are created subsequently to a decree directing the conveyance of the legal estate, in pursuance of an order of the house of lords:—Held, that the decree must be obeyed before setting up any new rights or interests. *Persse* v. *Persse*, 2 Jur. (N.S.) 551.

Want of Diligence.]—The court will not assist a plaintiff whose right has been protected by a decree in enforcing the extreme penalty upon a violation of that decree, when the plaintiff has not himself exercised due vigilance in maintaining his rights so secured. *Rodgers* v. *Nowill*, 1 W. R. 122.

Acquiescence.]—Where a plaintiff has obtained a decree restraining a defendant from doing any particular act, any acquiescence of the plaintiff

in the breach of the injunction by the defendant must be of the most distinct and clear description, amounting to almost enough to enable a defendant to enforce a claim founded on such acquiescence, or the defendant will be liable to be committed. *Rodgers* v. *Nowill*, 1 W. R. 205.

Failure of Execution.]—Where for any reason the execution of a final decree of the court in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is not discontinued thereby, nor are the further proceedings for the same purpose considered as taken in a new suit. *Singh* v. *Singh*, 9 L. T. 129.

Staying Proceedings.]—In 1848 the defendant mortgaged his freehold estate to the plaintiff. In 1852 a commission of lunacy was issued against him, and he was found by the inquisition to have been lunatic since 1825. The plaintiff filed a claim against the lunatic and his committee to foreclose the mortgaged estate, and proved the deed in the usual way by the attesting witness. The defendant did not cross-examine the witness, but produced evidence to show that the mortgagor was insane at the time of the execution of the deed. The court made the common foreclosure decree, but kept back the decree for six months, with leave to the defendant to take proceedings in the meantime for setting aside the deed. *Jacobs* v. *Richards*, 23 L. J., Ch. 557 ; 18 Jur. 527 ; 2 W. R. 174.

To Execute Deeds.]—The probate division has jurisdiction under s. 14 of the Judicature Act, 1884, in the event of any person neglecting or refusing to obey its order to execute a deed, to direct its execution by any other person whom it may nominate for the purpose. *Howarth* v. *Howarth*, 55 L. J., P. 49 ; 11 P. D. 95 ; 55 L. T. 303 ; 34 W. R. 633—C. A. Affirming 50 J. P. 376.

Where a defendant refused to obey an order, directing her to execute a mortgage, the judge appointed his chief clerk to execute it under s. 14 of the Judicature Act, 1884. *Edwards, In re, Owen* v. *Edwards*, 33 W. R. 578. S. P., *Derham* v. *Kiernan*, Ir. R. 5 Eq. 217.

Writ of Assistance—Delivery of Chattels.]—Although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession (Ord. XLVII.) the writ may still be issued for the purpose of recovering possession of and preserving chattels which have been ordered to be delivered to a receiver. *Wyman* v. *Knight*, 57 L. J., Ch. 886 ; 39 Ch. D. 165 ; 59 L. T. 164 ; 37 W. R. 76.

Sequestration and other Forms of Execution.]—*See* EXECUTION.

Orders for Payment of Money.]—*See* col. 275.

r. MOTION FOR JUDGMENT.

See R. S. C., 1883, Ord. XL.

On Verdict of Jury—Where made.]—Motions for judgment upon the verdict of a jury must, by s. 2 of the Judicature Act, 1890, be made to the judge who tried the case, and such motions will not, in the future, even by consent of parties, be heard by the court of appeal. *Stevens* v. *Marston*, 39 W. R. 129—C. A.

After Jury Discharged—Judge abstaining from giving Judgment.]—By. Ord. XL. r. 2, it is provided that "where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment" :—Held, that the judge cannot be said to have abstained from giving judgment, unless he has been asked to give judgment at the trial. *Davenport* v. *Ward*, 47 L. T. 348.

Judge leaving Party to Move.]—Upon the trial of an action at nisi prius, the judge may, if he think fit, at or after the trial, leave any party to move a divisional court for judgment, notwithstanding the provisions of s. 17 of the Appellate Jurisdiction Act, 1876, and the Rules of the Supreme Court, 1876, Ord. XXXVI. r. 22a, Ord. LVIIa. *Benschor* v. *Coley*, 52 L. J., Q. B. 398 ; 48 L. T. 533.

Short Cause.]—In an administration suit pending at the commencement of the Judicature Acts the defendant had put in his answer, but no further proceedings had been taken. It was desired by the plaintiff and defendant that the cause should be heard as short. The acts make no express provision for hearing of short causes. The court directed that the plaintiff should set down the cause on motion for judgment in the same way as provided by Ord. XXXIX. r. 10, when the defendant had made default in delivering his defence. *Palin* v. *Brookes*, 33 L. T. 322 ; 24 W. R. 20.

Special Case.]—Where a special case for the opinion of the court is stated in an action pursuant to the Rules of Court, 1875, Ord. XXXIV. r. 1, and the answers to the special case in fact dispose of the action, the proper course is to take the answers in the shape of a judgment making declarations to the effect of the answers, the action being, if necessary, set down pro formâ for trial on motion for judgment. *Harrison* v. *Cornwall Minerals Ry.*, 49 L. J., Ch. 834 ; 16 Ch. D. 66 ; 43 L. T. 496 ; 29 W. R. 258.

Demurrer.]—A demurrer to a defence ought not to have been raised by way of motion for judgment under the Judicature Act, Ord. XL. r. 11. *Mellor* v. *Sidebottom*, 46 L. J., Ch. 398 ; 5 Ch. D. 342 ; 37 L. T. 7 ; 25 W. R. 401.

Judgment against some Defendants in Absence of Others.]—There is a difficulty in making a final order at the hearing of an action against some defendants only, in the absence of the others ; where the minutes asked for a perpetual injunction against some defendants only, in the absence of the others, the difficulty was overcome by treating the application as interlocutory, and making the order asked for, and in addition staying all further proceedings against the defendants who appeared. *Cooke* v. *Gilbert*, 40 W. R. 682.

Filing Notice of Motion.]—A notice of motion for judgment is a document which may be delivered, in case a defendant does not appear, by filing it with the proper officer pursuant to Ord. XIX. r. 6. *Dymond* v. *Croft*, 45 L. J., Ch. 604 ; 3 Ch. D. 512 ; 34 L. T. 786 ; 24 W. R. 842—C. A. S. P., *Morton* v. *Miller*, 3 Ch. D. 516.

Notice of motion for judgment is not a

document required to be delivered between the parties where the defendant has not appeared and the writ has been filed with the proper officer. *Williams* v. *Cardwell*, 25 W. R. 646.

Writ without Pleadings—Statement of Claim dispensed with—Short Cause.]—A plaintiff, upon the defendant dispensing with a statement of claim, set down his action as a short cause, and moved for judgment according to prepared minutes. Upon the defendant objecting that the action must be brought to trial, it was ordered that the action be placed in the general non-witness list. *Wilmott* v. *Young*, 44 L. T. 331; 29 W. R. 413.

Effect of.]—A decree made upon a motion for decree is a decree for the purposes of the suit, and is for a dismissal if the suit fails. *Secretary of State for India* v. *Underwood*, 39 L. J., Ch. 569; L. R. 4 H. L. 580.

Evidence cannot be taken by Affidavit, even by Consent.]—On motion for judgment the court has no power, under the Rules of Court, 1875, to order that the evidence shall be taken by affidavit. Accordingly, where a consent action, in which an infant and a married woman were defendants, and in which the evidence had been taken by affidavit, was set down on motion for judgment, the court gave judgment, but directed that notice of trial should be given to the infant and married woman, and that the action should be placed in the paper again pro formâ. *Ellis* v. *Robbins*, 50 L. J., Ch. 512.

On Admissions—Application by some of several Plaintiffs.]—A motion under Ord. XXXII. r. 6, for an order against a defendant on admissions of fact, cannot be made by some of several plaintiffs. All the plaintiffs must join in any such application. *Wright, In re, Kirke* v. *North*, 65 L. J., Ch. 37; [1895] 2 Ch. 747; 13 R. 849; 73 L. T. 396; 44 W. R. 125.

—— **Payment into Court.**]—*See* supra, PAYMENT INTO AND OUT OF COURT, col. 248 et seq.

On Admissions in Pleadings.]—*See* post, col. 916.

In Default of Pleading.]—*See* post, col. 863 et seq.

In Default of Appearance.]—*See* ante, col. 199 et seq.

XIV. SPECIAL CASE.

a. *What Questions can be thus Decided*, 635.
b. *Who may state Special Case*, 638.
c. *Form and Settling*, 638.
d. *Amendment*, 639.
e. *Practice*, 641.
f. *Costs*, 646.

See R. S. C., 1883, Ord. XXXIV.

a. WHAT QUESTIONS CAN BE THUS DECIDED.

Only such as must arise in Action.]—Under Ord. XXXIV. r. 2, only such questions of law can properly be raised as must necessarily arise in the action. *Bolivia Republic* v. *National Bolivian Navigation Co.*, 24 W. R. 361.

So, Ord. XL. r. 8, is intended to enable the trial of such issues of fact only as must sooner or later have to be decided. *Ib.*

The 15 & 16 Vict. c. 76, s. 46, only enables the parties to state questions without pleadings which they might have raised with pleadings, but does not entitle them to put questions on speculation. *Wellesley* v. *Withers*, 4 El. & Bl. 750—Ex. Ch.

Question of Fact—Proceedings Extra cursum curiæ.]—A special case can only properly be stated for the purpose of obtaining a decision on questions of law arising upon facts which are admitted, and the consent of a judge to its use for the purpose of trying a question of fact cannot, although the fact when found might give rise to legal questions, make it a regular procedure in the ordinary course of law. *Burgess* v. *Morton*, 65 L. J., Q. B. 321; [1896] A. C. 136; 73 L. T. 713—H. L. (E.)

A judgment so given is pronounced extra cursum curiæ, and is in the nature of an arbiter's award or a consent order, from which, except in cases when the holder of the original judgment has raised no objection, no appeal will lie. *Bicket* v. *Morris* (L. R. 1 H. L. Sc. 47) distinguished, on the ground of consent given to appeal, from *Craig* v. *Duffus* (6 Bell's App. 308), *Dudgeon* v. *Thomson* (1 Macq. H. L. 714), and *Renfrew Magistrates* v. *Hoby* (2 Macq. H. L. 478). *Ib.*

When an Evasion of Stamp Act.]—A case was stated for the opinion of the court in which the question was whether the plaintiff was entitled to recover from the defendant a sum due on an alleged contract of insurance. No stamped policy had been issued, and the covering note or memorandum of insurance was also unstamped. For the purposes of the case, however, the parties agreed that a valid policy should be deemed to have been executed in the ordinary form in accordance with the covering note. The court ordered the case to be struck out, on the ground that they could not hear it without sanctioning what amounted to an evasion of the stamp laws. *Nixon* v. *Albion Marine Insurance Co.*, 36 L. J., Ex. 180; L. R. 2 Ex. 338; 16 L. T. 568; 15 W. R. 964.

Fictitious Questions.]—Upon a special case to obtain a decision whether persons not in esse would be entitled, under certain circumstances which might never arise, to a share in property, the court declined to decide the question, being of opinion that it would be injurious to the parties to have that decided until the events should happen which would give rise to the question. *Bright* v. *Tyndall*, 4 Ch. D. 189; 25 W. R. 109.

When the interest of the parties to a special case is not of such a nature as to give the court jurisdiction to decide the questions, the court will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision. *Ib.*

A father devised and bequeathed real and personal estate to trustees for his daughters for life as tenants in common, and after their respective deaths as to the share of each for such of the children of such daughter "as, being a son or sons, should attain the age of twenty-one, or, being a daughter or daughters, should marry under that age," as tenants in common; with a gift over of the share, original as well as accruing, of any daughter dying without leaving issue taking a vested interest, to the other or

others of his daughters and their children in like manner. The testator left six daughters surviving him, one of whom married and had two children, a son and a daughter, both of whom were infants at the date when the special case hereinafter mentioned was stated. One of the daughters assigned the contingent life interest in the shares of her five sisters to which she should become entitled under the gift in the event of any of her sisters dying in her lifetime without having had issue any child or children, who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should marry under that age, but having had issue a daughter or daughters who should attain twenty-one without having been married. A special case was stated to obtain the opinion of the court whether the assignee of the contingent life estate was entitled to present a petition for the appointment of new trustees of the will, or to file a bill to have the estate administered :—Held, that as the assignment was of a possibility only, and made for the purpose of getting a decision upon the construction of the will by anticipation, and as the point sought to be decided might never arise, on order ought to be made on the special case. *Ib.*

Courts of law will not answer speculative question ; and therefore a case must state conveyances, &c., that may raise the question. *Bliss* v. *Collins*, 1 Jac. & Walk. 426.

On a special case raising questions of legal limitations at the instance of a plaintiff not in possession, the court declined to make any order or to entertain any fictitious question as to title-deeds or accounts in order to found jurisdiction. *Pryse* v. *Pryse*, 42 L. J., Ch. 253 ; L. R. 15 Eq. 86 ; 27 L. T. 575 ; 21 W. R. 219.

When a plaintiff in a special case asked the decision of the court that she was under a will legal tenant in tail in remainder, expectant on the determination of a life interest in her father, or in the alternative that she was legal tenant in fee, or in tail in possession, or that she was legal tenant in tail in possession of a share only : —Held, that the court would not assume jurisdiction; or extend the meaning of the 13 & 14 Vict. c. 35, to decide a purely legal question. *Ib.*

The court refused to give judgment in a special case stated under 3 & 4 Will. 4, c. 42, s. 25, it appearing that the action was not bonâ fide brought to try a question really in contest between the parties to the cause. *Doe* d. *Duntze* v. *Duntze*, 6 C. B. 100 ; 17 L. J., C. P. 220.

Future Interests.]—The court will not, on a special case, make any declaration of future rights. *Smith* v. *Gibson*, 25 L. T. 559 ; 20 W. R. 88.

No declaration as to future interest will be made upon a special case. *Savage* v. *Tyers*, L. R. 7 Ch. 356 ; 20 W. R. 817.

In other Cases.]—Trying a feigned issue without the consent of the court, is a contempt of the court ; and after such a trial they will stay the proceedings. *Hoskins* v. *Berkeley*, 4 Term Rep. 402.

Questions on which it is proper for the court of chancery to send cases for the opinion of a court of common law, or to seek the assistance of the judges of such courts, under the statutes 13 & 14 Vict. c. 35, s. 14, and 14 & 15 Vict. c. 83, s. 8, or otherwise. *Faulkner* v. *Grace*, 9 Hare, 280.

A special case is only proper for the purpose of obtaining the opinion of the court in cases of doubtful construction. It is not similar to a suit or claim, as the court has no power to bind the rights of parties ; and upon this case the court declined to give any opinion upon two points which involved disputed rights. *Bailey* v. *Collett*, 23 L. J., Ch. 230 ; 2 W. R. 216.

E., a married woman, being entitled under a will to a share of 420*l.* to her separate use, and also claiming as one of the next of kin of the testator a share of the general residuary estate upon the ground that the gift of such general residue is void for remoteness, seeks to have these questions of construction determined by special case, making only the legatees of the 420*l.*, her husband, and the trustees, parties :—Held, that such a case is within Sir George Turner's Act. *Entwistle* v. *Cannon*, 4 W. R. 450.

b. Who may state Special Case.

Power of Parties or of Court or Judge to state.]—*See* Ord. XXXIV. rr. 1 and 2.

—— **Trial of Questions of Law or Fact.**]—*See* Trial (Mode of), col. 443.

By Railway Commissioners.]—*See* Railway.

Building Society — Winding-up in County Court.]—*See* Building Society.

By Justices or Quarter Sessions.]—*See* Justice of the Peace.

When Special Case may be stated by Arbitrator.]—*See* Arbitration.

Under Local Government Act.]—*See* Local Government.

c. Form and Settling.

Form.]—In an action against a company, the declaration alleged that the company by their servants so negligently and improperly managed their steam-engine, and the fire and igneous matter contained therein, that, through the negligence and improper conduct of the company by their servants, sparks of fire and portions of the fire and igneous matter passed and flew from the engine to and upon a stack of beans of the plaintiff, in a field adjoining the railway, near to which the company's engine was passing, and the same became ignited, and was wholly consumed. Plea, not guilty. In a special case, stated for the opinion of the court by order of a judge under the 3 & 4 Will. 4, c. 42, s. 25, it was stated that the stack of beans was eleven yards from the rails of the railway, that the engines and boilers used upon the railway were of the ordinary description, and were used at the time of the occurrence in question in the ordinary manner :—Held, that there was evidence for a decision of a jury with regard to the negligence of the company ; and that, upon the facts stated, the company was not entitled to a nonsuit ; and that the case, therefore, was improperly stated for the opinion of the court under the statute. *Aldridge* v. *G. W. Ry.*, 4 Scott (N.R.) 156 ; 1 D. (N.S.) 247 ; 3 Man. & G. 515.

Evidence and documents set out at length in an appendix should be numbered in paragraphs,

or the costs will not be allowed. *Hadley* v. *Perks*, L. R. 1 Q. B. 444.

Where the facts and questions stated on a special case were such as did not enable the court to determine the rights of the parties:—Held, that the proper course was to discharge the order made below on the case, without prejudice to any question. *Bulkeley* v. *Hope*, 8 De G. M. & G. 36; 25 L. J., Ch. 240; 4 W. R. 280—L.JJ.

It is not a proper use of the act of parliament to come to the court for its opinion on a partial or garbled statement of facts. *Ib.*

Statements on special cases with reference to facts which are doubtful, or as to which the evidence is scanty or insufficient. *Domville* v. *Lamb*, 9 Hare (App.) lv.

Signing.]—The court will not hear a special case which is not signed by counsel for both parties. *Branchardiere* v. *Elvery*, 18 L. J., Ex. 381. S. P., *Bliss* v. *Collins*, 1 Jac. & W. 426.

At the trial a verdict was taken for the plaintiff subject to a case for the opinion of the court. It was referred to a barrister to settle the special case, which being done, it was signed by him and by the plaintiff's counsel; but the defendant's counsel refused to sign it, because documents were omitted. The plaintiff having set the case down for argument, a rule was obtained for striking it out of the paper for irregularity:—Held, that the case might be set down in the special paper without the signature of counsel. *Price* v. *Quarrell*, 11 L. J., Q. B. 84; 6 Jur. 604.

A verdict having been taken for the plaintiff, subject to a case to be settled by a barrister, and the defendant having refused to procure the signature of a serjeant to the case when so settled, the court made a rule that the record and postea should be delivered by the associate to the plaintiff, unless the defendant should, within a week, cause the case to be signed. *Doe* d. *Phillips* v. *Rollings*, 2 C. B. 842; 15 L. J., C. P. 186.

The court directed a special case to be set down for argument, which was signed by the plaintiff (who intended to argue it in person) and by counsel for the defendant. *Udny* v. *East India Co.*, 13 C. B. 742; 22 L. J., C. P. 211; 17 Jur. 1078.

The same counsel may sign a special case, not only for the plaintiff but for the defendants. *Craig*, *Ex parte*, 20 L. J., Ch. 136; 15 Jur. 762.

d. Amendment.

When Allowed.]—The court will not allow a special case to be amended, by raising a point which the parties have not raised for their consideration. *Hills* v. *Hunt*, 15 C. B. 1.

Where a special case has been stated for the opinion of the court, the court will not, on the application of one of the parties, amend the case to enable the party applying to raise a point which the other party refuses to consent to raise, unless the point has been omitted by error or through fraud. *Mersey Dock and Harbour Commissioners* v. *Jones*, 8 C. B. (N.S.) 124; 29 L. J., C. P. 239; 6 Jur. (N.S.) 960; 2 L. T. 243.

Although the court may have power, even after judgment on a special case, to order an amendment by the statement of a fact omitted, and intended to be introduced, it will not do so when the fact is disputed or the intention denied. *Pennington* v. *Cardale*, 10 W. R. 544. See *Notman* v. *Anchor Assurance Co.*, 6 C. B. (N.S.) 536.

The court amended a case by directing (in delivering judgment) certain alterations in the pleadings to meet objections taken by the defendant to the declaration. *Carpenter* v. *Parker*, 27 L. J., C. P. 78.

The court will not amend a special case on which judgment has been given by inserting a fact which was known to the parties when the case was drawn. *Ganthony* v. *Witten*, 17 L. T. 117; 16 W. R. 61.

The court will not amend a special case by inserting a new fact, unless satisfied that the judgment would have been different if that fact had been originally inserted. *Ib.*

When the interest of the parties to a special case were not of such a nature as to give the court jurisdiction to decide the questions asked in the case, the court gave permission to amend the case by introducing a question as to the right of the plaintiffs to commit waste in order to give the court jurisdiction. *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93.

Mistake—Power of Court.]—In an action for the administration of the testator's estate it was ordered that a special case should be stated to obtain the opinion of the court on the effect of the codicil. The case made it appear that 3,000*l.* had been paid by the testator before the date of the codicil, and the declaration made by the court of appeal and the consequent inquiry went on this footing, and referred only to sums paid by him before the date of the codicil. A certificate was made accordingly, and the balance due from J. T. was found to be 453*l.* The 3,000*l.* had in fact been paid by the testator after the date of the codicil, though he had been called upon for payment before. No subsequent order had been made giving effect to the certificate. The executors on discovering the error applied for leave to amend the special case, which was refused by Kay, J., on the ground of want of jurisdiction:—Held, by the court of appeal, that the special case could not be amended. But that where a special case is stated in an action, and a decision given upon it under a mistake of fact, the court is not bound by that decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go on to trial, and direct inquiries to ascertain the real facts. On the present occasion the parties waiving all technical objections, and the payment of the 3,000*l.* after the date of the codicil being admitted, the court decided that the legacy must be reduced by 3,453*l.*, it not being material whether the 3,000*l.* was paid before or after the date of the codicil. *Taylor's Estate, In re*, *Tomlin* v. *Underhay*, 22 Ch. D. 495; 48 L. T. 552—C. A.

A material fact having been inadvertently omitted in the special case, but appearing to have been recognised by all parties, a preface was introduced before the order, stating the circumstances from which it appeared that that fact had been recognised by the parties. *Lane* v. *Debenham*, 11 Hare, 188; 17 Jur. 1005.

Special Power of Amendment.]—A term in a special case that the court should be at liberty to amend any part of the pleadings as they may think proper, gives no additional power beyond that possessed by a judge at nisi prius under

3 & 4 Will. 4, c. 42, s. 23. *Chapman* v. *Sutton*, 3 D. & L. 646 ; 15 L. J., C. P. 166.

By Addition of Parties.]—A special case was amended by leave at the hearing by adding a party in existence before the case was filed, but accidentally omitted, and ordered to be set down, as amended against the added defendant. *Barnaby* v. *Tassell*, L. R. 11 Eq. 363 ; 24 L. T. 221 ; 19 W. R. 323.

e. PRACTICE.

May be ordered before Statement of Claim.]—A judge has power, under Ord. XXXIV. r. 2, after writ and appearance, and before statement of claim, to order a point of law to be decided by statement of special case or otherwise. *Metropolitan Board of Works* v. *New River Co.*, 45 L. J., Q. B. 759 ; 1 Q. B. D. 727. Affirmed, 46 L. J., Q. B. 183 ; 2 Q. B. D. 67 ; 35 L. T. 589 ; 25 W. R. 175—C. A.

—— **Ordered after Appearance on uncontradicted Affidavit of.**]—When, therefore, the writ of summons was indorsed, "The plaintiffs claim damages from the defendants for refusing to supply them with water by meter under s. 41 of the New River Act, 1852," and after appearance the plaintiffs, on an affidavit, uncontradicted by the defendants, that the sole question between the parties was whether the defendants were bound to supply water by meter for road use, obtained an order under the above rule :—Held, that the order was rightly made. *Ib.*

Parties — Classes of Persons — Representation.]—The court heard a special case under 13 & 14 Vict. c. 35, s. 1, to determine questions arising between classes of persons respectively represented by one of them on behalf of all others in the same position. *Bardwell* v. *Sheffield Waterworks Co.*, 41 L. J., Ch. 700 ; L. R. 14 Eq. 517 ; 20 W. R. 939.

—— **Trustees.**]—Where all persons beneficially interested are parties to a special case, the trustees ought to be omitted. *Darby* v. *Darby*, 18 Beav. 412.

Trustees ought to be made parties to a special case presented under the 13 & 14 Vict. c. 35, s. 1, for ascertaining the construction of the instrument of which they are the trustees. *Vorley* v. *Richardson*, 8 De G. M. & G. 126 ; 25 L. J., Ch. 335 ; 2 Jur. (N.S.) 362 ; 4 W. R. 397.

—— **Protection.**]—By the combined effect of R. S. C. Ord. XXXIV. r. 8, and the saving clause in the Statute Law Revision Act, 1883, the protection given to trustees and others acting on the declaration of the court on a special case is preserved, notwithstanding the repeal of the act. *Forster* v. *Schlesinger*, 54 L. T. 51.

—— **Creditor.**]—Where a creditor of a deceased person is named as plaintiff in a special case, the record should not be entitled, "between such creditor on behalf of himself and all other creditors of the deceased plaintiffs and the defendants," such other creditors not being before the court, and therefore not bound by the proceedings. *Lee* v. *Head*, 1 Kay & J. 620 ; 3 Eq. R. 1046 ; 24 L. J., Ch. 569 ; 1 Jur. (N.S.) 722 ; 3 W. R. 591.

—— **Omission of.**]—The name of one of several children whose interests were identical, who was on a voyage to the East Indies, was allowed to be omitted as a defendant in a special case, in which the interests of the children were proposed to be determined. *Brown, In re*, 29 Beav. 401 ; 7 Jur. (N.S.) 650 ; 9 W. R. 430.

—— **Adding.**]—A special case, amended by leave at the hearing by adding a party in existence before the case was filed, but accidentally omitted, and ordered to be set down, as amended, against the added defendant. *Barnaby* v. *Tassell*, L. R. 11 Eq. 363 ; 24 L. T. 221 ; 19 W. R. 323.

Persons under Disability.]—On a special case under statute 13 & 14 Vict. c. 35, an infant may apply for the appointment of a guardian without a next friend. *Craig, Ex parte*, 20 L. J., Ch. 136 ; 15 Jur. 762.

Application for appointment of special guardians to infants, for the purpose of a special case, should be by motion, and not by petition. *Goodfellow, In re*, 1 Eq. R. 191 ; 1 W. R. 446.

Application for the appointment of a guardian to concur in a special case (*see* 9 Hare (App.) xlviii.) made in court, and not by summons at chambers. *Thornhill* v. *Copleston*, 10 Hare (App.) lxvii.

An affidavit as to the fitness of a proposed guardian to concur in a special case on behalf of an infant must be intituled in the matter of the act and also in the matter of the infant. *Star* v. *Newbery*, 20 Beav. 14.

Birth of Parties after Case set down.]—When the defendants to a special case include a class of children which is increased by the birth of a child after the case is filed, the new party should be brought before the court by a supplemental statement. *Palmer* v. *Flower*, 18 W. R. 887.

Upon the birth, after a special case has been set down for hearing, of an infant tenant in tail, the proper course for bringing such necessary party before the court is, that the order for setting down should be discharged, and the special case amended by making the infant a party. *Savage* v. *Snell*, 40 L. J., Ch. 216 ; L. R. 11 Eq. 264 ; 23 L. T. 801 ; 19 W. R. 382.

Since the filing of a special case affecting property to which certain infant defendants were entitled, another child in the same interest had been born. The court, at the hearing, dispensed with the presence of the newly-born child. *Palmer* v. *Flower*, 41 L. J., Ch. 193 ; L. R. 13 Eq. 250 ; 25 L. T. 816 ; 20 W. R. 174.

After a special case had been, under the usual order, set down for hearing under Sir George Turner's act (13 & 14 Vict. c. 35), an infant tenant in tail was born. The court, on being informed of the fact, held, that the proper course was, that the order for setting down the case should be amended by bringing the infant before the court, and that appearances de novo should be entered for all the parties to the amended case ; and then that upon proper affidavits the leave of the court should be obtained, under the 13th section of the act, for setting down the amended case. *Thistlethwaite* v. *Garnier*, 5 De G. & Sm. 73 ; 21 L. J., Ch. 16 ; 16 Jur. 57.

Semble, that the case, when amended, would on application be entered in the place of the original case in the paper. *Ib.*

Marriage of Party after Case set down.]—When after a special case has been set down for hearing a female party to it marries, the order setting down the case for hearing should be discharged, the case should be amended by making the husband a party, and a new order for setting it down should be obtained. *Atty* v. *Etough*, 41 L. J., Ch. 782 ; L. R. 13 Eq. 462 ; 26 L. T. 274 ; 20 W. R. 397.

When a female defendant to a special case marries after the case has been set down for hearing, it is not necessary to set the case down for hearing again. *Johnston* v. *Brown*, L. R. 8 Eq. 584.

On Bankruptcy of Parties.]—Where a verdict is taken for the plaintiff subject to a special case, and the defendant subsequently becoming bankrupt, the plaintiff declines to proceed with it, the court will send the cause down again. *Cottam* v. *Partridge*, 3 Scott (N.R.) 174 ; 2 Man. & G. 843 ; 9 D. P. C. 629 ; 10 L. J., C. P. 186 ; 5 Jur. 680.

Death of Parties.]—After verdict for a sole claimant in ejectment, taken subject to a special case, and before the case came on for argument, the claimant died. The court ordered the case to stand over until after a suggestion under s. 190 of 15 & 16 Vict. c. 76, had been entered by the legal representative of the claimant. *Denison* v. *Holiday*, 1 H. & N. 61 ; 26 L. J., Ex. 227.

Where a cause was referred to a barrister to state a special case, and the case was stated after the death of the defendant, the court refused to set it aside. *James* v. *Crane*, 3 D. & L. 661 ; 15 M. & W. 379 ; 15 L. J., Ex. 232.

Where a verdict was found for the plaintiff, on the trial of an ejectment, subject to a special case, and before the terms of the special case were settled the plaintiff died, the court discharged a rule for setting aside the verdict or staying the proceedings, upon the terms of the representative of the plaintiff giving security for costs. *Doe* d. *Egremont* v. *Stephens*, 2 D. & L. 993 ; 14 L. J., Q. B. 258 ; 10 Jur. 570.

One of the parties to a special case having died, the suit in which the case was entitled became abated :—Held, that the 15 & 16 Vict. c. 86, s. 52, providing for the abatement by death, marriage, or otherwise, was applicable to a special case as if it were a suit. *Wilson* v. *Whateley*, 1 John. & H. 331 ; 30 L. J., Ch. 673 ; 7 Jur. (N.S.) 908 ; 3 L. T. 316 ; 9 W. R. 52.

A party to a special case died after it had been set down ; liberty was given to amend by making his representatives parties. *Ainsworth* v. *Alman*, 14 Beav. 597.

Motion or Petition "Of course."]—The terms "motion or petition of course," in the 19th section of the 13 & 14 Vict. c. 35, mean that no service is requisite, but the same must be mentioned to the court. *Harrold, In re*, 20 L. J., Ch. 168 ; 15 Jur. 763.

Time of Delivery.]—A verdict in ejectment having been taken for the plaintiff by consent, subject to a special case, and a long period having elapsed without the plaintiff delivering a case, the court, notwithstanding the alleged insolvency of the defendant, and notwithstanding that proceedings in equity were pending as to the property, made absolute a rule to set aside the verdict, and for a new trial, unless within a certain time the plaintiff delivered a case. *Seymour* v. *Brecon Corporation*, 29 L. J., Ex. 296.

On a special case by way of appeal from a rule to enter a verdict for the defendant, he is not called upon to take any step towards settling or advancing the case ; but if the plaintiff does not do so with due promptitude, the court will compel him to do so under pain of final judgment for the defendant. *Hunt* v. *Allgood*, 3 F. & F. 155.

Power to draw Inferences.]—When, in a special case, power for the court to draw inferences from the facts stated is not reserved, neither the court of first instance nor the court of error can draw such inferences. *Latter* v. *White*, 41 L. J., Q. B. 342 ; L. R. 5 H. L. 578.

The court refused to allow a special case, stated under 3 & 4 Will. 4, c. 42, s. 25, to be argued where the court was to draw inferences from the facts stated, as a jury might, and liberty was reserved to either party to turn it into a special verdict. *Engstrom* v. *Brightman*, 5 C. B. 419 ; 5 D. & L. 499 ; 17 L. J., C. P. 142 ; 12 Jur. 337.

The court will not in general take upon themselves the office of a jury in deciding upon a special case submitted to them by agreement of the parties when the principal questions are questions of fact, to be decided upon the conflicting testimony of witnesses whose credit is made a matter of question. *Brockbank* v. *Anderson*, 7 Scott (N.R.) 813 ; 13 L. J., C. P. 102.

The court will not presume any material fact which is not expressly stated in the case unless power is reserved to the court to draw inferences from the facts stated, and that power is accepted by them. *Doe* d. *Taylor* v. *Crisp*, 1 P. & D. 37 ; 8 A. & E. 779 ; 8 L. J., Q. B. 41.

Where, at nisi prius, power is reserved to the court to draw inferences of fact, they may nevertheless decline to pronounce upon a question of fraud. *Whitmore* v. *Claridge*, 31 L. J., Q. B. 141 ; 8 Jur. (N.S.) 1059 ; 6 L. T. 431 ; 10 W. R. 693.

Time for setting down.]—A verdict and judgment having been taken for a plaintiff subject to a special case to be settled by a barrister, and the referee having settled it, the defendant obtained a rule to set aside the judgment, on the ground that the plaintiff neglected to take the necessary steps to set the case down for argument. Cause was shewn upon an affidavit stating that the delay had arisen partly from the refusal of the defendant to pay a moiety of the referee's fees for settling the special case, and partly from the fact of the plaintiff's attorney having been, until within two days of the application for the rule, engaged in negotiations for obtaining a loan of money on mortgage for the defendant, to enable him to settle the plaintiff's claim. The court discharged the rule, with costs. *Howkins* v. *Bennet*, 6 C. B. (N.S.) 386.

When more than six months have elapsed since an order for setting down a special case for argument without the order being drawn up, it is necessary, in order to the drawing up of such order, that the matter should be again mentioned to the court. *Bastard* v. *Page*, 17 L. T. 560.

Setting down when Parties Absent.]—The court directed a special case to be set down for hearing on the application of the executrix, the first tenant for life and the trustees being defendants ; the persons interested in remainder, who

were absent in New Zealand, being omitted as parties. *Bayley* v. *Miles*, 21 L. T. 784.

Setting down where Party under Disability.]—On motion for leave to set down a special case, where an infant was a party, the court was satisfied with the statement of counsel that the statements in the special case were true, and dispensed with the usual affidavit. *Elwes* v. *Elwes*, 20 W. R. 480.

Application to set down a special case for argument, when any of the parties are married women, infants, or lunatics, should be mentioned to the court. *Sidebotham* v. *Watson*, 1 W. R. 229, 303.

Short Cause.]—The court will advance a special case to be heard on a short cause day on the statement by counsel of facts shewing that it is important that the case should be disposed of shortly, and his representation that the hearing will not take more than ten minutes. *Wood* v. *Wood*, 19 W. R. 972.

A special case may be set down for argument as a short cause on the usual certificate that it is fit to be heard as a short cause. *Dole* v. *Atkinson*, 3 Jur. (N.S.) 41.

At the rolls a special case will not be taken out of its order, though certified to be short. *Anon.*, 1 W. R. 10.

Right to begin.]—Upon the argument of a special case, where the verdict is entered for the plaintiff, he is entitled to begin, though by the pleadings the issue may be upon the defendant. *Stone* v. *Compton*, 1 Arn. 436.

Where a rule to set aside an award is made into a special case, the counsel, who objects to the award ought to begin and have the reply. *Dippins* v. *Anglesea* (*Marquis*), 2 D. P. C. 647.

Upon the argument of a special case stated in replevin, the plaintiff has the right to begin. *Vigar* v. *Dudman*, 24 L. T. 734.

In a case stated for the opinion of the court by the commissioners of inland revenue, pursuant to the 13 & 14 Vict. c. 97, for deciding the proper amount of stamp duty to be paid upon a conveyance of property:—Held, that the counsel for the appellant was entitled to begin, and that the counsel for the crown had the right to a general reply. *Chandos* (*Marquis*) v. *Inland Revenue Commissioners*, 6 Ex. 464; 2 L., M. & P. 311; 20 L. J., Ex. 269.

Hearing Counsel.]—Upon the argument of a special case only one counsel is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the court upon an order nisi to quash, and there all the counsel instructed on both sides may be heard. *Spurling* v. *Bantoft*, 60 L. J., Q. B. 745; [1891] 2 Q. B. 384; 65 L. T. 584; 40 W. R. 157; 17 Cox, C. C. 372; 56 J. P. 132.

Answer disposing of Action—Motion for Judgment.]—Where the answer to the special case disposes of the action, the proper course is to take a declaration in the terms of the answer and stay further proceedings in the action, and it is unnecessary to set down the action for trial on motion for judgment, as suggested in *Harrison* v. *Cornwall Minerals Ry.* (16 Ch. D. 66, 80). *Cane, In re, Ruff* v. *Sivers*, 60 L. J., Ch. 36; 63 L. T. 746.

Where a special case for the opinion of the court is stated in an action pursuant to the Rules of Court, 1875, Ord. XXXIV. r. 1, and the answers to the special case in fact dispose of the action, the proper course is to take the answers in the shape of a judgment making declarations to the effect of the answers, the action being, if necessary, set down pro formâ for trial on motion for judgment. *Harrison* v. *Cornwall Minerals Ry.*, 49 L. J., Ch. 834; 16 Ch. D. 66; 43 L. T. 496; 29 W. R. 258.

Appeal to Court of Appeal.]—*See* APPEAL.

Error before Judicature Acts.]—As to the retrospective effect of s. 32 of the 17 & 18 Vict. c. 125, upon special cases decided before the act came into operation, see *Hughes* v. *Lumley*, 4 El. & Bl. 358; 24 L. J., Q. B. 29; and *Elliott* v. *Bishop*, 10 Ex. 927; 24 L. J., Ex. 158.

An action for obstruction of ancient lights was referred to arbitration, and the order of reference provided that the arbitrator should, if required by either of the parties, state a special case for the opinion of the court, and that judgment should be entered according to the opinion of the court. He stated a special case, raising the question whether the plaintiff was entitled to the flow of light, on which the judgment of the court was for the plaintiff:—Held, that there was no judgment upon which error could be brought. *Courtauld* v. *Legh*, 38 L. J., Ex. 124; L. R. 4 Ex. 187; 20 L. T. 496.

See ARBITRATION.

f. COSTS.

Generally.]—*See* COSTS.

Costs of Cause.]—Where after writ issued a special case is stated, without pleadings, under 15 & 16 Vict. c. 76, s. 46, and there is no agreement as to costs, a plaintiff who has obtained judgment for part of his claim is entitled to the general costs of the cause, and the defendant is entitled to deduct any costs which he may have incurred in respect of the matter on which he has succeeded. *Elliott* v. *Bishop*, 10 Ex. 522; 3 C. L. R. 272; 24 L. J., Ex. 33; 1 Jur. (N.S.) 46; 3 W. R. 160.

The court has power, under the 32nd section of the statute 13 & 14 Vict. c. 35, to give costs of a special case under it. *Jackson* v. *Craig*, 20 L. J., Ch. 204; 15 Jur. 811.

Where the general costs of the suit are given to a party by the decree, they include the costs of a special case on which the opinion of a court of law was taken under the direction in the cause of this court. *Humphrey* v. *Grey*, 3 De G. & Sm. 450; 18 L. J., Ch. 488; 13 Jur. 823.

Out of what Fund.]—On a special case the costs follow the same rule as in administration suits, and are payable out of the general residue; and if there be none, out of the property specifically bequeathed. *Cookson* v. *Bingham*, 17 Beav. 262.

The court has no jurisdiction to order the costs of all parties to a special case to be paid unless there is a fund in court. The proper course is to insert in the special case a question out of what estate or fund the costs should be paid. *Blinston* v. *Warburton*, 2 Kay & J. 410; 25 L. J., Ch. 468; 2 Jur. (N.S.) 858.

Practice as to costs of parties to a special case under the 13 & 14 Vict. c. 35, where the estate in reference to which the question arises had

been administered. *Hindle* v. *Taylor*, 5 De G. M. & G. 577.

Costs of a special case paid out of surplus income. *Hume* v. *Richardson*, 31 L. J., Ch. 713; 8 Jur. (N.S.) 686; 6 L. T. 624; 10 W. R. 528.

A testator bequeathed his leasehold and personal property, except plate, to his wife absolutely, and he devised his real estate to sell, and out of the produce to pay his funeral and testamentary expenses and debts, and to invest the residue and pay the income to his wife for life, with remainders over:—Held, that the funeral and testamentary expenses and debts were primarily payable out of the produce of the real estate. The costs of a special case to determine this question are nevertheless payable out of the personal estate. *Gilbertson* v. *Gilbertson*, 34 Beav. 354; 12 L. T. 816; 13 W. R. 765.

Who entitled to.]—A special case raised a question of election under a will, the plaintiff and the defendant each fairly claiming what he thought himself entitled to, and no question of conduct being involved in the matter. The plaintiff succeeded:—Held, that he was entitled to his costs. *Ustieke* v. *Peters*, 4 Kay & J. 457; 4 Jur. (N.S.) 1271.

Costs of a special case held payable by a defendant. *Sabin* v. *Heape*, 27 Beav. 553.

Costs of a special case held payable by the defendants. *Flux* v. *Best*, 31 L. T. 645; 23 W. R. 228.

Judgment reversed on Appeal.]—A special case, stated under 15 & 16 Vict. c. 76, s. 46, in which the question was, whether the plaintiff had a right to sell to the defendant certain tenant's fixtures and trade fixtures. The court gave judgment for the plaintiff for the value of the trade fixtures, and for the defendant as to the tenant's fixtures. The master allowed the plaintiff the general costs of the cause, deducting the costs of the defendant in respect of that part on which he had succeeded. The defendant took proceedings in error, and the court of error reversed the judgment for the defendant, and affirmed the judgment for the plaintiff, and increased it by the value of the tenant's fixtures, but made no mention of costs:—Held, that the court below had no power to direct the master to review his taxation by allowing the plaintiff his costs of the proceedings below, and disallowing those of the defendant, but that the costs must be taxed according to the judgment of the court of error. *Elliott* v. *Bishop*, 11 Ex. 321; 24 L. J., Ex. 303; 1 Jur. (N.S.) 808; 3 W. R. 596.

Follow Event.]—When a special case is stated for the opinion of the court, the costs follow the event. *Richards* v. *James*, 16 L. T. 672.

When a verdict is found for the plaintiff on some counts and for the defendant on other counts, and the questions raised on the counts found for the defendant are submitted for the opinion of the court in the form of a special case, on which the defendant obtains judgment, the master should allow the costs of the special case to the defendant. *Gosbell* v. *Archer*, 5 N. & M. 523; 2 A. & E. 500; 1 H. & W. 559; 5 L. J., K. B. 35.

Abortive Special Case.]—Where, after verdict, the court recommended a special case, which was acceded to by both parties, but which was never finally settled by reason of the defendant's default:—Held, that the plaintiff, who had the general costs of the cause, was not entitled to the costs of the abortive special case. *Poley* v. *Botfield*, 4 D. & L. 328; 16 M. & W. 65; 16 L. J., Ex. 3.

Where, after a verdict for a sum of money, two questions were raised for the opinion of the court on a special case, and one of them at the time of argument was withdrawn by mutual consent:—Held, that the plaintiff, retaining his verdict for the sum of money, was entitled to the costs of the special case, though the defendant succeeded on the point which was argued. *Garland* v. *Jekyll*, 3 Bing. 330; 9 Moore, 620; 3 L. J. (O.S.) C. P. 227; 27 R. R. 630.

Case Unnecessary.]—In an action upon a bill of exchange drawn in figures for 245*l.*, and in words for two hundred, a verdict was taken for the plaintiff, subject to the opinion of the court upon a special case; if the court was of opinion that the plaintiff was entitled to recover either of those sums, a verdict to be entered accordingly; if neither, a nonsuit. The court directed a verdict for 200*l.*, which the defendant had been ready to pay, but had not tendered. The court refused to allow him his costs attending the special case, holding that the declaration might have been amended at nisi prius upon nominal costs. *Saunderson* v. *Piper*, 5 Bing. (N.C.) 561; 7 Scott, 418; 7 D. P. C. 632; 9 L. J., C. P. 64.

Delay.]—When a special case, on which judgment had been given for the plaintiff, was, at the instance of the defendant, turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, the court, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiff the costs thereby occasioned. *Collins* v. *Gwynne*, 2 Scott, 332; 4 D. P. C. 122.

XV. PETITIONS.

a. In what Cases, 648.
b. Form of, 651.
c. Service, 654.
d. Other Points, 655.

a. In what Cases.

Petition instead of Summons—Costs.]—Where under the Judgment Law Amendment Act, 1864 (the procedure under which has been altered by Ord. LV. r. 9 (*b*), of the Rules of the Supreme Court), an application has been made by a judgment creditor by petition instead of by originating summons for the sale of the debtor's interest in certain houses in respect of which a receiver has been appointed, the court has power under Ord. LXX. r. 1, to allow the petition, but the petitioner, if successful, will only be entitled to the costs of an originating summons. *Martin and Varlow, In re*, 13 R. 189; 43 W. R. 247.

—— **Payment out of Court.**]—Where money has been paid into court under the provisions of the Lands Clauses Consolidation Act, 1845, and the ascertainment of the persons entitled involves the construction of a will, the application must be by petition, and not by summons. *Hicks, In re, N. E. Ry., Ex parte*, 63 L. J., Ch. 568; 8 R. 319; 70 L. T. 529.

Petition or Summons for Payment out of Court.]—*See* post, col. 763, and LANDS CLAUSES ACT.

Petition or Bill.]—A., being entitled, under a decree, to an annuity, which she was to receive from the receiver in the cause, borrowed 100*l.* from B., and signed a memorandum of agreement to the effect that her said annuity should be a security for that sum and interest, and also gave an order upon the receiver for payment to B. of 100*l.* Upon B. presenting the order to the receiver, the receiver stated that he would not pay it, because A. had desired him to pay to no person but her agent. Upon the petition of B., praying an order upon the receiver for payment:—Held, that, as A. appeared and opposed the petition, the court had no jurisdiction to make the order upon petition, but that B. should have come by bill. *Wastell* v. *Leslie, Carter, Ex parte*, 11 Jur. 29.

Question between Crown and Subject.]—When the crown, being interested in respect of administration duty, consented to appear, the court decided the question between the crown and subject on petition. *Ware's Trusts, In re*, 41 L. J., Ch. 121; 25 L. T. 737; 20 W. R. 142.

Life Assurance — Policy — Appointment of Trustees.]—Application for the appointment of trustees of a policy of life assurance, effected under the provisions of the Married Women's Property Acts, for the benefit of the wife and children of the assured, may be made by petition. *Atkinson's Policy Trusts, In re*, 13 R. 285.

Steward.]—Court will not determine in whom is the right to appoint a steward on petition for delivery of deeds, &c., to the appointee of one of the parties. *Mott* v. *Buxton*, 7 Ves. 201.

Court taking Possession of Property.]—If the court takes possession of the property of an individual by mistake, he may apply by petition pro interesse suo, and the court may immediately grant him relief. *Anon.*, 1 L. J. (O.S.) Ch. 11.

Compromise.]—The proposition that every agreement for a compromise of a suit can be carried into effect by petition is not general. *Dawson* v. *Newsome*, 6 Jur. (N.S.) 625; 8 W. R. 725.

Setting aside Injunction.]—A person not a party to a suit, in which an injunction has been made, will properly proceed by petition to set aside the injunction. *Bourbaud* v. *Bourbaud*, 10 L. T. 781; 12 W. R. 1024.

Real Assets.]—Specialty creditor of uncle of bankrupt, from whom real estate descended to bankrupt through elder brother, seeking to follow real assets in hands of assignees, and an inquiry as to specialty debts outstanding, and the assets, allowed to be by petition, the property being small. *Morton, Ex parte*, 5 Ves. 449.

Letters of Administration.]—Semble, where a party objecting to a paper annexed to letters of administration has been by the court assigned to declare whether he propounds another instrument, it is irregular and inconclusive, instead of following up the assignation, to have the question decided upon petition. But such procedure estops the parties from further litigation. *Henfrey* v. *Henfrey*, 4 Moore, P. C. 29; 6 Jur. 355.

Counsel's Clerk.]—Petition against a clerk of counsel dismissed for want of jurisdiction, but without costs, on account of his improper conduct in the matter complained of. *Cotton, Ex parte*, 9 Beav. 107; 10 Jur. 84.

Payment of Money.]—In an interpleader suit to determine the right of conflicting claimants to portions of an aggregate fund, the court directed inquiries as to the claims of several defendants, and reserved further direction and costs. One defendant obtained a separate report, finding his title to a portion of the fund, and, being unable to set down the cause on further directions, in consequence of the claimants of the other portions of the fund not having proceeded to establish their title, presented his petition for payment of the sum found due to him; but the court refused to order such payment upon petition, or until the cause was heard on further directions, and the costs of the suit could be disposed of. *Bruce* v. *Elwin*, 9 Hare, 294.

A testator gave his property after the death of his wife to trustees, in trust to pay the interest and profits to his two daughters, J. and E., to their separate use, with a direction to pay to and apply for the benefit of A., the son of E., 200*l.* annually when he attained the age of twenty-one years, and before that period such part of the 200*l.* bequeathed to him as might be judged proper. He then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E., and from which the interest is to arise, to my grandson, namely, 4,000*l.*, which sum shall be my grandson's property"; and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren. The executrix having, in mistake, made payments to A. in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order authorising her to retain them, and made upon petition, after the decree had been passed and entered, is regular. *Livesey* v. *Livesey*, 3 Russ. 287. *S. C.* in part reversed *Id.* 542; 6 L. J. (O.S.) Ch. 13; and 7 L. J. (O.S.) Ch. 120.

A. was appointed receiver, but the solicitor in the cause alone acted and paid over the rents to the tenant for life. An incumbrancer compelled the receiver to pay the same amount into court; and after payment of his claim there remained a surplus, which was paid to the tenant for life:—Held, that A. could not, on petition, obtain repayment by the tenant for life or out of the estates. *Gurdon* v. *Badcock*, 6 Beav. 157; 12 L. J., Ch. 62.

A feme covert, entitled to a reversionary interest in a chose in action, obtained a release of the prior interest; and a petition being presented by all parties interested, including the feme covert, for payment and distribution of the fund:—Held, that payment of her share could not be ordered to be made to the married woman and her husband on petition. Semble, a bill is the proper course. *Story* v. *Tonge*, 7 Beav. 91; 13 L. J., Ch. 191; 8 Jur. 566.

Accounts.]—If court of exchequer will interfere at all in cases of commissioners of audit

investigating accounts of public functionary, it will not in a summary way on petition and motion, but on bill only. *Colebrooke, Ex parte*, 7 Price, 87.

An accounting party in a cause should not apply by petition for his discharge. *Drever* v. *Mawdesley*, 18 L. J., Ch. 273; 13 Jur. 330.

Specific Performance.]—A suit for specific performance of a contract was at the hearing ordered to stand over. The contract being afterwards performed, it was held to be regular for the plaintiff to bring before the court, upon petition, the facts which had taken place subsequently to the answer. *Price* v. *Penzance Corporation*, 4 Hare, 506.

b. FORM OF.

Signature of Counsel.]—Notwithstanding Ord. XIX. r. 4, applications for the advice of the court under 22 & 23 Vict. c. 35, s. 30, still require the signature of counsel. *Boulton's Trusts, In re*, 51 L. J., Ch. 493; 30 W. R. 596.

In Alternative.]—A petition may be framed in the alternative, and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances. *Schooley, Ex parte*, Buck, 476.

Residence.]—The petition of a person not a party to the cause must state his residence, otherwise it cannot be heard. *Glazbrook* v. *Gillatt*, 9 Beav. 492.

Setting out Transactions.]—At the hearing of a suit to establish a will, an issue was directed at the instance of the heiress-at-law, who was a married woman. Before any trial, she and her husband presented a petition, stating that, at the urgent request of their children (who were devisees), they had agreed to withdraw all opposition to the will upon being allowed their costs, and praying that the order directing the issue might be discharged upon these terms upon this petition; an order was made according to the prayer, and purporting to be made upon the consent of the married woman by her counsel. Subsequently a private act of parliament was obtained authorising leases to be made of the devised estates. The married woman was one of the petitioners for the act, and was excepted from the saving clause; and the act recited the will, and proceeded upon the assumption of its validity. Some years afterwards the married woman presented a petition to rehear the cause. This petition was intituled in the cause and in the matter of the private act. It stated the subsequent transactions, but not the provisions of the act:—Held, that the preceding transactions did not constitute grounds for taking the petition off the file; and that such grounds were not afforded by the introduction into the petition of statements as to the matters occurring since the hearing, or by the petition being intituled in the matter of the act, or by the omission to set out in it the act itself, especially, upon appeal, when these objections of form had not been insisted upon in the court below. *Turner* v. *Turner*, 2 De G. M. & G. 28; 21 L. J., Ch. 422.

Title—Act of Parliament.]—The court will not make an order on a petition presented under an act of parliament, unless it be intituled in the matter of the proper act. *French, In re*, 2 Jo. & Lat. 243; 8 Ir. Eq. R. 96.

It is not necessary to intitule a petition in the matter of the act of parliament under which it is presented; and if it be intituled in the matter of a wrong act of parliament, and the court can see, from the matter of the petition itself, that it has jurisdiction to make the order prayed under the authority of a public statute, the reference to the act in the title will be rejected as surplusage. *Hunter* v. *Edmonds*, 6 Ir. Eq. R. 123.

It is not necessary that the petition or other proceedings under the judgment creditors' acts should be intituled of those acts. *Nagle* v. *Creagh*, 6 Ir. Eq. R. 265.

The title of a petition presented under an act of parliament, as the Trustee Act (1 Will. 4, c. 60), should contain a reference to that act, as well as to the matter of the petition. *Law, In re*, 4 Beav. 509; 11 L. J., Ch. 118; 6 Jur. 615.

Petitions for the appointment of new trustees of charity estates must be intituled in the matter of Sir Samuel Romilly's act, and the fiat of the attorney-general previously obtained. *Bierton Charity Land, In re*, 10 Hare (App.) lxv.

The rule which requires petitions for the appointment of new trustees of charities to be intituled in the matter of Sir Samuel Romilly's act applies to the case of a petition for the appointment of trustees of a Wesleyan chapel. *Varteg Iron Works Wesleyan Chapel, In re*, 10 Hare (App.) xxxvii.

At the hearing of a suit to establish a will, an issue was directed at the instance of the heiress-at-law, who was a married woman. Before any trial, she and her husband presented a petition, stating that, at the urgent request of their children (who were devisees), they had agreed to withdraw all opposition to the will upon being allowed their costs, and praying that the order directing the issue might be discharged upon these terms upon this petition; an order was made according to the prayer, and purporting to be made upon the consent of the married woman by her counsel. Subsequently a private act of parliament was obtained authorising leases to be made of the demised estates. The married woman was one of the petitioners for the act, and was excepted from the saving clause; and the act recited the will, and proceeded upon the assumption of its validity. Some years afterwards the married woman presented a petition to rehear the cause. This petition was intituled in the cause and in the matter of the private act. It stated the subsequent transactions, but not the provisions of the act:—Held, that the preceding transactions did not constitute grounds for taking the petition off the file; and that such grounds were not afforded by the introduction into the petition of statements as to the matters occurring since the hearing, or by the petition being intituled in the matter of the act, or by the omission to set out in it the act itself, especially, upon appeal, when these objections of form had not been insisted upon in the court below. *Turner* v. *Turner*, 2 De G. M. & G. 28; 21 L. J., Ch. 422.

—— **Names of Solicitors.**]—A petition was presented and answered for the taxation of a solicitor's bill of costs, &c., and intituled in a cause which had no existence; a copy of it was then served on the solicitors, who, by letter to

the petitioner's solicitors, apprised them of the irregularity of the petition, and of their intention not to appear upon it. An order was then obtained by the petitioner on the petition day to adjourn the hearing of the petition till the next petition day, with liberty in the meanwhile to amend the petition. The petition was accordingly amended, one of such amendments being the intituling it "In the matter" of the solicitors (stating their several names), in addition to the title of the cause. No new fiat was affixed to the petition, and it was served on the solicitors, who declined appearing upon it. An order was obtained by the petitioners for taxation of the solicitors' bill of costs, on the condition (suggested by the petitioners' counsel) of paying the amount of the bill of costs into court. This order was discharged by the Master of the Rolls, on the motion of the solicitors, before the amount of the bill of costs was paid into court. On appeal, the Lord Chancellor affirmed the order of the Master of the Rolls discharging the previous order obtained for the taxation of the bill of costs; the court below having no jurisdiction, under the circumstances stated, to make such a previous order. *West* v. *Smith*, 10 L. J., Ch. 230.

—— **Infant.**]—Where a petition is presented in a cause for a reference to inquire whether an infant is a trustee under the statute of Anne, and the infant is not a party to the cause, it is not enough that the petition be intituled in the cause: it must be intituled also in the matter of the infant. *Headley* v. *Redhead*, 1 L. J. (O.S.) Ch. 159.

—— **Bankruptcy.**]—Petition under 33 Geo. 3, c. 54, s. 10, in consequence of bankruptcy of trustee of friendly society, should, it seems, be intituled in bankruptcy only, and not in matter of the society. *Anon.*, 6 Madd. 98.

Court has no jurisdiction in bankruptcy to declare an infant heir of assignee a trustee of bankrupt's estate; the petition must be intituled under 6 Geo. 4, c. 74. *Kirk, Ex parte*, Buck, 478. S. P., *Beddam, Ex parte*, 1 Rose, 310.

A petition for the committal of a person for publishing insulting observations on the court of review, and on parties engaged in litigation before it with reference to proceedings on a particular bankruptcy, is properly intituled in the matter of such bankruptcy. *Turner, Ex parte, Martin, In re*, 3 Mont. D. & D. 523.

—— **Cause—Matter.**]—There being a matter and a cause, reference by which it is sought to affect the fund should be directed in the cause as well as matter. *Massey, In re*, 2 Moll. 365.

—— **Lunacy.**]—A petition praying that the committee of a lunatic may be ordered to transfer property vested in the lunatic as a trustee ought to be intituled in the lunacy, and need not be intituled in the matter of the act which authorises the Lord Chancellor to make the order. *Fowler, In re*, 2 Russ. 449.

Two Suits.]—An order was made in a suit in the court of Kindersley, V.-C., declaring K., a party to the suit, entitled to money. An order was made in a suit at the rolls directing a party to that suit to pay money. Sequestrators were appointed in the suit at the rolls against K.'s estate. The plaintiffs in the suit at the rolls were also the defendants in the suit before the vice-chancellor; they and the sequestrators presented a petition in the suit before the vice-chancellor praying payment to them of K.'s money in that suit, or the transfer of it to the credit of the other cause:—Held, that the petition must be amended by being entitled in both suits, and must then be presented to the lords justices, but that K. must, in the meantime, be enjoined from receiving the money which had been ordered to be paid to her. *Knight* v. *Knight*, 25 L. J., Ch. 848; 4 W. R. 771.

Parties.]—A special jurisdiction, under an act of parliament, must be strictly followed; therefore, under an act preventing the necessity of recovery by tenant in tail of land to be purchased, each party must petition. *Baynes* v. *Baynes*, 9 Ves. 462.

Under the Public Health Act, local bodies are not bodies corporate. Petitions must be in the name of the clerk, and pray payment to the treasurer. *Llanelly Local Board, Ex parte*, 22 L. J., Ch. 419; 17 Jur. 107; 1 W. R. 159.

c. SERVICE.

Time for.]—It is irregular to serve a petition after the petition day for which it is answered. *Salvidge* v. *Tutton*, 10 L. J., Ch. 347.

What Parties.]—A petition cannot be brought on merely for the purpose of ascertaining what parties are to be served. A petitioner must serve such persons as he thinks proper, and state in the footnote who have been served. *Green, In re*, 29 L. J., Ch. 716; 6 Jur. (N.S.) 530.

Out of Jurisdiction.]—Where some of the persons entitled to certain funds in court were residing out of the jurisdiction, and it was impossible to deal with such funds unless a petition, which had been presented asking for payment out of a portion thereof, was served upon such persons, the court gave liberty to serve the petition, together with a copy of the order, upon them. *Colls* v. *Robins*, 55 L. T. 479.

The court has no jurisdiction to allow service out of the jurisdiction of a petition under the trustee relief act for payment of money out of court. *Gordon's Settlement Trusts, In re* (W. N. 1887, p. 192), not followed. On appeal from this decision, it appearing that the order sought by the petition was only for carrying into full effect an order which had recently been obtained by the respondents, the court of appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service. *Jellard, In re*, 39 Ch. D. 424; 60 L. T. 83—C. A.

On the hearing of a petition for the revocation of a patent where one of the respondents was out of the jurisdiction, the court ordered that notice of the presentation of the petition should be given to such respondent, and that the petition should go into the witness list. *King & Co.'s Trade-mark, In re* ([1892] 2 Ch. 462), followed. *Kay's Patent, In re*, 8 R. 263; 70 L. T. 756.

When a respondent to a petition was out of the jurisdiction, the court made an order for substituted service, and also gave leave to the petitioner to serve the respondent abroad. *Bonelli's Electric Telegraph Co., In re, Cook's*

Claim, 43 L. J., Ch. 720; L. R. 18 Eq. 655; 22 W. R. 856.

The court has power, under the Consolidated Order X. r. 7, to order service of a petition upon a respondent out of the jurisdiction. *Haney's Trusts, In re*, 44 L. J., Ch. 272; L. R. 10 Ch. 275; 23 W. R. 662.

Affidavit.]—An affidavit of the service of a petition respecting the trustees of a corporation, which stated that it had been served on A., who was, "as the deponent had been informed and believed," the clerk of the trustees:—Held, insufficient. *Lichfield Corporation Charities, In re*, 12 L. J., Ch. 439.

An affidavit of service of a petition must be made at the latest before the rising of the court on the day on which the application is made. *Milltown (Lord)* v. *Stewart*, 8 Sim. 34; 1 Jur. 940.

After a petition has been called on, and the hearing postponed to a future day, by consent of both parties, if the petitioner does not then appear to support it the respondent is entitled to have the petition dismissed with costs, without an affidavit that he has been served with the petition. *Ward, Ex parte*, 1 Deac. 86; 2 Mont. & Ayr. 391.

d. OTHER POINTS.

Amendment.]—A petition may be amended by stating facts which have taken place since leave to amend was given. *Westbrook's Trusts, In re*, 40 L. J., Ch. 224; L. R. 11 Eq. 252; 23 L. T. 726; 19 W. R. 381.

A petition praying the payment out of court, under the trustee relief act, of a small sum to the petitioners, in certain shares, to which they were held not entitled on the true construction of a will, was allowed to be amended by the addition of a prayer for a declaration of the rights of all parties, and payment accordingly; and, subject to such amendment, an order was made containing such a declaration, and for payment in conformity therewith. Costs of all parties out of the fund. *Walker's Trusts, In re*, 16 Jur. 1154; 1 W. R. 33.

Order made on petition amended after it was drawn up. *Hoole* v. *Roberts*, 16 Jur. 1135.

A petition was presented by a single woman, and answered on the 1st December. On the 2nd, before the petition was in the paper, she married:—Held, that the petition might be amended, by making it the petition of the husband and wife, without a fresh stamp. *Robinson* v. *Hewetson*, 1 Drew. 307; 1 W. R. 100.

Trust estate had descended on an infant on whom a petition for a vesting order had been served. He did not appear, and no guardian had been appointed. The court made a vesting order on the petition being amended by striking out the note of intended service. *Tweedy, In re*, 9 W. R. 398.

A petition having been presented by A., an annuitant, seeking for payment of the arrears of her annuity out of the corpus of a fund which had been set apart to answer the annuity, and an order having been made on the petition, but not passed and entered, the petition was, by consent of all parties, allowed to be amended by stating further facts, and seeking similar relief as to another annuity similarly situated, and which was also in arrear. *Hislop* v. *Wykeham*, 3 W. R. 286.

Where a petition was answered, and brought on, and stood over, with liberty to amend by adding co-petitioners, one of the persons to be added was found to be dead, and the name of his administrator, under letters dated subsequently to the date of the Lord Chancellor's fiat, was inserted in the petition, and it was presented as a new petition:—Held, that a new petition was not necessary. *Maude* v. *Maude*, 5 De G. & Sm. 418; 16 Jur. 932.

A petition may by leave be amended after order. *Bunnett's Settlement, In re*, 1 Jur. (N.S.) 921.

Petition ordered to be amended so as to state facts as foundation for order. *Humphry's Estate, In re*, 1 Jur. (N.S.) 921.

The amendment of a petition, by adding the name of a next friend, does not render it necessary that the petition should be reanswered. *Medow, In re*, 33 L. J., Ch. 742; 10 L. T. 185; 12 W. R. 595.

Where the petition was defective in not shewing a clear title, the court, though leave was given to amend, made an order that the costs of the day's attendance should not be allowed. *Proctor, In re*, 16 Jur. 233.

Where, after a petition to wind up a company had been opened, and the evidence gone into, counsel for the respondent raised the point that the petition was demurrable, the court gave leave to amend the petition on the ground that it is the duty of the respondent to be prompt with a demurrer, and that he should have insisted upon the court giving a decision upon the demurrer before the evidence was gone into. *White Star Consolidated Gold Mining Co., In re*, 48 L. T. 815.

Opening—Two Petitions.]—Where two petitions are presented in the same matter, the first presented is entitled to be first opened. *Mallorie, In re*, 1 H. & Tw. 435.

Where there are two petitions appealing from an order, one to the effect that no relief ought to have been granted, and the other that a greater measure of relief ought to have been granted, it is more convenient that the petition asking the relief should be opened first. *Neate* v. *Pink*, 3 Macn. & G. 476; 21 L. J., Ch. 574; 16 Jur. 69.

Branch of Court.]—The Consolidated Order VI. r. 6, does not apply to a charity matter so as to render it necessary, when a petition has been presented in one branch of the court, that all subsequent petitions in respect of the same charity should be presented in the same branch of the court. *Watts, In re*, 8 Jur. (N.S.) 204; 10 W. R. 365.

The rule which requires applications to be made in the same branch of the court:—Held, not to apply to applications for the payment of dividends upon sums paid into court in the matter of a private act of parliament. *Bilston Curacy, In re*, 10 W. R. 516. S. P., *Hayter, Ex parte*, 10 W. R. 557.

Under the chancery procedure amendment act, one vice-chancellor has jurisdiction to hear a petition for another vice-chancellor. *Holloway* v. *Phillips*, 22 L. J., Ch. 1091; 17 Jur. 875.

Where a petition is presented in two matters which have been dealt with by different branches of the court, it is proper, in the absence of special circumstances, that the petition should be presented in that branch of the court where the

prior order in date has been made ; and leave should be obtained in the usual way for the transfer into that court of the matter in which the subsequent order has been made. *Browse, In re*, 12 Jur. (N.S.) 153 ; 14 W. R. 298.

Jurisdiction—Court of Appeal.]—The court of appeal has no jurisdiction to hear an original petition. *Dunraven and Aberdare Coal and Iron Co., In re*, 33 L. T. 371 ; 24 W. R. 37.

Abatement.]—Interim order on petition in an abated suit in the nature of an injunction for a limited time, to protect property in question in that suit, but administered in a suit before another branch of the court, giving the petitioner an opportunity of applying in such other branch of the court, he undertaking to revive or otherwise make himself a party to the abated suit. *Fisher* v. *Fisher*, 4 Hare, 196 ; 14 L. J., Ch. 264 ; 9 Jur. 200.

On a petition under the lands clauses act to sanction an investment in land, an order was made approving the investment, and directing a reference as to title. Before the order was fully worked out the petitioner died. On the application of his executors, it was ordered that the proceedings should be revived for their benefit. *Foul, In re*, 42 L. J., Ch. 900.

See supra, PARTIES (CHANGE OF).

Order on.]—The court makes no declaration of right upon a petition, but prefaces the order with a statement of opinion. *Sharshaw* v. *Gibbs*, 1 Kay, 333 ; 23 L. J., Ch. 451 ; 18 Jur. 330 ; 2 Eq. R. 314.

When unauthorised.]—A petition was presented in the names of A. and B., but without the authority of A. :—Held, that, having regard to the rights of the respondents, the petition could not be ordered to be taken off the file on the application of A. *Turbuck* v. *Turbuck*, 6 Beav. 134.

Dismissal of—Order not passed and entered.]—When minutes of an order for winding up a company had been delivered out, but the order had not been passed and entered, the court by consent dismissed the petition. *Crown Bank, In re*, 59 L. J., Ch. 739 ; 44 Ch. D. 634 ; 62 L. T. 823.

Filing Copy.]—A petitioner having refused to deliver the original petition, for the purpose of being filed with the clerk of the reports, prior to the order made upon its being passed, leave was given to the respondents to file in its stead the copy of the petition with which they had been served. *Andrews* v. *Walton*, 1 Myl. & C. 360.

A petition, presented at the rolls, was afterwards heard by the Lord Chancellor, who made an order upon it, but before the order was passed the original petition was lost. The Lord Chancellor allowed a copy of it, certified by the under-secretary at the rolls to be a true copy, to be filed, in pursuance of the 27th of the new orders of December, 1833, instead of the original petition. *Sanderson* v. *Walker*, 1 Myl. & C. 359.

Where original petition has been lost, the copy left with the court may be filed in its place. *Smith* v. *Hardwood*, 1 Sm. & G. 137 ; 1 W. R. 111.

A petitioner having refused to file the original petition, it was ordered that the respondent be at liberty to file a copy, and that the petitioner do pay the respondent his costs of the application. *Devonshire, In re*, 32 Beav. 241.

Petitioners neglected to file the petition and had lost it. On the application of the respondents, liberty was given to file a copy, and the petitioners were ordered to pay the costs of the application. *Anglo-Greek Steam, &c. Co., In re*, 35 Beav. 419.

Costs.]—A petition which the court has no jurisdiction to entertain may be dismissed with costs, semble. *Isaac, In re*, 4 Myl. & C. 11.

—— **Two Petitions.**]—When two petitions are presented on the same day in the same matter, the court will order the costs of the more perfect petition only to be paid out of the fund, notwithstanding that the less perfect petition was presented first. *Pring's Trust, In re*, 42 L. J., Ch. 473 ; 28 L. T. 467.

Where two petitions with the same object are bonâ fide prepared by different parties, the costs of both will be allowed ; but where solicitors were aware that a petition had been presented, and nevertheless persisted in presenting another for the same object, no costs were allowed on the second petition. *Chaplin, In re*, 33 L. J., Ch. 183 ; 9 L. T. 677 ; 3 N. R. 289.

—— **Tender for—Respondent not Interested.**]—When a petitioner does not, on serving the petition upon a respondent who has no interest in the matter, tender him a sum sufficient to enable him to consult a solicitor as to the petition, the petitioner must pay the costs of his appearing. *Wood* v. *Boucher*, 40 L. J., Ch. 112 ; L. R. 6 Ch. 77 ; 23 L. T. 723 ; 19 W. R. 234.

If a petitioner, on serving a petition on a respondent, the necessity for whose appearance is a matter of doubt, at the same time offers him 40*s.* in order to enable him to get legal advice, and the respondent afterwards appears, the court will consider whether the appearance is justified or not, and if it finds that the appearance was not justified, will not order the petitioner to pay such respondent's costs of appearance. Otherwise the respondent must have his costs of appearance. *Duggan, In re*, L. R. 8 Eq. 697.

—— **Party Served and Appearing.**]—A party who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Garey* v. *Whittingham*, Turn. & R. 405. *But see* note, *id.* 407. *S. C.*, 2 L. J. (o.s.) Ch. 16.

A party who had been served with a petition, and had appeared upon it, was held entitled to the costs of his appearance, although nothing was prayed against him, and he had no interest in the result of the petition. *Lodge* v. *Robins*, 9 L. J., Ch. 331 ; 4 Jur. 478.

A party served with a petition held not to lose the costs of his appearance merely because his counsel at the hearing had raised an unsuccessful opposition. *Stevens, Ex parte*, 2 Ph. 772 ; 13 Jur. 2.

Where an unnecessary party had been served with a petition solely in consequence of a claim set up by him, he was left to bear his own costs. *Shrewsbury School, In re*, 1 Macn. & G. 85 ; 13 Jur. 201.

Where a party is served with a petition or

notice of motion, he is not bound to take upon himself the responsibility of deciding whether his interest in the matter is such as to render it unnecessary for him to appear, and he will not be deprived of the costs of his appearance on the ground that he is not interested in the matter. *Bamford* v. *Watts*, 2 Beav. 201.

A defendant who has been served with a petition, though he has no interest in the subject-matter of it, is entitled to the costs of appearance. *Marks* v. *Marks*, 18 L. J., Ch. 171.

A party served with a petition appeared merely to ask for his costs:—Held, not a sufficient reason to deprive him of them. *Bruce* v. *Kinloch*, 11 Beav. 432.

A solicitor was concerned in a cause for two parties, and a petition was served on him which affected one only, but without any intimation in respect of which of these parties he was served. He appeared on the hearing for both:—Held, that the party having no interest in the matter was entitled to his costs. *Kilminster* v. *Noel*, 12 Beav. 246; 19 L. J., Ch. 25.

A respondent unnecessarily served is not, as a matter of course, entitled to his costs of appearing. *Birch, In re*, 2 Kay & J. 369.

The court disapproves of the appearance of parties on the hearing of a petition, though served, where their appearance is unnecessary, and their costs will be disallowed. *Day* v. *Croft*, 19 Beav. 518.

Where a person has been properly served with a petition, he has a right to have his costs of appearance. *Burnell, In re*, 10 Jur. (N.S.) 289; 10 L. T. 127; 12 W. R. 568.

Where, upon a petition being presented, parties having no sufficient interest in the subject-matter to make their appearance necessary are served and appear, they are entitled to their costs. *Clarke* v. *Simpson*, 17 L. T. 559.

XVI. MOTIONS AND RULES.

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g. Costs, 678.

a. In what Cases.

Disposing of whole Subject of Action.]—The defendant was in the employment of the plaintiffs, the executors of P., who were carrying out certain contracts with a railway company on behalf of P.'s estate, for some time previous to 1895. While in their employment he measured up and entered the work done by the plaintiffs for the railway company. During a part of the time he also acted in some capacity on behalf of the railway company, and received a part of his salary from them. In April, 1895, the defendant of his own accord left the plaintiffs' service, and took with him the books or documents in which he had entered the said measurements. The plaintiffs brought this action for the recovery of the documents, and now moved for an interlocutory order for their delivery:—Held, on the evidence, that the papers had never been in the defendant's possession in any capacity but that of clerk to the plaintiffs; that his taking them away was wholly improper, and that he ought to be ordered to give them up in four days, notwithstanding that their recovery was the sole object of the action. *Whitwham* v. *Moss*, 73 L. T. 57.

Court will not, upon motion, make an order which will decide the merits of the cause. *Like* v. *Beresford*, 3 Bro. C. C. 366.

An order embracing the whole subject of the suit cannot be made on motion without express consent. Notice to the other parties is not sufficient if they do not attend. *Ib.*

It is very common in equity to decide a question on motion, where all the facts appear upon the bill and answer, and there is nothing to dispute but the law of the court. *Revel* v. *Hussey*, 2 Ball & B. 286; 12 R. R. 87.

A testator devised and bequeathed certain copyhold and leasehold estates to trustees, upon trust to pay the rents and profits to M. A., for her life, to her separate use, and without power of anticipation, and a testatrix gave certain freehold estates to trustees in trust for the same M. A., for her life, to her separate use, and without power of anticipation. M. A. was a feme sole at the date of the testator's will, and of his death. She was also a feme sole at the date of the testatrix's will, but she was married at the death of the testatrix. M. A. joined with her husband in granting annuities to the plaintiff, charged upon the estates bequeathed by the testator, and the estates devised by the testatrix. On the insolvency of the husband, a bill was filed by the plaintiff to have the annuities paid out of the estates; and upon motion for an injunction and receiver, the court granted the motion as to the estates devised by the testator, but not as to those devised by the testatrix, on the ground that the rents of the former estates ought to be secured till the question in the cause could be determined, which could not be decided on an interlocutory motion. *Tullett* v. *Armstrong*, 1 Keen, 428; 5 L. J., Ch. 303.

Subsequent Orders.]—Where papers upon which a lien is claimed had been delivered up, pursuant to an order upon petition at the rolls, pending an appeal upon which that order was ultimately reversed:—Held, that restitution of the papers should be ordered upon motion and affidavit. Such a motion is independent, and is not open to any objection, upon the ground that an order upon petition cannot be varied by motion. *Richards* v. *Platel*, 11 L. J., Ch. 409.

Under the charity petition act, where one order has been obtained on petition, a subsequent order may be obtained on motion. *Chipping Sodbury School, In re*, 5 Sim. 410.

After an order upon petition under the friendly society acts, the subsequent orders may be obtained on motion. *Friendly Society, Ex parte*, 10 Ves. 287.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the court as to the costs merely may be entertained by motion, but if it is by way of further directions it must be by petition. The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves. *Shadbolt, Ex parte, Fox, In re*, 2 Deac. & C. 286; 1 L. J., Bk. 82.

A motion cannot be made upon a decretal order till it is passed with the registrar. *Smith* v. *Reynolds*, Mos. 69.

The court will not determine matters in a summary way upon motion that have been reserved between parties till after the master has made his report. *Cooke* v. *Gwyn*, 3 Atk. 689.

Wrong Parties.]—Where wrong party sued, it must be shewn by plea and not by motion. *Harrison* v. *Haule*, Cary, 61.

Setting aside Order.]—An order made upon petition may be set aside on motion, when the objection is grounded upon the want of jurisdiction and not upon error in the substance of the order itself. *Dovenby Hospital, In re*, 1 Myl. & C. 279; 5 L. J., Ch. 212.

For Attachment of the Person.]—*See* ATTACHMENT.

To Dismiss for want of Prosecution.]—*See* ante, col. 226.

For Judgment in Default of Pleading.]—*See* post, cols. 863 et seq.

For Judgment on Admissions in Pleadings.]—*See* ante, cols. 916 et seq.

b. NOTICE OF.

1. When Necessary.

Notice must be given for time to answer affidavits, unless the motion is made when the petition is called on. *Binns, Ex parte*, 3 Deac. & C. 189.

Every motion for an order which may have the effect of delaying the cause must be made on notice. *Brien* v. *Brien*, 1 Hog, 389.

Notice must be given to the other side of the application to discharge an order. *Lowe, Ex parte, Aaron, In re*, 1 Deac. & C. 43.

Notice must be given of a motion made to the court of appeal, under the Judicature Act, Order XL. r. 4, to set aside the judgment entered at the trial before a jury and enter judgment. *Jones* v. *Davis*, 36 L. T. 415.

Orders Ex parte or Of course.]—*See* supra, JUDGMENTS AND ORDERS, ante, col. 584.

2. Form and Contents.

Particulars.]—A notice of motion for leave to file a supplemental answer, stating that "certain facts," without specifying them, are intended to be introduced, is irregular. *Haslar* v. *Holds*, 2 Beav. 236; 3 Jur. 996.

A notice of motion should fully state the matter of the application, so that if the court should say "be it so," the office may be enabled, by following the notice, to frame the order. Where the notice of motion was for leave "to amend the bill in the several particulars specified in an affidavit," the court refused to make any order. *Curreen* v. *Walsh*, 1 Ir. Eq. R. 200.

Amendments moved ought properly to be stated. *Carnatic (Nabob)* v. *East India Co.*, 1 Ves. J. 388.

Upon an application to file a supplemental answer, the defendant should state, on his notice of motion, the facts intended to be introduced therein. *Smith* v. *Hartley*, 5 Beav. 432.

See PLEADING (AMENDMENT).

Notice of motion to make a consent a rule of court, should set forth the substance of the consent. *Smith* v. *Martin*, 4 Ir. Eq. R. 168.

A party quarrelling with the report of bad title, should move to set aside, not to send it back to the officer to be reviewed, and the notice of motion ought to state the grounds upon which the party seeks to set aside the report. *Vincent* v. *Thwaites*, 4 Ir. Eq. R. 689.

A notice of motion to have a receiver's account sent back to be reveiwed, must specify the items objected to: it is not sufficient to refer for them to the affidavit used upon the motion. A motion to vacate the recognizance at the same time that the receiver applies to be discharged is premature. *D'Arcy* v. *Sherry*, 2 Ir. Eq. R. 411.

Where Motion to be made.]—A notice that the court will be moved at the royal courts of justice is sufficient, though the judge be sitting in chambers. *Petty* v. *Daniel*, 56 L. J., Ch. 192; 34 Ch. D. 172; 55 L. T. 745; 35 W. R. 151.

Two Matters.]—Application that documents may be produced, &c., and that publication may be enlarged, till, &c., being matters not only not inconsistent but connected with and depending on each other, may be made by one motion. *Firkins* v. *Lowe*, 13 Price, 193; M'Clel. 73.

Affidavits.]—Where affidavits are intended to be read in support of a motion made on notice, the general rule of the court requires that notice that such affidavits are filed and are intended to be read, be given in the notice of motion; and unless this be done the affidavit cannot be read. The rule does not apply to affidavits of service of notice of motion. *Rock* v. *Unett*, Younge, 268.

See ATTACHMENT.

Motion by a plaintiff for the postponement of the cross-examination of his witnesses by the defendant until after the defendant had filed the last of the affidavits refused, on the ground that the notice of motion wrongly recited that the time allowed to the defendant for filing his affidavits had been enlarged. *Morey* v. *Vandenbergh*, 14 L. T. 542.

The court has discretionary power to permit the defendant to cross-examine the plaintiff's witnesses before filing his own affidavits. *Ib.*

A notice of motion and affidavit in support professed, in its title, to give the names of all the parties, but omitted one. The court would not proceed, but gave leave to amend and re-swear. *Davis* v. *Barrett*, 7 Beav. 171.

Title.]—A motion for leave to file a supplemental bill was entitled in the suit which it was proposed to institute:—Held, that the court could neither hear the motion nor allow the title to be amended. *Morrall* v. *Pritchard*, 11 Jur. (N.S.) 969; 13 L. T. 425; 14 W. R. 172.

Service before Appearance—Leave of Court.]—Service of a notice of motion upon a defendant before he has appeared to the bill is irregular, unless the leave of the court has been previously obtained. *Hill* v. *Rimell*, 2 Myl. & C. 641; 8 Sim. 632; 7 L. J., Ch. 82; 2 Jur. 45.

Where a motion is made with the leave of the court, if the notice does not mention that it will be so made, the defendant may disregard it. *Ib.*

A defendant who has not appeared to the bill, and whose time for appearance has not expired, may safely disregard a notice of motion in which

it is not stated that the notice is served by leave of the court. *Moggridge* v. *Thomas*, 2 Coop. C. C. 166. *And see cases there collected.*

A plaintiff cannot before appearance serve a notice of motion on defendant, without first obtaining the special leave of the court; and the notice of motion should state that such leave has been given. *Jacklin* v. *Wilkins*, 6 Beav. 607; 13 L. J., Ch. 32.

Leave to serve notice of motion upon defendants before their appearance in the cause does not include also leave to give short notice of the motion; and if other than the regular period of notice be given leave for that purpose must be obtained, and will not be implied from the distance of the place of service. *Hart* v. *Tulk*, 6 Hare, 611; 18 L. J., Ch. 162. See *Newton* v. *Chorlton*, 10 Hare (App.) xxvii.; 1 W. R. 257, 266.

Short Notice—Leave of Court.]—Where a party applies for special leave to serve short notice of motion he must distinctly state to the court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. But in a case where short notice of a motion had been irregularly applied for and served, but the party served had not been injured by the irregularity, the court exercised its discretion under Ord. LIX. r. 1, and disregarded the irregularity and heard the motion on the merits. *Dawson* v. *Beeson*, 52 L. J., Ch. 563; 22 Ch. D. 504; 48 L. T. 407; 31 W. R. 537—C. A.

A party having leave from the court to move on short notice should state in the notice that he moves on short notice by leave of the court. *Harris* v. *Lewis*, 8 Jur. 1063.

Leave given to serve notice of motion before appearance does not also include leave to serve short notice; and if that be required, it must be expressly given; but where short notice has been given without leave of the court to that effect, it is not of course to order the party moving to pay the costs, unless any costs have been specially occasioned to the other parties by the irregularity. *Newton* v. *Chorlton*, 10 Hare (App.) xxvii.; 1 W. R. 257, 266. See *Hart* v. *Tulk*, supra.

Where special leave is obtained to serve short notice of motion with a copy of the bill it must be so stated in the notice, otherwise the motion will be refused. *Chambers* v. *Toynbee*, 10 L. T. 860; 12 W. R. 1100.

—— **In Vacation.**]—Leave to serve short notice of motion cannot be given by the chief clerk in vacation any more than during the sittings. *Conacher* v. *Conacher*, 29 W. R. 230.

—— **When given.**]—Plaintiff cannot move to amend his bill on an affidavit of equitable facts without notice to defendant; but if circumstances of case require it, and it is late in the term, court will order defendant to accept short notice of motion. *Harrison* v. *Delmont*, 1 Price, 117.

Short notice of motion to take bill pro confesso allowed, notwithstanding Consolidated Ord. XXII. r. 3. *Wedderburne* v. *Thomas*, 10 Jur. (N.S.) 92.

Short notice of motion to take the bill pro confesso allowed, notwithstanding Consolidated Ord. XXII. r. 3. *Newton* v. *Carr*, 6 N. R. 347.

Time for giving—For what Day.]—Where an order in chambers was made on the 14th, and notice of motion was given on the 19th for the "21st, or such other day as counsel can be heard" (this not allowing two clear days after notice):—Held, that the motion could be properly made on the 22nd, which was the eighth and last day for the motion under Ord. LIII. r. 4. *Forrest* v. *Davies*, 26 W. R. 534.

On the 20th of December, 1875, the plaintiffs served on the defendants a notice that the court would be moved on the 22nd, or as soon after as counsel could be heard, to reinstate for argument a demurrer in which judgment had been given for the defendants in the absence of the plaintiffs. On the 11th and 12th of January, 1876, the defendants appeared in court by their counsel to oppose the motion, but no one appeared for the plaintiffs:—Held, that the notice was bad on two grounds: first, because under Ord. LXI. r. 1, the Michaelmas sittings terminate on the 21st of December; and second, because there were not two clear days between the 20th and 22nd, as required by Ord. LIII. r. 4; that the defendants therefore were not bound to appear, and were not entitled to their costs of doing so. *Daubney* v. *Shuttleworth*, 45 L. J., Ex. 177; 1 Ex. D. 53; 34 L. T. 357; 24 W. R. 321.

When a notice of a motion is personally served on a party out of court, it should be of a motion to be made on a particular day, and not on "the first opportunity." *Creed* v. *Creed*, 2 Ir. Eq. R. 32.

A notice of motion was given for a day not in the sittings of the court:—Held, that the notice was good. *Daubney* v. *Shuttleworth* (1 Ex. D. 53), overruled on this point. *Coulton, In re, Hamling* v. *Elliott*, 56 L. J., Ch. 312; 34 Ch. D. 22; 55 L. T. 464; 35 W. R. 49—C. A.

When a matter is sent to the official referee for inquiry and report, and upon the report being made one party applies that the action be dismissed, a two days' notice of motion under Ord. XL. r. 7, is sufficient. *Larkin* v. *Lloyd*, 64 L. T. 507.

Notice of motion may be given for any day in term, though it is not the course of the court to hear opposed special motions except on the days appointed for that purpose. *Chaffers* v. *Baker*, 5 De G. M. & G. 482; 2 Eq. Rep. 748; 2 W. R. 546.

Where notice of motion is given for the 2nd November, or so soon after as counsel can be heard, and the motion is made on the 4th November, which day by an error in the printed list, was not appointed for motions, the case will not be postponed on the ground that the parties served are not prepared. *Electric Telegraph Co. of Ireland, In re, Budd, Ex parte*, 5 L. T. 249; 10 W. R. 4.

Notice of motion on Saturday must be given for Tuesday, not Monday. *Maxwell* v. *Phillips*, 6 Ves. 146.

A party ordered to take a step within a fixed time, or that the bill should be dismissed, if desirous of an extension of the time, must give notice of motion, so as to enable him to bring it on before the expiration of the time fixed. *Huntingtower (Lord)* v. *Sherborn*, 5 Beav. 380.

Notice of motion in a cause cannot be given before service of a subpœna; nor is the defect cured by the defendant appearing in order to insist on the objection of irregularity. *Lampard* v. *Padfield*, 2 L. J. (O.S.) Ch. 30.

If notice of a motion to dismiss a bill for want of prosecution is given for too early a day, the defect is not cured by the motion being

accidentally postponed to a day when it might have been regularly made. *De Geneve* v. *Hannam*, 1 Russ. & M. 494.

—— **Extension of Time.**]—Where notice of motion has not been given in sufficient time, owing to a bonâ fide mistake, the court may, in its discretion, allow the party in default to shew the reason of the mistake by affidavit, and allow the motion to be made on a later day. *Smith* v. *Smacksmen Insurance Co.*, 32 W. R. 184.

Amendment of.]—Where proceedings for expunging a trade mark have been commenced by notice of motion, the subsequent alteration or amendment of the notice in a mere matter of detail not affecting the nature of the relief claimed, such as by striking out the name of a respondent improperly added, or by changing the date for the hearing of the motion, does not make it a new notice of motion requiring to be taken to the writ department of the central office to be re-marked with the name of the judge in rotation, under Rules of Supreme Court, 1883, Ord. V. r. 9 (*c*), or requiring the leave of the court to use at the hearing affidavits filed prior to the alteration or amendment. *King & Co.'s Trade Mark, In re*, 62 L. J., Ch. 153; [1892] 2 Ch. 462; 66 L. T. 491.

A notice of motion having been given for a day not in the sittings, the court amended the notice in this respect. *Williams* v. *De Boinville*, 17 Q. B. D. 180; 54 L. T. 732; 34 W. R. 702.

A notice of appeal by motion from the order of a judge in chambers to a divisional court is bad if the day for which it is given falls at a time when no court could by any possibility be sitting. *Maullin* v. *Rogers*, 55 L. J., Q. B. 377; 55 L. T. 121; 34 W. R. 592. *But see preceding case*, and *Coulton, In re*, supra.

On an application for an interlocutory injunction, the court, on being satisfied that under the circumstances no injustice would be done, gave leave to amend by claiming a receiver. *Hubbuck* v. *Helms*, 56 L. J., Ch. 536; 56 L. T. 232; 35 W. R. 574.

On motion for judgment in default of defence a defence has been put in before the hearing, but as it disclosed no real grounds of defence, the court ordered the notice of motion to be amended by making it a motion for judgment on admissions in the defence. *Gill* v. *Woodfin*, 53 L. J., Ch. 617; 25 Ch. D. 707; 50 L. T. 490; 32 W. R. 393—C. A.

3. Service of.

Personal Service.]—A defendant had not appeared to a bill filed in 1874, but an appearance had been entered for him by the plaintiff. The defendant was attached for not answering, and remained in prison until liberated under the act:—Held, that personal service of a notice of motion in the cause without the leave of the court first obtained was regular. *Sanders* v. *Miller*, 24 W. R. 392. *See* Rules of Supreme Court, 1883, Ord. LXVII. r. 5.

On Defendant who fails to Appear—Filing.]—A notice of motion is a document within the meaning of Ord. XIX. r. 6, that may be served on a defendant who has failed to appear by filing the same with the proper officer. *Morton* v. *Miller*, 45 L. J., Ch. 613; 3 Ch. D. 516; 24 W. R. 723—C. A.

On whom — Servant — Attorney — Agent.]—Service of a rule upon "a female servant at the lodgings of the defendant" is not good service. *Price* v. *Thomas*, 11 C. B. 543.

An affidavit that the deponent served "the defendant with a true copy of the rule, by delivering and leaving with one H., at the defendant's residence, situate, &c., a true copy of the rule, and at the same time shewing the original thereof, and that H. promised to deliver the copy to the defendant," is insufficient, as it does not shew a service on any person connected with the defendant's residence. *Taylor* v. *Whitworth*, 9 M. & W. 478; 1 D. (N.S.) 600; 11 L. J., Ex. 137.

An affidavit stating that service of a rule had been made upon A., "who acts as the attorney or agent of the defendant in this cause," is sufficient. *Pattrick* v. *Rickards*, 3 D. & L. 573; 15 L. J., Q. B. 204.

Where a rule is served by leaving a copy with a servant, an inquiry should be subsequently made of the servant whether the master had received the copy. *Panter* v. *Seaman*, 5 N. & M. 679.

At the defendant's residence there was a board stuck up, with the words, "Messages and parcels to be left at" a particular place. A rule was served at that place, by leaving it with a woman, who said she was in the habit of receiving messages and parcels for the defendant. The woman afterwards said she had given it to him:—Held, sufficient service. *Engelhart* v. *Morgan*, 1 D. P. C. 422.

Service of a rule on an attorney by leaving it with a laundress at his chambers, who stated that she was authorised to receive notices and papers for him, is insufficient. *Dodd* v. *Drummond*, 1 D. P. C. 381. S. P., *Alanson* v. *Walker*, 3 D. P. C. 258.

So is service on the laundress's servant. *Smith* v. *Spicer*, 2 D. P. C. 231.

In 1849 a bill was filed, purporting to be exhibited by a married woman suing in respect of her separate estate, by a person named as her next friend, but who, it afterwards appeared, had died two days before the bill was filed. A year afterwards a new next friend was, without his knowledge, substituted for the deceased. The plaintiff's solicitor afterwards became insolvent, and left the country. A notice of motion to dismiss the plaintiff's bill, for want of prosecution, with costs, was served on the agent of the insolvent, the solicitor for the plaintiff in the cause; and thereupon an order was made, dismissing the bill, with costs, to be paid by the new next friend. Upon a motion by the new next friend to vary the order, by charging the costs on the plaintiff's solicitor, or to limit the liability of the new next friend to the payment of costs whilst he was on the record as such:—Held, that the notice of the motion to dismiss had been sufficiently given by service on the agent of the plaintiff in the cause, and that the form of the order, charging all the costs on the new next friend, was correct. *Bligh* v. *Tredgett*, 5 De G. & Sm. 74; 21 L. J., Ch. 204; 15 Jur. 1101.

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the court, the respondent should serve

the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service. *Drake, Ex parte*, 3 Deac. & C. 284.

—— **Wife.**]—Service of notice of motion, where the defendant had left his home and could not be found, and the wife of the defendant had left his home and gone to her own relations, directed to be effected by being served on the wife, and a copy thereof left at the defendant's house, and advertisements inserted in local newspapers. *Mellows* v. *Bannister*, 31 W. R. 238.

—— **Married Woman.**]—A married woman is entitled to a separate notice of a motion for a receiver of her separate estate. Secus, as to a motion for her answering separately. *Richardson* v. *De Held*, 1 N. R. 5.

—— **Scotch Company.**]—Service of a notice of motion on a Scotch company not party to the suit at its office in London, held good. *Maclaren* v. *Stainton*, 16 Beav. 279; 22 L. J., Ch. 274; 1 W. R. 70. *See now* Ord. XI.

Putting under Door.]—Service of a notice or a rule by putting it under the door of an attorney's office is not good service without some evidence that it has duly come to hand. *Burdett* v. *Lewis*, 7 C. B. (N.S.) 791.

By Post.]—Where a copy of a rule nisi has been sent in a letter by post to a defendant resident in the country, together with the original rule, and the letter is received back, indorsed "Received a copy of the within rule," and that indorsement is signed by the defendant, it will be deemed a sufficient service. *Smith* v. *Campbell*, 6 D. P. C. 728.

Avoiding Service.]—Where regular service of a rule is endeavoured to be dispensed with, on the ground of absence or otherwise, the affidavit must shew what efforts have been made to serve the party before secondary service will be allowed. *Mudie* v. *Newman*, 2 D. P. C. 639. *See* Rules of Supreme Court, 1883, Ord. LXVII. r. 6; and *O'Donnell* v. *Kearney*, Ir. R. 4 Eq. 206.

Where a person keeps out of the way to avoid being served personally with a rule, preparatory to obtaining an attachment against him, and it is clearly made out to the satisfaction of the court, the court will dispense with personal service. *Green* v. *Prosser*, 2 D. P. C. 99.

A notice of motion for a decree cannot be given by substituted service. *Lechmere* v. *Clamp*, 30 L. J., Ch. 651; 9 W. R. 355.

Party out of the Jurisdiction.]—When a party to a suit, being a personal representative out of the jurisdiction, has been served with a copy of the bill, and it is desired to serve him with a notice of motion for a receiver, he must be personally served, and reasonable notice given him. *Kavanagh* v. *Wall*, 18 L. T. 18.

The order for leave to serve the notice out of the jurisdiction is to be drawn up and served, and is to specify the time allowed for filing affidavits in reply. *Meek* v. *Ward*, 1 W. R. 504; 10 Hare (App.) i., lv.

Notice of motion for decree, under Consolidated Ord. XXXIII. r. 4, allowed to be served on defendant in Demerara, an appearance having been entered for her under Consolidated Ord. X. r. 7 (4). *Middleton* v. *Chichester*, 1 N. R. 255.

A letter to the plaintiff's solicitor acknowledging the receipt of a notice of motion for a decree from a defendant out of the jurisdiction, without stating that he consented to be bound by any such decree, is not sufficient proof of notice of motion under the order of the 7th August, 1852, s. 1, No. 22. *Mendes* v. *Guedalla*, 5 L. T. 308.

The leave of the court is necessary, in order to serve personally a party out of the jurisdiction with notice of a motion in a cause, although such party has been served out of the jurisdiction, under the statute 4 & 5 Will. 4, c. 82, with the subpœna to appear and answer, and an appearance has been entered for him in the suit under that statute. *Green* v. *Pledger*, 3 Hare, 165; 13 L. J., Ch. 213; 8 Jur. 801.

If a party in a suit may be served out of the jurisdiction, under the statute 4 & 5 Will. 4, c. 82, in respect of any part of the subject of the suit, the service is good for all the other purposes of the suit. *Ib.*

Where the defendant is out of the jurisdiction, and his solicitor had absconded, service of notice of motion at the solicitor's address for service held sufficient, though the place mentioned in such address was now untenanted. *Newton* v. *Thomson*, 16 Jur. 1008.

An originating notice of motion to rectify the register of trade marks, by removing therefrom the trade marks of a foreign company having no place of business in the United Kingdom, was served upon the company in Paris, without any leave for service out of the jurisdiction. The company and the comptroller-general were named as respondents to the notice of motion:—Held, that the company ought not to have been so named, and that the service was wrong, and must be set aside. Directions given for procedure. Semble, that the court has no power to give leave to serve such a notice of motion out of the jurisdiction. *Compagnie Générale d'Eaux Minérales, In re*, 60 L. J., Ch. 728; [1891] 3 Ch. 451; 40 W. R. 89.

Production of Original.]—It is not necessary to produce the original rule on a service of a copy, except in cases where the party is to be brought into contempt. *Holmes* v. *Senior*, 4 M. & P. 828; 7 Bing. 162. *See* Rules of Supreme Court, 1883, Ord. LXVII. r. 1.

Effect of Delay.]—It is not sufficient to make a party guilty of laches that he has delayed for an unnecessary time to serve a rule, unless it be shewn that the other party is prejudiced by the delay. *Gurney* v. *Gurney*, 1 B. C. Rep. 119; 3 D. & L. 734; 15 L. J., Q. B. 265.

Irregularity.]—It is not open to one defendant on an interlocutory application to object to the irregularity of the service of and appearance by another defendant, if such other defendant, having notice of the application, does not himself object on the ground of such irregularity. *Green* v. *Pledger*, 3 Hare, 165; 13 L. J., Ch. 213; 8 Jur. 801.

—— **When Appearance a Waiver.**]—Where the party against whom a rule nisi for an attachment was obtained appeared, and objected that the rule nisi had not been personally served, the court, notwithstanding, made the rule absolute. *Levy* v. *Duncombe*, 3 D. P. C. 447; 1 C. M. & R. 737; 5 Tyr. 490; 1 Gale, 60.

Appearing by counsel to object to a notice of

motion, on the ground of want of personal service, is a waiver of the objection. *Harvey* v. *Hall*, 23 L. T. 391.

Where a copy of a rule served was not intitled in any cause, the party's appearing by counsel to take the objection does not operate as a waiver of the irregularity. *Warner* v. *Wood*, 3 D. P. C. 262.

If an imperfect copy of a rule is served, the party served must appear to it, and by such appearance he does not admit that he is properly brought into court, so as to prevent him from taking the objection to the form of the copy of the rule. *Wood* v. *Critchfield*, 1 D. P. C. 587; 1 C. & M. 72; 3 Tyr. 235; 2 L. J., Ex. 2.

If a party against whom a rule is granted obtains its enlargement, he cannot afterwards object that it was not personally served. *Cartwright* v. *Blackworth*, 1 D. P. C. 489.

A formal objection to a notice of motion is waived by the party appearing and requesting further time to oppose it. *Morland, Ex parte*, 3 Deac. & C. 248.

When a defendant appears and takes a technical objection to a notice of motion the court may give leave to amend immediately, and serve the amended notice there and then, and proceed at once to try the case on the merits. *Heywood* v. *Wait*, 18 W. R. 205.

c. The Application.

Extension of Time.]—Where a motion for a new trial is to be made conditionally on the result of a decision pending in the court of appeal in a similar cause, notice of motion should be given within the usual time, and application be then made to the court to postpone the hearing till the decision in the court of appeal has been obtained. The court has a full discretion over such applications, and is not limited to cases only where parties have been misled. *Puckett* v. *Short*, 32 W. R. 123.

Rule Nisi—Chancery Division.]—In the chancery division a rule nisi will not be granted. *Copp, In re*, 32 W. R. 25.

—— **Under New Rules.**]—The court will grant a rule nisi for a mandamus to the overseers of a parish within the district of a school board to pay precepts issued by such board, or to levy rates for the purpose of paying them. Ord. LII. of the Rules of the Supreme Court, 1883, does not apply to applications for writs of mandamus, inasmuch as by Ord. LII. r. 5, the practice in use before the making of the rules of 1883 with regard to such applications is preserved. *Gribthorpe School Board* v. *Gribthorpe Overseers*, 47 J. P. 727.

The effect of Ord. LII. of the Rules of the Supreme Court, 1883, is to repeal so much of s. 6 of the County Courts Act, 1875, as requires appeals from county courts to be made ex parte in the first instance. And it is now necessary to give notice of motion under that order before moving the queen's bench division on appeal from the decision of a county court judge. *Harris* v. *Galpin*, 47 J. P. 727.

Non-Appearance of Respondent—Affidavit of Service.]—An order dismissing an action for want of prosecution was made subject to production of an affidavit of service, no one appearing for the plaintiff. Shortly afterwards counsel appeared for the plaintiff, but the judge refused to have the case argued. No affidavit of service was sworn or filed until after the day on which the motion was made. The registrar drew up the order on production of an office copy of an affidavit of service sworn and filed after that day, omitting in the order the date of the affidavit. It appeared that since the passing of the judicature acts the rule in *Lord Milltown* v. *Stuart* (8 Sim. 34) had not been uniformly observed by the registrars:—Held, that, assuming the drawing up of the order on an affidavit sworn and filed after the day on which the motion was made to be irregular, the irregularity was not such that the court ought on that ground to discharge the order. *Secar* v. *Webb*, 53 L. J., Ch. 464; 25 Ch. D. 84; 49 L. T. 481; 32 W. R. 351—C. A.

Until altered by authority, the rule that where an order has been made upon motion for judgment by default the affidavit of service of notice of motion must be produced to the registrar by four o'clock of the day on which the order has been made, is the right one, and will be strictly enforced in this branch of the court after the end of the present sittings; until which date twenty-four hours' grace will be allowed and service within that time be considered sufficient. In *Secar* v. *Webb* (supra), the court of appeal did not decide that production of an affidavit three days after the date of the order was sufficient, but only (on the principle fieri non debet, factum valet) that, it being clear that the notice had been duly served, the lateness of production was not in itself, under the circumstances, a sufficient irregularity to justify them in discharging the order. *Rosier, In re*, *Jones* v. *Bartholomew*, 49 L. T. 442.

Where upon an application to the court by motion or petition, the party does not appear, no order can be made, unless the affidavit of service be made, at the latest, before the rising of the court on the day on which the application is made. *Milltown (Lord)* v. *Stuart*, 8 Sim. 34; 1 Jur. 940.

Where affidavits are intended to be read in support of a motion made on notice, the general rule of the court requires that notice that such affidavits are filed and are intended to be read be given in the notice of motion, and unless this be done the affidavit cannot be read. The rule does not apply to affidavits of service of notices of motion. *Rock* v. *Unett*, Younge, 268.

When a motion is made, and fails for want of production of office copy of the affidavit of service of notice of this motion, the motion made on a subsequent day must be supported by a new notice of that motion. *Cuthbert* v. *Fane*, 1 Jur. 890.

An order, obtained on affidavit of service, discharged with costs, on the ground of a misnomer of a party in the affidavit. *Salomon* v. *Stalman*, 4 Beav. 243; 10 L. J., Ch. 327.

The application of a party, by his counsel, for time to answer affidavits filed in support of a motion, whereupon time was given and affidavits filed, is not an appearance by that party on the motion entitling the other party to obtain the order on a subsequent motion day, without an affidavit of service, no counsel then appearing for the opposing party. *Hutton* v. *Hepworth*, 6 Hare, 319; 12 Jur. 835.

An order made upon affidavit of service of the notice of motion, must not depart from the terms of the notice, even though it be less extensive

than the notice, if such less extensive order may be more prejudicial to the party against whom it is made than would have been the larger order which was asked. The notice was, that the court would be moved to dismiss an original and a supplemental cause, or to direct the original cause to be put into the paper for hearing; the order made upon affidavit of service was, that the supplemental cause should be dismissed, and the original cause put in the paper. The court, upon motion, discharged the order. *Ib.*

A party obtained an order on motion, the other side not appearing, but the service of the notice of motion, though regular, was supported by an imperfect affidavit:—Held, that he could not subsequently verify the service, and that a new notice of motion must be given. *Barton* v. *Chambers*, 4 Beav. 547.

On the application of defendant's counsel, a motion stood over; when it came on again, it appeared that defendant had since changed his solicitor, but without order, and no counsel then appeared for him. The motion was granted on an affidavit of service. *Davidson* v. *Leslie*, 9 Beav. 104.

An affidavit of service is sufficient, if the service is sworn to have been effected "on the attorney or agent for the plaintiff in this cause." *Morris* v. *Bedward*, 9 D. P. C. 130.

Parties.]—On a motion to discharge an alleged irregular order, no parties can be heard in support of the application but those who have joined in the notice of motion to discharge it. *Stubbs* v. *Sargon*, 3 Beav. 408.

Some defendants may move to have proceedings taken off the file, without serving their co-defendants. *Hodson* v. *Ball*, 11 Sim. 456; 6 Jur. 160. Affirmed, 12 L. J., Ch. 80.

Notice of motion given on behalf of a relator in an information:—Held, irregular; it should be on behalf of the attorney-general. *Att.-Gen.* v. *Wright*, 3 Beav. 447; 10 L. J., Ch. 234.

A person, though not a party to a suit, may apply in it by motion (stating his title in the notice of motion), unless a long statement of facts is required to shew his title; and then he must apply by petition. *Jones* v. *Roberts*, 12 Sim. 189.

If a motion is intended to lay the foundation for a subsequent application against the solicitor of some of the parties, the solicitor, in his personal capacity, ought to be made a party to that motion. *Vansandau* v. *Moore*, 1 Russ. 441; 4 L. J. (O.S.) Ch. 177; 25 R. R. 101.

A. being sued at law on policy of insurance which he had made as B.'s agent; on motion for injunction on affidavit of B.'s residing abroad, A. must have notice. *Beachcroft* v. *Gordon*, 3 Anstr. 686.

Notice of motion for order of sale of crown debtor's mortgaged lands, under extent, should be given to mortgagee before motion. *Rex* v. *Coombes*, 1 Price, 207.

Where, after great delay, the solicitor of a deceased party was served with a notice of motion:—Held, that his duty to the court, as well as duty to the parties serving him, was to appear and set the matter right. *Chalie* v. *Gwynne*, 9 Beav. 319.

On what Materials made.]—A rule making the same order in several causes may be moved for on a single affidavit intitled in all the causes. *Barrack* v. *Newton*, 1 Q. B. 525; 10 L. J., Q. B. 182.

But two rules moved for under similar circumstances should be founded on distinct and separate affidavits; for as an indictment for perjury could not be sustained on the affidavits referred to in the second cause already sworn in the first, the court will refuse to act on them. *Reg.* v. *Mizen*, 1 D. (N.S.) 865; 6 Jur. 857.

On shewing cause against a rule obtained by the plaintiff to rescind a judge's order, which directed the master to review his taxation, it was objected on the part of defendant that there were no materials before the court to shew what the taxation had been; the defendant's counsel saying he had an answer on the merits, the court ordered the master's allocatur to be produced at once, without imposing any terms. *Ashcroft* v. *Foulkes*, 18 C. B. 261; 25 L. J., C. P. 202; 2 Jur. (N.S.) 449; 4 W. R. 457.

The court will not hear a motion founded on documents, unless counsel be furnished with a brief, and the solicitor be in attendance with the documents. *Curtis* v. *Darcy*, 6 Ir. Eq. R. 149.

A defendant cannot vary the title of the cause in a notice or affidavit used upon a motion in the cause. *M'Kiernan* v. *Kernan*, 4 Ir. Eq. R. 275.

Affidavit not served with Notice of Motion.]—A notice of motion to set aside an award, which would expire on the last day of the sittings next after such award, was served without any copy of the affidavit in support of the application:—Held, that though the court may not have power to enlarge the time for making the application under Ord. LXIV. r. 7, there is power under Ord. LXX. r. 1, to hear the application, although the time has expired, if the court deem fit. *Wiggeston Hospital and Stephenson, In re*, 54 L. J., Q. B. 248; 52 L. T. 101; 33 W. R. 551.

See also ATTACHMENT.

—— **Summons or Motion.**]—The court had granted an injunction restraining the defendants from polluting a stream, but suspended the order for three months. The plaintiff, soon after the expiration of that period, served them with notice of motion under Ord. XLII. r. 31, for leave to issue sequestration. The defendants contended that copies of the affidavits intended to be used had not been served with the notice of motion, and that the application for leave, if necessary, ought to have been by summons in chambers:—Held, that copies of affidavits need only be served with the notice of motion in cases where the liberty of the subject is involved, as in attachment, and that under the circumstances, the plaintiff was right to move the court in the first instance, instead of proceeding by summons in chambers. *Selous* v. *Croydon Rural Sanitary Authority*, 53 L. T. 209.

Further Evidence after Hearing.]—After a summons has been heard by the judge personally in chambers, and he has given his decision upon it, further evidence, which was not before him in chambers, will not be received upon a motion in court to discharge the order made in chambers. *Munns and Longden, In re*, 50 L. T. 356.

Motions being renewed on fresh evidence after previous refusal, when allowed to discharge an order not justified by the evidence in the court below. *Tanner* v. *Carter*, 1 Coop. C. C. 337.

On a motion, although no notice is given by the party moving that he will read any evidence, the court may take notice of the matters given in evidence in previous proceedings in the cause,

and may also refer to notes of the observations of the court on such previous proceedings. *Lister* v. *Leather*, 3 Jur. (N.S.) 433 ; 5 W. R. 550.

Second Application.]—Where a party fails, in the first instance, from the incompleteness of his materials, he cannot afterwards come to the court. *Levi* v. *Coyle*, 12 L. J., Q. B. 295 ; 7 Jur. 724.

The rule that an application once disposed of cannot be renewed under the same circumstances and for the same objects is not binding in all cases. *Butler, In re, Masters* v. *Butler*, 13 Q. B. 341 ; 18 L. J., Q.B. 328 ; 13 Jur. 869.

Where a motion besides the merits of the case fails, by reason of some defect in the affidavits, the court will not give leave to renew the application. *Ilderton* v. *Burt*, 6 C. B. 433.

A judgment signed in an action brought by A. in the name of B. having been set aside by a judge's order, a rule nisi was obtained to rescind that order, on the ground that the summons upon which it was made had been improperly altered by the defendant's attorney. This rule, which, by mistake, purported to have been moved on behalf of B., was discharged upon an affidavit of B., shewing that the rule had been moved without any authority from him, and that the alteration in the summons had been made with his sanction :—Held, that a second application for the same purpose might be made on the behalf of A., the party really interested. *Tilt* v. *Dickson*, 4 C. B. 736.

The court will not entertain a second application upon grounds which might and ought to have been brought forward upon a former occasion. *Leggo* v. *Young*, 17 C. B. 549 ; 25 L. J., C. P. 176.

Priority of Motion to Discharge Prisoner.]—A motion to discharge a prisoner from custody has priority over all other motions. *Ashton* v. *Shorrock*, 43 L. T. 530 ; 29 W. R. 117.

Attachment of Applicant.]—An attachment issued against a defendant before the making of a motion by him, but after service of the notice of motion, will not prevent the motion being made. *Jeyes* v. *Foreman*, 6 Sim. 384 ; 3 L. J., Ch. 97.

Specially constituted Court—Public Interest.]—The divisional court will decline to specially constitute a court to hear a motion for a rule to shew cause, which, it is alleged, involves questions of great constitutional importance and public interest, although it might specially constitute a court to hear the rule argued on the question of its being made absolute. *Lewis, Ex parte*, 52 J. P. 264.

Court of Appeal.]—Special leave had been given to make an original motion before the court of appeal in a cause which had been heard before the court, and in which an appeal was pending in the house of lords :—Held, that the respondent had no right to have the motion first heard before the vice-chancellor. *Powell* v. *Elliot*, 20 W. R. 194.

Drawing up Order.]—In an action of A. against B., the matter was by rule of court referred to the master. A. died before the master's report was read. His executors obtained a rule to shew cause why they should not be made parties to the rule :—Held, that it was not necessary that the second rule should be drawn up on reading the first, provided it adverted to the first, which was in court. *Bland* v. *Daw*, 8 Q. B. 126 ; 15 L. J., Q. B. 1 ; 10 Jur. 8.

On the last day of term a rule was made absolute on an affidavit of service ; the master next day discovering that the affidavit was defective refused to draw up the rule. The court considering the rule as a pending rule, allowed a motion to be made in the sittings after the term to make the rule absolute on an amended affidavit of service. *Dow* v. *Bell*, 4 Ex. 259 ; 18 L. J., Ex. 391.

In drawing up a rule, it is not necessary to specify the particular document on which it is obtained, but it may be described as a paper writing, provided it is properly verified by affidavit. *Platt* v. *Hall*, 2 M. & W. 391 ; 5 D. P. C. 583 ; 6 L. J., Ex. 144.

—— **Order not going beyond Notice or Writ.**]—The circumstance that an order goes beyond the notice of motion on which it is made, however immaterial as between those who have appeared and taken part in the discussion upon the motion, is not so as to those parties interested in the subject-matter of the motion, who, being served with notice thereof, did not appear thereon, for these are entitled to rest on their right to assume that nothing beyond what is contained in the notice will be asked upon the motion. *Carew, Ex parte*, 23 L. J., Ch. 761 ; 18 Jur. 339 ; 2 Eq. R. 652 ; 2 W. R. 367—L.JJ.

Semble, where a motion for an injunction is treated as the hearing of the action, and there is no statement of claim, the plaintiff is precluded from asking relief on any ground not specifically claimed by the writ. *Serff* v. *Acton Local Board*, 54 L. T. 379.

Order to Stand Over.]—When a cause is heard upon a motion for decree, the court has power to order the hearing to stand over to prove the execution of a deed. *Raworth* v. *Parker*, 2 Kay & J. 163 ; 25 L. J., Ch. 117 ; 4 W. R. 273.

Effect of Dismissal.]—Where a plaintiff, on motion for a decree, has not established his case, apparently through some omission on his part, the motion will be dismissed, and the cause left to come to a hearing. *Thomas* v. *Bernard*, 5 Jur. (N.S.) 31 ; 7 W. R. 86.

Where, on a motion for a decree, a plaintiff has not made out his case, the court has a discretion to dismiss the motion with costs, leaving the suit unaffected. *Ward* v. *Dickson*, 5 Jur. (N.S.) 698.

Construction—Peremptory.]—A peremptory rule only means so far as the party is not prevented by the act of God or some inevitable accident. *Mostyn's Case*, Lofft, 262, 786.

Where a rule is drawn up to shew cause peremptorily on a day named, it may be made absolute as soon as the court has gone through the bar on that day. *Lace* v. *Adamson*, 12 M. & W. 807 ; 13 L. J., Ex. 232 ; 8 Jur. 409.

—— **Conditional.**]—Where a rule was made absolute for changing the venue from Middlesex to the country, on payment of the costs of the application, "and of all costs reasonably and bonâ fide incurred and rendered useless by the rule" ; and, after taxation of the costs, the defendant's attorney gave notice to the plaintiff's

attorneys that he abandoned the rule:—Held, that the rule was conditional only, and that the defendant was not bound to abide by it, although the plaintiff had, in the meantime, incurred the costs of his witnesses who were on their way to town before the rule was made absolute. *Pugh* v. *Kerr*, 5 M. & W. 164.

d. SHEWING CAUSE AGAINST RULE.

Affidavits.]—Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained. *Barham* v. *Lee*, 4 M. & Scott, 327; 2 D. P. C. 779. S. P., *Clothier* v. *Els*, 3 M. & Scott, 216; 2 D. P. C. 731.

Cause cannot be shewn till an office copy is taken of the affidavit on which the rule nisi was obtained. *Brown* v. *Probert*, 1 D. P. C. 659.

See further, EVIDENCE (AFFIDAVITS).

If a rule is moved without affidavits, none can be used in answer to it. *Atkins* v. *Meredith*, 4 D. P. C. 658.

Right of Reply.]—If cause is shewn against a rule in the first instance, the counsel who obtains the rule has a reply in support of his rule. *Anon.*, 4 Taunt. 690.

The crown has a right to reply on a motion for a new trial, after verdict for the crown. *Att.-Gen.* v. *Tomsett*, 2 C. M. & R. 170; 5 Tyr. 514; 1 Gale, 147; 4 L. J., Ex. 171.

On a motion against which cause is shewn in the first instance, the counsel making the motion has the right to reply as in an ordinary case. *Gibson* v. *Winter*, 1 H. & W. 436.

Shewing Cause at Chambers.]—The court has no power, without the consent of parties, to make a rule returnable at chambers on a day out of term. *Pollack* v. *Turnock*, 3 Jur. (N.S.) 92.

The court will not, at the close of a term, grant a rule to shew cause at chambers, where the party could have applied earlier. *Anon.*, 2 Chit. 266.

It is competent to the court, in case of necessity, to grant a rule on the last day of term, returnable at chambers. *Casse* v. *Wright*, 14 C. B. 562; 23 L. J., C. P. 144.

On the last day of term the court will make a rule nisi concerning a matter of a pressing nature returnable at chambers, but it is not the practice to enlarge rules returnable at chambers without the consent of the parties. *Ib.*

Other Points.]—The court will not allow a party, as a matter of right, to shew cause against a rule in the first instance, although notice has been given to the other side. *Doe* d. *Wright* v. *Smith*, 3 N. & P. 335; 8 A. & E. 255.

A party upon whom the rule does not call is not obliged to shew cause, because he is served with the rule; and if he does, the court will not give him his costs of appearing. *Johnson* v. *Marriat*, 2 D. P. C. 343.

e. RE-OPENING, ALTERING, AND RESCINDING.

Re-opening and Rescinding—When Allowed.]—Where an order has been made on motion and affidavit of service in the absence of parties, the court will, on proper application, give the absent party leave to move to discharge the order. *Mapp* v. *Elcock*, 22 L. J., Ch. 707; 17 Jur. 370.

The court refused to rehear a rule, upon a suggestion that it had been decided upon an erroneous report of the masters on a point of practice. *Gingell* v. *Bean*, 1 Man. & G. 555; 1 Scott (N.R.) 390.

A rule once disposed of, after full argument, cannot be opened again upon a suggestion that new matter has since come to the knowledge of the party, which might alter the decision of the court. *Phillips* v. *Weyman*, 2 Chit. 265.

After the parties at nisi prius had entered into a rule of court, arranging the terms of alternate enjoyment of a watercourse, in which terms the defendant was disappointed of the expected benefit, the court refused to open the rule and let him proceed to trial upon putting the plaintiff wholly in statu quo in respect of costs, or on any terms whatever. *Fussel* v. *Silcox*, 5 Taunt. 628.

But if a rule nisi is discharged through mistake of counsel in not stating the terms of the affidavits on which it was founded, the case may be reheard in a subsequent term. *Rex* v. *Middlesex (Sheriffs)*, 1 Chit. 445.

Upon a statement of counsel that he had moved for a rule to set aside an award, under a mistaken supposition that an affidavit deposing to certain facts had been sworn, the court, on the day after granting a rule nisi, gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening. *Perring* v. *Kymer*, 4 N. & M. 477; 1 H. & W. 20.

But the court refused to open a rule which had been made absolute without cause shewn, upon an affidavit by the attorney, alleging that he had understood the rule to be absolute in the first instance. *Charlton* v. *Burfit*, 1 M. & Scott, 450.

The court will not rescind a rule, on the ground that, at the time of discussion, the parties omitted to state the clause of a particular statute which might have affected its judgment or decision. *Dillamore* v. *Capon*, 8 Moore, 462; 1 Bing. 398; 2 L. J. (O.S.) C. P. 35.

Non-performance of a condition in a rule is no ground for an application to rescind it. *Bayntun* v. *Bayntun*, 1 C. B. (N.S.) 220.

Mistakes in the terms of rules may be attended to on a motion to open them within the same term, or perhaps that following; but where more time has elapsed, the affidavits which were used on the occasion of making the first rule absolute, cannot be referred to in order to open it, unless the new motion is made, and the new rule drawn up on reading them. *Lord* v. *Hope*, 5 Tyr. 487.

When a rule nisi has been discharged, the court has no power, on the application of the party who obtained and supported it, to alter it by striking out any portion of it, when the party who has shewn cause objects to the alteration. *Kynnaird* v. *Leslie*, 12 Jur. (N.S.) 468.

If a rule has been drawn up improvidently or by mistake of the officer, it may be discharged on terms. *Brooks* v. *Weston*, 8 Moore, 87.

A rule fraudulently obtained will be discharged with costs. *Rex* v. *Page*, 2 Ld. Ken. 272.

A rule in the bail court will not be permitted to be reopened and argued in the full court, in the term after judgment has been pronounced, although the judge who heard the case sanctions the application to the court. *Todd* v. *Jeffery*, 2 N. & P. 443; 7 A. & E. 519; W. W. & D. 613; 7 L. J., Q. B. 1.

If a rule is obtained and discharged before the single judge in the bail court, the full court will not allow a rule for the same purpose to be

discussed before them, though on affidavits discovering facts not previously stated. *Rossett* v. *Hartley*, 7 A. & E. 552, n.; 5 N. & M. 415; 1 H. & W. 581; 5 L. J., K. B. 49.

A side-bar rule obtained without disclosing the whole circumstances of a case will not be suffered to stand. *Symonds* v. *Parmenter*, 1 Wils. 86.

Where it is sought to impeach a rule, the materials upon which the rule was founded should be brought before the court. *Needham* v. *Bristowe*, 4 Scott (N.R.) 773; 4 Man. & G. 262; 1 D. (N.S.) 700; 11 L. J., C. P. 207.

Amendment, when Allowed.]—Where a rule cannot be served, it may be amended and enlarged, even though it has run out. *Grissold* v. *Harding*, 1 C. B. (N.S.) 556.

An issue went down for trial, when an arrangement was made between the parties (under a rule of court), but through inadvertence the plaintiff did not ask for the costs of the issue:—The court refused to allow the rule to be amended in this respect in a subsequent term. *Hayne* v. *Robertson*, 17 C. B. 548.

Where, in an action upon an agreement, a plaintiff obtained a verdict, and a rule was afterwards made absolute to enter a verdict for the defendant, the court, under special circumstances, allowed the rule to be amended by directing a nonsuit to be entered, but only upon the terms of the plaintiff paying the costs of the former action, and of the rule. *Sillen* v. *Holloway*, 14 C. B. (N.S.) 336.

A rule made absolute or discharged in one term cannot be amended in a subsequent term, whether on the civil or crown side of the court. *Reg.* v. *Hearts of Oak Friendly Society*, 14 L. T. 360.

A rule nisi for a mandamus was discharged, nothing being said as to costs. In the following term an application was made to amend the rule by discharging the rule nisi with costs:—Held, that the court had no power in such subsequent term to amend the rule. *Ib.*

f. Abandonment.

A motion not made when called on is to be treated as an abandoned motion. *Turner* v. *Turner*, 15 Jur. 1165.

A rule, when once obtained, cannot be abandoned by the party moving. *Simpson, In re*, 17 L. T. 617.

If a party obtaining a rule does not choose to proceed on it, the other party cannot compel him. *Doe* d. *Harcourt* v. *Roe*, 4 Taunt. 883.

Although the general practice may be for one party to the suit to draw up a rule obtained in the progress of a cause, if the other party wishes to act upon it he should draw it up within the time to which it relates; for if not drawn up within such period, it is to be considered as having been abandoned. *Gingell* v. *Bean*, 1 Man. & G. 50.

Costs.]—When a counsel intends to ask for the costs of a motion as abandoned, it is his duty before doing so to communicate his intention to the counsel who is instructed to move. *Aitken* v. *Dunbar*, 46 L. J., Ch. 489; 25 W. R. 366. S. P., *Yetts* v. *Biles*, 25 W. R. 452.

The court allowed two sets of costs of an abandoned motion to A. and B., who were sheriffs of London and also sheriffs of Middlesex, and had been served with the notice of motion in each capacity. *Von Bolten* v. *Cruden*, 21 W. R. 356.

Where court is moved for payment of costs under General Order, 5th August, 1818 (3 Madd. 318; 1 Swanst. 328), on account of a notice of motion which has been abandoned, such notice of motion must be mentioned to the court, and must also be produced to registrar before he draws up order. *Withey* v. *Haigh*, 3 Madd. 437.

g. Costs.

On Non-Appearance of Parties giving Notice.]—When notice had been given of a motion before the court to rescind a judge's order, and the parties giving the notice did not appear, the court ordered them to pay the costs of the other party appearing to shew cause against the motion. *Berry* v. *Exchange Trading Co.*, 45 L. J., Q. B. 224; 1 Q. B. D. 77; 24 W. R. 318.

If a plaintiff does not appear at the hearing of a cause on motion for decree, the defendant is entitled to his costs without producing an affidavit of service. *Marter* v. *Marter*, 9 L. T. 302; 12 W. R. 34.

Of Abandoned Motions.]—*See* supra.

Of Parties Served with Bad Notice.]—Where a notice of motion was not given two clear days before the day for the hearing:—Held, that the party served was not bound to appear, and therefore was not entitled to his costs of doing so. *Daubney* v. *Shuttleworth*, 45 L. J., Ex. 177; 1 Ex. D. 53; 34 L. T. 357; 24 W. R. 321.

Of Party Served, but having no Interest.]—A party who has been served with a notice of motion, but has no interest in the subject-matter, is not entitled to appear by counsel on the motion merely to ask for his costs. *Campbell* v. *Holyland*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128.

Therefore, where a plaintiff in a foreclosure action, who had parted with his interest, had been served with a notice of motion to reopen foreclosure absolute, and appeared by counsel on the motion and asked for his costs, he was held not to be entitled to his costs of appearance; but inasmuch as, upon his being served with the notice of motion, no intimation was given him that he need not appear, and no tender was made to him of his costs of being advised as to the effect of the motion, he was allowed 40*s.* costs. *Ib.*

A party not interested in a motion, who is served with notice, is entitled to the costs of appearing. *Heneage* v. *Aikin*, 1 Jac. & Walk. 377.

A party appearing on a motion without necessity, though served with notice, not allowed to have his costs from the party making the motion. *Wormall* v. *Williamson*, 2 Jur. 440.

A party served with a notice of motion, though not interested in the subject-matter of the motion, is yet entitled to the costs of appearing. *Tabuteau* v. *Warburton*, 4 Dr. & War. 267.

A party unnecessarily serving notices in a cause shall pay the costs occasioned thereby. *Hogan* v. *M'Namara*, 2 Jo. & Lat. 242.

Where a party is served with a petition or notice of motion, he is not bound to take upon himself the responsibility of deciding whether his interest in the matter is such as to render it necessary for him to appear, and he will not be deprived of the costs of his appearance, on the ground that he is not interested in the matter. *Banford* v. *Watts*, 2 Beav. 201.

Parties, though not formally served with a notice of motion, yet substantially made respondents, held entitled to their costs, the plaintiffs having requested their solicitor to appear, and having furnished to him a copy of the notice, and informed him by letter of the time when the motion would come on. *Shaw* v. *Forrest*, 20 Beav. 249.

Asking for by Notice.]—Motion granted, but costs refused, because not sought for in the notice. *Little* v. *Johnson*, 1 Moll. 234.

Costs given on a motion, although not mentioned in the notice. Every motion on notice, whether the notice mentions costs or not, is made at the peril of costs to the applicant. If no mention is made of costs in the notice of a successful motion, no costs are given against the opposite party, if he does not appear; nor even if he does appear and resist, if he does not put the party making the motion to additional expense by affidavits or documents; but if he puts the party to such additional expense, the applicant may have costs, although he did not seek costs by his notice. *Ib.*

Costs not given on a motion unless mentioned in the notice. *Mann* v. *King*, 18 Ves. 297.

An order having been made by a vice-chancellor refusing a motion with costs, an order is made by the Lord Chancellor giving relief inconsistent with the first mentioned order. That order, having been recited by the subsequent order, though not expressly discharged thereby, is no longer a subsisting order. The costs of the present application to stay proceedings under the vice-chancellor's order were given, though not asked for by the notice of motion. *Dawson* v. *Jay*, 2 W. R. 598.

Costs of a motion may be given, although the notice of motion does not ask that the order may be made with costs. *Powell* v. *Cockerell*, 4 Hare, 572; 15 L. J., Ch. 196; 10 Jur. 243.

Costs of a motion may be given, though not asked for by the notice of motion. *Clark* v. *Jaques*, 11 Beav. 623.

Costs given, though not asked by the notice of motion. *Butler* v. *Gardener*, 12 Beav. 525.

Where a notice of motion does not ask for costs, it is irregular where the respondent does not appear, to take an order for costs upon an affidavit for service. *Pratt* v. *Walker*, 19 Beav. 261.

Where Costs in the Cause.]—Party making successful motion is entitled to his costs as costs in the cause, but party opposing it is not entitled to his costs as costs in the cause. *Mem.*, 1 Sim. & S. 357.

Party making motion, which fails, is not entitled to his costs as costs in cause, but party opposing it is entitled to his costs as costs in the cause. *Ib.*

Where motion is made by one party, and not opposed by other, costs of both parties are costs in the cause. *Ib.*

The costs of a motion to advance a cause under the 4th Order of May, 1839, ordered to be paid by the plaintiff. *Browne* v. *Lockhart*, 10 Sim. 420; 9 L. J., Ch. 53.

Costs of an application to advance the cause being granted, directed to be costs in the cause. *Carthew* v. *Barclay*, 10 Sim. 273.

A party gave notice of a motion, and died before the motion was heard, and the suit was revived by his executors, who declined to proceed with the motion. The bill revived by the executors was dismissed with costs. The costs of the abandoned motion are not costs in the cause. *Lewis* v. *Armstrong*, 3 Myl. & K. 69.

As contrary to the principle of the court, an action on a post obit was restrained, and subsequent motion to set aside the injunction was refused with costs; such case being against the general rule that costs of motion for injunction, or to dissolve an injunction, refused, are costs in the cause. *Marsack* v. *Reeves*, 6 Madd. 108.

From the error of the commissioner the names of the witnesses examined in the cause were not affixed to the ingrossment of their depositions. On a motion for the suppression of the depositions on this ground, it was ordered that the names should be added to the ingrossment, and that the costs of the motion should be costs in the cause. *Lee* v. *Egremont*, 2 De G. & Sm. 363; 17 L. J., Ch. 437; 12 Jur. 660.

When at the time of a motion no order is made regarding the costs of it, they follow the costs in the cause, especially in the case of injunction bills. *Bourne* v. *Farran*, 6 Ir. Eq. R. 659.

If no direction is given by the court concerning the costs of a motion, they are costs in the cause. *Hind* v. *Whitmore*, 2 Kay & J. 458.

Where an order is made giving the plaintiff the costs of suit, and nothing is said about the costs of a motion for an injunction, the plaintiff is entitled to them under the liberty to apply, and must apply by petition. *Harris* v. *Hilliard*, 20 L. T. 210.

The usual rules as to the costs of motions do not always apply; and where one of the parties is ordered to pay all the costs of a suit up to a given time, the costs of motions made during that time may be included in the costs of the suit. *Webster* v. *Manby*, L. R. 4 Ch. 372; 20 L. T. 387; 17 W. R. 545.

When a motion for an injunction involving the merits of the cause was ordered to stand over to the hearing, and afterwards the bill was changed into an information and bill, and at the hearing a decree for a perpetual injunction was made with costs, the plaintiff's costs of the motion, though not specifically mentioned, are costs in the cause, and will be allowed him on taxation. *Att.-Gen.* v. *Lonsdale* (*Lord*), 40 L. J., Ch. 198; L. R. 6 Ch. 141; 23 L. T. 794; 19 W. R. 235.

A motion for a receiver made by a plaintiff in a partnership suit was ordered to stand over till the hearing of the cause, and no order was made as to the costs of the motion. Afterwards the common order was made for dismissing the bill for want of prosecution:—Held, that the defendant's costs of the motion must be allowed him as costs in the cause. *Corcoran* v. *Witt*, 41 L. J., Ch. 67; L. R. 13 Eq. 53; 25 L. T. 653.

Costs Reserved.]—If the costs of a motion are reserved until the hearing, and at the hearing no mention is made of these costs, but the costs of the suit are reserved until the hearing for further directions, that reservation does not include the costs of the motion, and consequently the court can make no order respecting them. *Gardner* v. *Marshall*, 14 Sim. 575; 9 Jur. 958.

On a motion for an injunction being refused,

the costs were reserved to the hearing of the cause; and at the hearing the injunction was decreed, and the defendant was ordered to pay to the plaintiff the costs so reserved, as well as the general costs of the suit relating to the injunction. But, on appeal, this course of proceeding was disapproved by the Lord Chancellor, and the decree was altered by striking out the order for payment of the reserved costs. *Lewis* v. *Smith*, 1 Macn. & G. 417.

If a plaintiff's motion is successfully opposed by a defendant on affidavits, and before answer, the rule is to reserve the costs until the hearing. Secus, if the plaintiff moves on the defendant's answer. *Waring* v. *Manchester, Sheffield & Lincolnshire Ry.*, 2 H. & Tw. 239; 18 L. J., Ch. 450; 14 Jur. 613.

When upon an interlocutory application there is reason to suppose that the bill will never come to a hearing, it should be asked that the costs of such interlocutory application may be reserved not simply to the hearing, but till hearing or further order, or be made costs in the cause. *Rumbold* v. *Forteath*, 4 Jur. (N.S.) 608.

Reservation of the costs of a motion, but providing for the event of the bill being dismissed before the hearing. *Jones* v. *Batten*, 10 Hare (App.) xi.; 22 L. J., Ch. 13; 16 Jur. 1059; 1 W. R. 275.

Where a plaintiff's costs of two motions were reserved to the hearing, and were then by mistake omitted to be provided for by the decree, which had been inrolled, the court, on petition, made a separate order for their payment. *Viney* v. *Chaplin*, 3 De G. & J. 282; 28 L. J., Ch. 164; 7 W. R. 159.

On a motion some time previously, to have a second bill on behalf of an infant taken off the file, the court had not made an order in the terms of the motion, but by an order intituled in both suits had retained the second bill, and reserved the costs of it and of that motion. The question coming on now to be finally settled as to the costs of the second suit and of that motion:—Held, that it was not now open to the court to omit all provisions for the costs of that second suit. *Ashley* v. *Allden*, 16 Jur. 460.

An application to the Master of the Rolls, on the certificate of plaintiff's counsel, to advance a cause as a short cause, was refused on the defendant's counsel stating that it was not a short cause, and the costs of the motion were reserved. The cause afterwards came on in its regular course, when the court, being of opinion that the cause was a proper one to be heard as a short cause, gave the plaintiff the costs of the motion. *Aldworth* v. *Robinson*, 2 Beav. 287.

When the court orders a motion to stand till the hearing of the cause, it in effect reserves to itself the right of dealing differently with the costs of the motion, and those of the cause. *Singer* v. *Audsley*, 41 L. J., Ch. 229; L. R. 13 Eq. 401; 26 L. T. 238; 20 W. R. 438.

Costs of Former Motion not Paid.]—Costs for an irregular motion, for leave to amend, not having been paid, a second motion was also refused with costs. *Philipps* v. *Stephenson*, 9 Price, 205.

A renewed motion cannot be made until the costs occasioned by the former notice of motion are paid. *Bellechamber* v. *Giani*, 3 Madd. 550. See also *Tarent* v. *Trewit*, Bunb. 86.

Order discharged, on ground that costs of two previous applications, which had been refused with costs, had not been paid. *Killing* v. *Killing*, 6 Madd. 68.

If costs are not taxed, however, nonpayment is no objection. *Id.*, n.

Motion under the circumstances dismissed with costs, the defendant being in contempt for nonpayment of costs of a like motion. *Needham* v. *Needham*, 1 Coop. C. C. 208, n.

If a party allows a notice of motion to be twice discharged with costs, such conduct is oppressive, and the court will not hear the motion until provision is made for payment of those costs. *Blake* v. *Blake*, 2 Hog, 190.

A motion being refused with costs, the party cannot afterwards renew the motion till the costs have been paid. *Oldfield* v. *Cobbett*, 12 Beav. 91.

A second motion for the same object which had previously failed with costs, cannot be made until those costs have either been paid, or been secured by a payment into court. *Burdell* v. *Hay*, 33 Beav. 189.

As to Stay of Proceedings until Payment of Costs of Former Proceedings.]—*See* supra, STAYING PROCEEDINGS, col. 306.

Ex parte.]—Costs cannot be given on an ex parte application. *Cast* v. *Poyser*, 26 L. J., Ch. 93, 353; 3 Jur. (N.S.) 38.

Two Objects.]—Where the motion is for an injunction which is refused, and also for inspection of papers, the latter not being objected to at the bar, the court will give the defendant the costs of the motion. *Robertson* v. *Eastern Counties Ry.*, 11 L. J., Ch. 101; 5 Jur. 1149.

Where a notice of motion embraces two objects, and the principal one fails, the party moving must pay the costs of the motion. *Sturch* v. *Young*, 5 Beav. 557; 12 L. J., Ch. 56.

Where one part of a motion is of course, and the other part contested and refused, the court, although it grants that part which is of course, will order the party moving to pay the costs of the motion. *Murray* v. *Walter*, Cr. & Ph. 114; 3 Jur. 719.

Absence of Party.]—An order made in the absence of a party on motion, of which he had no notice, that he should pay the costs of such motion, is irregular. *Beadles* v. *Burch*, 9 L. J., Ch. 348.

After Amendment.]—Costs occasioned by a notice of motion which was rendered ineffective by a subsequent amendment of the bill, must be paid by the plaintiff. *London & Blackwall Ry.* v. *Limehouse District Board of Works*, 3 Kay & J. 123.

If, between the giving of a notice of motion to dismiss, and the making of the motion, the plaintiff obtains an order to amend, the plaintiff must pay the costs of the motion, but no order will be made upon it. *Davenport* v. *Manners*, 2 Sim. 514.

Discharging Order.]—An order "to discharge an irregular order with costs" carries the costs of the application to discharge it. *West* v. *Smith*, 3 Beav. 492; 10 L. J., Ch. 218.

Costs Occasioned.]—"The costs of and occasioned by the application" include the costs of an interlocutory order made in pursuance of part

of the application. *Green, Ex parte*, 1 Glyn. & J. 188.

The plaintiff, having filed his bill, gave notice of a motion for an injunction, which stood over, at the request of the defendants, that they might file affidavits. Before the motion was heard, the defendants put in a demurrer, which was, in the first instance, overruled, but was afterwards allowed upon appeal, and the plaintiff was ordered to pay the costs of the demurrer, and the costs of the suit:—Held, that the defendants were entitled to their costs occasioned by the motion for an injunction. *Finden* v. *Stephens*, 17 L. J., Ch. 342; 12 Jur. 319. Reversing 16 Sim. 40.

On a bill filed for an injunction, the plaintiff obtained the injunction on motion, the defendant appearing and opposing the motion. The bill was subsequently dismissed, with costs:—Held, that the defendant was entitled to the costs of the motion which he had unsuccessfully opposed. *Stevens* v. *Keating*, 1 Macn. & G. 650; 2 H. & Tw. 176; 19 L. J., Ch. 407; 14 Jur. 157.

Sequestration.]—A person who had refused to pay the rent of a sequestered estate, which he occupied as tenant to the sequestrators, except under an indemnity, was nevertheless held entitled to his costs of a motion by the sequestrators to compel payment of the money. *White* v. *Wood*, 2 Y. & Coll. 615; 7 Jur. 1124.

Affidavits.]—It is not necessary that all the affidavits filed on a motion should be read in order to entitle the successful party to the costs of them. *Freer* v. *Rimmer*, 14 Sim. 391.

If a plaintiff obtains an injunction on affidavits, and the injunction is afterwards dissolved with costs, the defendants will be allowed their costs of counter-affidavits filed with a view of strengthening their case, although the question in issue in the cause might have been decided on demurrer. *Barnsley Canal Co.* v. *Twibell*, 17 Beav. 19; 13 L. J., Ch. 434.

Motion to rectify Register—Interlocutory Motions.]—On the 23rd July, 1889, a motion on behalf of W. to remove his name from the register of the company in respect of certain shares, came on for hearing as an action with witnesses. W. was not present for examination, and the court, as an indulgence, allowed the motion to stand over till the Michaelmas sittings, on condition that W. paid to the company "all their costs of such motion incurred up to the present time, including the costs of the hearing of this motion this day." On the 16th December, 1889, Kay, J., decided the motion in favour of W., and ordered the taxing-master to tax the costs of W. of his motion, except the costs of the said order of the 23rd July, 1889, directed to be paid by him. The solicitors of the company sent in a bill of costs of the motion up to the 23rd July, 1889, including the costs of the motion on that day. W. objected to pay any costs for items which were utilised at the postponed hearing. He also objected to pay the costs of an interlocutory application to attach the secretary of the company for non-compliance with an order for discovery, which costs had by consent been made costs in the action; also the costs of an interlocutory application to postpone the trial, on which no order was made:—Held, that the taxing-master had acted upon a wrong principle in including these interlocutory applications in the costs of the motion, which W. was ordered to pay; but that the other items for subpœnas, &c., which were utilised at the postponed trial, were in the discretion of the taxing-master, and W. must pay them. *Metropolitan Coal Consumers' Association, In re, Wainwright's Case*, 63 L. T. 216.

Transfer of Action—Costs of Correspondence before Motion.]—On the hearing of an opposed motion for the transfer of an action from one judge of the chancery division to another, the Lord Chancellor made an order directing the transfer, and that the respondent should pay the costs of the motion. Before the notice of motion was given, the moving party wrote to the respondent asking whether he would consent to the transfer, which he refused to do. In taxing the costs under the order of the Lord Chancellor, the taxing-master disallowed the costs of this correspondence. On summons to review the taxation:—Held, that the taxing-master was right. *Norton* v. *Fenwick*, 54 L. J., Ch. 632; 52 L. T. 341.

Under old Practice.]—Costs cannot be given on the refusal of a rule to shew cause. *Weldron* v. *Norris*, 2 W. Bl. 769.

There being no rule to tax upon. *Poole* v. *Watson*, 1 Jur. 71.

Cost of shewing cause against a rule in the first instance are never given. *Rex* v. *Long*, 1 M. & Ry. 139. S. P., *Reed* v. *Speer*, 5 D. P. C. 330; *Harvey* v. *Divers*, 16 C. B. 497.

Though notice of motion was given. *Gerrard* v. *Gaskell*, 2 Chit. 401.

So where a party shews cause successfully in the first instance he is not entitled to costs. *Fitch* v. *Green*, 2 D. P. C. 439.

Where cause is shewn against a rule in the first instance, the costs are in all cases in the discretion of the court, and will rarely be given. *Norris* v. *Carrington*, 16 C. B. (N.S.) 396.

Where a rule is not moved with costs, and nothing is said about them at the time of discharging it, they are not payable to the successful party. *Anon.*, 1 Chit. 398. S. P., *Drinker* v. *Pascoe*, 4 D. P. C. 566; 1 H. & W. 651.

A rule which does not ask for costs cannot be made absolute with costs. *Gleddon* v. *Trebble*, 9 C. B. (N.S.) 367.

The general practice is for the court not to give costs where they are not asked for by the rule, unless there are special circumstances. *Marriott, In re*, 1 C. B. (N.S.) 499.

Where a rule prays for several things, to some of which the party is entitled, and to others not, but cause is shewn against all, no costs are given on either side; though if cause had been shewn against the bad part only, the party shewing would have had costs. *Aliven* v. *Furnival*, 2 D. P. C. 49.

Where an affidavit answered a rule nisi for setting aside proceedings for irregularity, with costs, but was written in a cramped and slovenly hand, the court refused to grant the costs of the opposition. *Bane* v. *Jones*, 8 D. & R. 114.

If a rule is drawn up in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeeds upon the alternative. *M'Andrew* v. *Adams*, 1 Scott, 99; 1 Bing. (N.C.) 270; 3 D. P. C. 120; 4 L. J., C. P. 4.

A rule to set aside a judge's order having been drawn up at the instance of the defendant,

without mentioning costs, the plaintiff consented to its being made absolute, notwithstanding the defendant obtained a second rule, drawn up with costs, stating that he abandoned the first:—The court directed the costs to abide the event of the cause. *Jeves* v. *Hay*, 1 Scott (N.R.) 399; 1 Man. & G. 390.

Upon a motion to postpone a trial, the notice of the intended application omitting to offer the costs of the postponement, the court made the rule absolute as well on payment of those costs as of the costs of the motion, though cause was shewn in the first instance. *Ward* v. *Ducker*, 6 Scott (N.R.) 45.

A party who shews cause successfully, in the first instance, against a rule, which, if granted, would be a stay of proceedings, and operate to his prejudice, will be allowed the costs of opposing the rule. *Rennie* v. *Beresford*, 3 D. & L. 464; 15 L. J., Ex. 78; 10 Jur. 76.

On discharging a rule with costs, the practice of the court generally is, not to order them to be paid to anyone not a formal party to the rule, without a separate application with that object. *Reg.* v. *Green*, 2 G. & D. 789.

The court has a discretionary power to order costs to be paid by persons making affidavits in support of a motion, particularly attorneys in their professional character; but if the claim for costs arises on the affidavits in answer, there must be a special application. *Ib.*

After an inquisition under the Tithe Commutation Act (6 & 7 Will. 4, c. 71), s. 82, the owner of the land obtained a rule to set aside the writ under which it was taken, and all subsequent proceedings, which after argument was discharged, no mention being made of the costs:—Held, that the costs of shewing cause against that rule could not be taxed as part of the costs of the inquisition. *Hammersmith Rent-charge, In re*, 19 L. J., Ex. 66; 14 Jur. 917.

A party served with a rule calling upon him to shew cause is not entitled to his costs of appearing upon the rule, if he has no costs to shew. *Cassidy* v. *Steuart*, 4 Scott (N.R.) 187; 3 Man. & G. 575; 10 L. J., C. P. 57.

XVII. SUMMONSES.

a. *In General*, 685.
b. *Originating Summons.*
1. Jurisdiction, 689.
2. Service of, 694.
3. Other Points, 695.

a. In General.

Determination of Questions at issue in Action.]—Except to the extent to which special provisions are made by the rules, as, for instance, by Ord. XV., the plaintiff in an action is not entitled to take out a summons for the determination of the questions which are at issue in the action, and which will properly be decided at the trial. *Borthwick* v. *Ransford*, 54 L. J., Ch. 569; 28 Ch. D. 79; 33 W. R. 161.

Service—Out of the Jurisdiction.]—The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers calling on the defendant to shew cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction:—Held, that there was no jurisdiction to grant such leave. *Weldon* v. *Gounod*, 15 Q. B. D. 622.

A judge of the chancery division has authority to order service out of the jurisdiction of a summons under s. 9 of the Vendor and Purchaser Act, 1874. *Drapers' Co.* v. *McCann*, 1 L. R., Ir. 13.

The court has jurisdiction to order service of a summons under the Companies Act, 1862, ss. 100, 165, upon respondents out of the jurisdiction. *British Imperial Corporation, In re*, 5 Ch. D. 749; 25 W. R. 583.

Leave will not be given to serve a summons for taxation of costs upon a foreigner out of the jurisdiction. *Brandon, Ex parte, Bouron, In re*, 54 L. T. 128; 34 W. R. 352.

Where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods, and would probably sue the defendant in respect of them, the court gave the defendant leave to serve an interpleader summons out of the jurisdiction upon the foreigner. The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear and prosecute his claim, or, if he does not appear, so that any future claim prosecuted by him against the defendant in respect of the subject-matter of the action within the jurisdiction may be barred. *Credito Gerundense* v. *Van Weede*, 53 L. J., Q. B. 142; 12 Q. B. D. 171; 32 W. R. 414; 48 J. P. 184.

If it is desired to make a foreigner residing out of the British dominions a party to proceedings to be commenced by administration summons, he should be served with notice of summons, and not with the summons itself. *McLaughlin, In re, Roulston* v. *McLaughlin*, 25 L. R., Ir. 513.

—— **Of Originating Summons.**]—*See* infra.

—— **Substituted Service.**]—A sum of money having been paid into court for the benefit of the defendant, M., his solicitor, obtained a charging order for costs upon it under 23 & 24 Vict. c. 127, s. 28. The costs had been taxed ex parte. M. then took out a summons to shew cause why the sum of money paid into court should not be paid out to him in part satisfaction of his taxed costs. This summons could not be served upon the defendant, who appeared to be wilfully evading service of it. L. had acted for the defendant after M. had ceased to do so, and H. had introduced the defendant to M.:—Held, that substituted service of the summons should be allowed; that a notice calling upon the defendant to appear in one month should be put up at the master's office, and served upon L. and H., and advertised in the "Times" newspaper, and thereupon, if the defendant did not appear, an order might be made on the summons. *Hunt* v. *Austin, Mason, Ex parte*, 51 L. J., Q. B. 455; 9 Q. B. D. 598; 47 L. T. 300—C. A.

Form.]—The omission or imperfect description of the year in the date of summons is immaterial; it is sufficient if the day and month are properly stated. *Solomons* v. *Nainby*, 5 M. & W. 389; 7 D. P. C. 459; 8 L. J., Ex. 267.

The word "peremptory" was put upon a summons, without the authority of the judge, and the court inflicted the payment of costs upon the attorney. *Finnerty* v. *Smith*, 1 Scott, 743; 1 Hodges, 158.

Striking Out—Frivolous and Vexatious.]—A summons under the Vendor and Purchaser Act asking for relief, to which it is plain from the contract that the applicant cannot be entitled, will be stayed as frivolous and vexatious. A. agreed with B. to sell him a public-house, and that in case A. should take, or be interested or concerned in a public-house within one-third of a mile of the premises sold during the occupation of B. or his widow, A. should pay to B. 500*l.*, and a covenant to this effect should be inserted in the conveyance. A.'s title to the property consisted of an agreement to purchase it from C., which contained a similar provision limited to the occupancy of A. and his widow, and not mentioning any covenant in the conveyance. B. accepted the title and tendered a conveyance containing a covenant by C., in the terms of A.'s agreement with B. C. refused to enter into this covenant, and B. took out a vendor and purchaser summons for a declaration that he was entitled to a covenant by C. A. moved to stay proceedings under the summons as frivolous and vexatious:—Held, that, as it was clearly impossible to make a declaration on the summons which would be binding on B., and the relief, if any, to which the applicant was entitled was specific performance with abatement, to which the declaration asked would not help him, the summons ought to be struck out as frivolous and vexatious. *Bartlet and Berry's Contract, In re*, 76 L. T. 751.

Counsel.]—The rule against hearing counsel at chambers during term did not apply to summonses which were taken out and returnable in vacation, but adjourned to a day in term. *Doe* d. *Roberts* v. *Roe*, 13 M. & W. 691; 2 D. & L. 673; 14 L. J., Ex. 101.

Rehearing by another Judge.]—Where a judge has, upon hearing the parties on a summons, refused an order, it is highly improper to proceed by summons before another judge; the party dissatisfied may apply to the court. *Wright* v. *Stevenson*, 5 Taunt. 850.

Effect of, as a Stay of Proceedings.]—A summons stays nothing unless it is returnable before the judgment may be regularly signed. *Calze* v. *Littleton (Lord)*, 2 W. Bl. 954.

A summons is no stay of proceedings unless followed up. *Knowles* v. *Vallance*, 1 Gale, 16.

A summons returnable before judgment is signed operates as a stay of proceedings. *Morris* v. *Hunt*, 1 Chit. 93.

Where a judgment and an attendance upon a summons are running together, the summons must be attended before judgment can be signed. *Barton* v. *Warren*, 3 D. & L. 142; 14 L. J., Q. B. 312; 10 Jur. 375.

A summons to stay proceedings is waived by the delivery of a plea before the summons is due. *Ib.*

A summons served after judgment signed does not operate as a stay of proceedings, so as to prevent the plaintiff from making up and carrying in the judgment roll. *Phillips* v. *Birch*, 2 D. (N.S.) 97; 5 Scott (N.R.) 178; 4 Man. & G. 403; 11 L. J., C. P. 297.

A summons for a stay of proceedings on payment of debt and costs (in an action in which judgment had been given by default) was taken out on the 24th April, returnable on the 25th. Before the summons was returnable, by agreement between the parties, the matter was postponed until three o'clock on the 26th. On the morning of the 26th, the plaintiff executed a writ of inquiry, of which notice had been previously given:—Held, that, as the summons operated as a stay of proceedings from the time at which it was originally returnable on the 25th, the execution was bad and must be set aside. *Serjeant* v. *Brown*, 2 D. (N.S.) 985; 7 Jur. 700.

An order "peremptory" for time to plead does not preclude a defendant from again applying by summons for further time; and, if he takes out such further summons, judgment signed for want of a plea after the summons is returnable, is irregular. *Beazley* v. *Bailey*, 16 M. & W. 58; 4 D. & L. 271; 16 L. J., Ex. 1; 10 Jur. 906.

Costs—Adjourned.]—When a matter stands over in judge's chambers, the summons is adjourned, and therefore the costs of obtaining a new appointment and serving it will be disallowed on taxation. *Catlin, In re*, 18 Beav. 512.

An adjournment into court is part of the proceedings in chambers, and the costs of such adjournment go with the costs in chambers. *Mitchell, In re*, 33 L. J., Ch. 187; 9 Jur. (N.S.) 1272; 9 L. T. 282; 12 W. R. 39.

The party at whose instance an adjournment is made will not have to pay the costs thereof, even if the question appears unarguable, unless, in the opinion of the court, there has been misconduct in bringing forward the question for the decision of the judge. *Ib.*

Where a summons had been taken out at chambers, afterwards adjourned into court, and abandoned by the plaintiff, the court, on motion by the defendant, ordered that the costs incurred by him in preparing to meet such summons should be taxed, and paid by the plaintiff. *Lister* v. *Bell*, 28 L. J., Ch. 162; 5 Jur. (N.S.) 115.

The same practice prevails whether the summons has or has not been adjourned into court. *Ib.*

Where an adjourned summons is refused, the applicant will, as a general rule, have to pay the costs of the summons as well as the adjournment. *Beach* v. *Sleddon*, 39 L. J., Ch. 123.

When a summons is dismissed with costs, the costs will, as a general rule, include all the costs, both of the adjournment and in chambers. *Alcock* v. *Gill*, 21 L. T. 704.

When a summons is dismissed with costs, costs in chambers are included as well as costs in court. *Ipstone Park Colliery Co., In re, Brough's Claim*, 18 W. R. 285.

Upon a summons being adjourned into court, the "costs of the application" directed to be paid by the party against whom the court decides are simply the costs of the adjournment. *European Central Ry., In re, Holden, Ex parte*, L. R. 8 Eq. 444; 21 L. T. 197; 17 W. R. 875.

When a claim against a company in liquidation is adjourned into court and allowed with costs out of the estate, only the costs of the adjournment into court are meant to be given, and the costs incurred by the claimants in chambers must be added to the amount of the claim. *Wright, Ex parte, General Estates Co., In re*, L. R. 8 Eq. 123.

—— **Other Points.**]—Costs follow a reversal of a decision of a judge at chambers. *Friend* v. *L. C. & D. Ry.*, 25 W. R. 735.

On a summons adjourned from chambers to the court, it is the practice to certify for counsel. *Graham* v. *Graham*, 1 Johns. 624.

On an adjournment from chambers, the court always certifies for counsel. *Greville* v. *Greville*, 5 Jur. (N.S.) 1237; 8 W. R. 130.

See now R. S. C. 1883, Ord. LXV. r. 27, sub-r. 16.

b. ORIGINATING SUMMONS.

1. Jurisdiction.

Effect of Ord. LV.]—The rr. 3 and 4 of Ord. LV. are only rules of procedure, and only enable certain proceedings to be taken by way of originating summons that would before have had to be taken by action, and do not enlarge the class of persons entitled to take those proceedings. *Hargreaves, In re, Dicks* v. *Hare*, 59 L. J., Ch. 375; 44 Ch. D. 236; 62 L. T. 819—C. A.

Delivery up of Papers by Solicitor.]—The expression "originating summons" does not include every summons by which proceedings are commenced without writ, but has reference exclusively to summonses by which such proceedings are commenced as could formerly have only been commenced by bill or writ. Consequently the procedure laid down by the rules in the case of an originating summons does not apply to a summons for the delivery up of papers by a solicitor. *Holloway, In re, Pallister, Ex parte*, 63 L. J., Q. B. 672; [1894] 2 Q. B. 163; 9 R. 384; 70 L. T. 615; 42 W. R. 433—C. A.

Equitable Tenant for Life — Possession — Custody of Title Deeds.]—The court has power to make an order allowing an equitable tenant for life to take possession of settled property, and giving him the custody of the title deeds, upon an originating summons. *Bagot's Settlement, In re, Bagot* v. *Kittoe* (8 R. 41), followed. *Newen, In re, Newen* v. *Barnes*, 63 L. J., Ch. 763; [1894] 2 Ch. 297; 8 R. 309; 70 L. T. 653; 43 W. R. 58; 58 J. P. 767.

Question between Annuitant and Devisee of Land charged with Annuity.]—A person contingently entitled to an annuity charged by will on lands specially devised, took proceedings by originating summons against the executors and trustees, and the devisee, to have it determined whether he was entitled to be paid the annuity:—Held, that there was no jurisdiction to decide the question on summons under Ord. LV. r. 4. *Newman's Trusts, In re*, 29 L. R., Ir. 9.

Creditor's Action—Absence of Legal Personal Representative.]—A judgment creditor took out an originating summons under Rules of Court 1883, Ord. LV. rr. 3, 4, against the husband of the judgment debtor, who had died intestate, as the person "entitled to take out letters of administration of the estate" of the deceased, for administration of that estate. The defendant had applied for, but had not yet obtained, letters of administration, and there was in fact no legal personal representative of the intestate yet constituted. The plaintiff moved for the appointment of a receiver. In opposition to the motion, an affidavit was made by the defendant, stating that since his wife's death he had taken all necessary steps to take out letters of administration, and that it was his intention to do so immediately:—Held, that the summons was bad, even treating it as a writ, since it asked only for administration of the estate, and there was no legal personal representative before the court; that the summons specified in Rules of Court, Ord. LV. r. 3, was for relief against trustees, executors, or administrators, and that the summons did not come within the order, and, therefore, that there was no action in which an order could properly be made, and that the motion must be dismissed. *Leask, In re, Richardson* v. *Leask*, 65 L. T. 199.

Executor—Money to whom belonging.]—One executor took out an originating summons against the other executor and the testator's widow to have it decided whether a sum of money in the possession of the widow, and which she alleged had been given to her by her husband in his lifetime, belonged to her or to her husband's estate:—Held, that on the originating summons the court only had jurisdiction to decide points which could have been determined in an action for the administration of the estate, and therefore had no jurisdiction to determine the question as to whom the money belonged. *Davies, In re, Davies* v. *Davies* (38 Ch. D. 210), approved. *Royle, In re, Royle* v. *Hayes*, 59 L. J., Ch. 1; 43 Ch. D. 18; 61 L. T. 542; 38 W. R. 17—C. A.

Forfeiture of Lease—Application for Relief.]—An application by a lessee, under s. 14, sub-s. 2, of the Conveyancing Act, 1881, for relief against forfeiture by reason of a breach of covenant cannot be made by originating summons. *Lock* v. *Pearce*, 62 L. J., Ch. 582; [1893] 2 Ch. 271; 2 R. 403; 68 L. T. 569; 41 W. R. 369—C. A.

Question between Legal Devisees.]—Upon an originating summons under r. 3 of Ord. LV. of the Rules of Supreme Court, 1883, there is jurisdiction to determine such questions only as before the existence of that rule could have been determined under a judgment for the administration of an estate or execution of a trust. Consequently, there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a will. *Davies, In re, Davies* v. *Davies*, 57 L. J., Ch. 759; 38 Ch. D. 210; 58 L. T. 312; 36 W. R. 587.

Question affecting Person claiming adversely to Will.]—The court has no jurisdiction, on an originating summons under r. 3 of Ord. LV. of the Rules of Court, 1883, to determine a question affecting a person claiming adversely to the will of a deceased person. *Bridge, In re, Franks* v. *Worth*, 56 L. J., Ch. 779; 56 L. T. 726; 35 W. R. 663.

Construction of Will—Settlement.]—H. devised lands to T. in terms which raised a question whether the lands passed to T. in fee or for life only, with remainder to A. as tenant in tail under a prior settlement, the legal estate in the lands passing direct to the devisee or devisees, and there being no trustees of the will. H. died in 1863. T. died in 1884, having devised his real estate to trustees. A. executed a disentailing deed and a resettlement of his estate. The trustees of T.'s will took out an originating summons under Ord. LV. r. 3, making A. and the trustees of his resettlement defendants, for the determination of the questions whether the lands devised by the will of H. passed to T. in fee, and thence to the trustees of his will, or whether they belonged to T. for life only with remainder to A. in tail, and if so, were included in A.'s resettlement:—Held, that Ord. LV. r. 3, did not apply to the case, and that the court had

no jurisdiction to determine the questions upon an originating summons. *Carlyon, In re, Carlyon* v. *Carlyon*, 56 L. J., Ch. 219 ; 56 L. T. 151 ; 35 W. R. 155.

Appointment of Receiver.]—Semble, that a receiver may be appointed upon an originating summons. *Gee* v. *Bell*, 56 L. J., Ch. 718 ; 35 Ch. D. 160 ; 56 L. T. 305 ; 35 W. R. 805.

In an administration action, commenced by originating summons, a receiver may (in a proper case) be appointed immediately after the service of the summons and before any order for administration has been made. *Francke, In re, Drake* v. *Francke*, 57 L. J., Ch. 437 ; 58 L. T. 305.

A mortgagee issued a writ asking for the usual order for foreclosure, and moved for the appointment of a receiver, and on the motion being heard, a receiver was appointed. A statement of claim was delivered, but the mortgagor having become bankrupt, the plaintiff withdrew his claim for payment :—Held, that the plaintiff should have proceeded by originating summons. *Barr* v. *Harding*, 58 L. T. 74 ; 36 W. R. 216.

To set aside Release.]—Two legatees having alleged that they had been induced to execute a release, indemnifying the executors of a testator's estate, without having had independent advice :—Held, that they were entitled to take out an originating summons under Ord. LV. r. 3, of the Rules of Court, 1883, to have the release set aside, the question of the validity of the release being one "arising in the administration of the estate" and "affecting" the rights of the legatees within the meaning of that order. *Garnett, In re, Gandy* v. *Macaulay*, 50 L. T. 172 ; 32 W. R. 474.

The court, in its discretion, will not allow a claim which involves setting aside a release to be determined on an originating summons, but will require a writ to be issued. *Ellis' Trusts, In re, Kelson* v. *Ellis*, 59 L. T. 924 ; 37 W. R. 91.

Mortgage—Priorities.]—A question of disputed priority as between two mortgagees, even assuming that the court has jurisdiction to decide it on originating summons—as to which, quære—is not such a question as ought to be determined by such a mode of procedure. *Giles, In re, Real and Personal Advance Co.* v. *Mitchell*, 59 L. J., Ch. 226 ; 43 Ch. D. 391 ; 62 L. T. 375 ; 38 W. R. 273—C. A.

—— **Question as to calling in Mortgage—One Trustee against Co-trustee.**]—One of the trustees of a will took out an originating summons against his two co-trustees, asking for the determination of the question whether the trustees ought to take any, and if any what, steps to call in or otherwise with respect to certain mortgage securities held by the trustees upon trusts declared by the will :—Held, that the summons was properly taken out under Ord. LV. r. 3 (*g*), for the determination of a question arising in the administration of an estate. *Medland, In re, Eland* v. *Medland*, 58 L. J., Ch. 572 ; 41 Ch. D. 476 ; 60 L. T. 851 ; 37 W. R. 753—C. A.

—— **Construction of Mortgage-deed—Offer to Redeem.**]—A mortgage may proceed by originating summons, under Order LIVA., r. 1, to have a question of construction arising on the mortgage-deed determined without making an offer to redeem. *Nobbs* v. *Law Reversionary Interest Society*, 65 L. J., Ch. 906 ; [1896] 2 Ch. 830 ; 75 L. T. 309.

—— **Action for Redemption—Disputed Title.**]—The plaintiff obtained judgment in a redemption action where the defendant denied the tender, and disputed the plaintiff's title to redeem :—Held, that the plaintiff was entitled to such costs only as he would have been entitled to on an originating summons contested by the defendant, and attended by counsel, such costs to include the costs of the witnesses examined in court to prove tender and plaintiff's title. *Johnson* v. *Evans*, 60 L. T. 29.

Power of Appointment — Validity.] — The question having been raised whether a power of appointment under a will was invalid as infringing the rule against perpetuities :—Held, that there was jurisdiction to determine the question on an originating summons under Ord. LV. r. 3. *Hargreaves, In re, Midgley* v. *Tatley*, 59 L. J., Ch. 384 ; 43 Ch. D. 401 ; 62 L. T. 473 ; 38 W. R. 470—C. A.

Trustees — Direction to.] — An originating summons ought not to be taken out under Ord. LV. r. 3, for the purpose of obtaining a direction to trustees to do or abstain from doing an act which is outside the scope of their trusts. *Suffolk* v. *Lawrence*, 32 W. R. 899.

—— **Payment into Court—Wilful Default.**]—An originating summons was taken out under Ord LV. of the Rules of Court, 1883, by one of the residuary legatees under the will of a testator, against the executors and trustees thereof asking that certain questions or matter arising in the administration of the estate of the testator might be determined and relief given in respect thereof. The summons asked that a sum of stock standing in the names of the trustees might be transferred into court ; that a mortgage-deed for securing the payment of a sum forming part of the testator's estate might be deposited in court ; that the trustees might be ordered to pay into court a sum forming part of the estate and improperly used by them in their respective businesses ; for proper accounts ; a declaration of the rights and interests of the persons beneficially entitled ; that so far as might be necessary for the purposes aforesaid the estate might be administered by the court ; and that the trustees might be ordered to pay the costs. It was objected that the case ought to have been commenced by a writ in an action, inasmuch as trustees could not properly be charged with wilful default by an originating summons :—Held, that the court had jurisdiction upon an originating summons, to order payment into court of moneys which had been received by trustees and improperly applied by them ; and therefore to grant the relief asked for in the present case. *Chapman, In re, Fardell* v. *Chapman*, 54 L. T. 13.

—— **Breach of Trust.**]—A proceeding by which trusteees are charged with a breach of trust cannot be brought by originating summons. *Weall, In re, Andrews* v. *Weall*, 37 W. R. 779.

An action was commenced by originating summons, and on the 25th March, 1893, it was declared that the trusts of a will ought to be performed under the direction of the court, and certain inquiries were directed, among others, as to the value of the mortgage securities and

whether they were sufficient, and whether they should be called in or retained, and in case they were insufficient, "under what circumstances and by whom the moneys owing thereon were advanced, and what valuations were taken by the persons advancing such moneys, and whether such investments were proper." On the 5th November, 1894, further inquiries and accounts were directed, and among others, an account of the personal estate not specifically bequeathed of the testator's estate. The chief clerk certified on the 26th of March, 1896, that the investments were to a certain extent improper, and as to one of them that it was made on no sufficient valuation, and found that the defendants were liable thereon. A summons was then taken out by them asking that this might be varied, and it was so varied on the grounds that it was beyond the scope of the inquiry and not borne out by the evidence. The question now arose, the summons to vary coming on with the further consideration, what further relief there was, if any, as it lay in respect of a breach of trust, and could not presumably be given on originating summons:—Held, that the words of the inquiry above set out went too far, and that, if objection had been taken to it at the time, it would not have been proceeded with, but that, not having been objected to, it was now binding on the court. That that being so, it would be idle to send the applicants to commence another action, and that, as the account asked for was one upon which the defendants, if the case had occurred prior to the judicature act, might have been held liable on the common account, the beneficiaries were entitled to have it taken. At the same time, there was no intention of getting rid of the rule by a side wind which prevented contested cases being decided on originating summons, and if, therefore, it appeared on taking the account that it involved vivâ voce evidence, application should be made for directing the issue to be dealt with in the proper mode. *Stuart, In re, Smith* v. *Stuart*, 74 L. T. 546.

—— **Question whether Defendant Co-trustee with Plaintiff.**]—The plaintiff claimed, by action, that it might be determined whether the defendant was co-trustee with him of a settlement under which both of them had been appointed trustees, and that a new trustee might be appointed in the defendant's place. The defendant denied that he had ever accepted the trusts or acted as trustee, or that he had refused to concur in the appointment of a trustee in his place; and it was objected that the application ought to have been by originating summons:—Held, that relief could not have been granted under an originating summons, and that the plaintiff had rightly proceeded by action, and was entitled to his costs thereof. *Elworthy* v. *Harvey*, 60 L. T. 30; 37 W. R. 164.

—— **Appointment of New Trustee—Vesting Order.**]—Upon an originating summons asking for general administration of an estate and the appointment of new trustee, the court can make an order for the appointment of new trustees, all the parties interested in the appointment being before the court. *Allen, In re, Simes* v. *Simes*, 56 L. J., Ch. 779; 56 L. T. 611. And see *Elworthy* v. *Harvey*, supra.

The court has no jurisdiction, upon an originating summons in chambers, to make an order appointing new trustees, and vesting in them the trust estate. *Gill, In re, Smith* v. *Gill*, 53 L. T. 623; 34 W. R. 134.

An originating summons having been issued under Ord. LV. r. 13 (*a*), of December, 1888, for the appointment of a new trustee and vesting order:—Held, that this was a "matter" within s. 42 of the Trustee Act, 1850, and that the court had power on motion in the summons to make an order vesting the trust property in the new trustee, with the right to call for a transfer of stock in the Bank of England. *Jones, In re*, 59 L. J., Ch. 157; 61 L. T. 554; 38 W.R. 203.

Under r. 13 (*a*) of Ord. LV. of the Rules of Court, 1883, a vesting order may be obtained by summons in chambers upon the appointment of new trustees, but in a complicated case a petition for the appointment of new trustees and a vesting order may be presented, and the costs thereof will be allowed. *Morris's Settlement Trusts, In re*, 60 L. T. 96; 37 W. R. 317.

Trustee Relief Act.]—The procedure by way of originating summons is not intended to be substituted for the statutory procedure under the Trustee Relief Act, and a trustee's right of payment in under that act remains unaffected. *Parker's Will, In re*, 58 L. J., Ch. 23; 39 Ch. D. 303; 60 L. T. 83—C. A.

Sale by Court.]—An order for sale of a judgment debtor's interest in certain houses in respect of which a receiver has been appointed, can be made on an originating summons under Order LV. r. 9b. *Martin and Varlow, In re*, 13 R. 189; 43 W. R. 247.

Approval of Sale by Court.]—Under r. 3 (*f*) of Ord. LV. the court can only approve of a sale which the executors or trustees of the will or deed to which the originating summons relates could have made themselves. *Robinson, In re, Pickard* v. *Wheater*, 55 L. J., Ch. 307; 31 Ch. D. 247; 53 L. T. 865.

Objection to—Time for—Costs.]—An objection to the jurisdiction upon an originating summons having been taken by the defendants for the first time after the hearing of the summons had been adjourned into court:—Held, that the objection ought to have been taken in chambers, and that, though the objection was good, and the summons must be dismissed with costs, the defendants could not be allowed the costs of the adjournment into court. *Davies, In re, Davies* v. *Davies*, 57 L. J., Ch. 759; 38 Ch. D. 210; 58 L. T. 312; 36 W. R. 587.

2. Service of.

Similar to Service of Writs.]—In an administration action commenced by originating summons under Ord. LV. rr. 3 and 4, of the Rules of Court, 1883, the defendant being a person of unsound mind not so found by inquisition, the summons was served, as required for writs by Ord. IX. r. 5, of the same rules, on the person under whose care the person of unsound mind was. No appearance was made by the defendant on return of the summons, and none was entered. Notice of motion was served for the appointment of a guardian ad litem, as required by Ord. XIII. r. 1, of the same rules in case of default of appearance to writs. The court, holding that the rules as to the service of writs applied to an

originating summons, made an order appointing a guardian ad litem. *Pepper, In re, Pepper* v. *Pepper*, 53 L. J., Ch. 1054; 50 L. T. 580; 32 W. R. 765.

Indorsement and Affidavit of Service.]—Ord. LXVII. r. 6, applies to service of an originating summons which should be indorsed after service in the manner provided by Ord. IX. r. 16, and the affidavit of service should verify the making of such indorsement. *Browne* v. *Browne*, 29 L. R., Ir. 368.

Out of the Jurisdiction.]—Where an originating summons was taken out by an executor for the purpose of deciding the question of the domicil of a testator, and the widow and one adult child and two infants were separately represented by counsel; but one adult child, C. B., was in Calcutta and could not be served, and the property was of great value; the court refused to decide the question in the absence of C. B., but gave leave to issue a writ, and gave leave to serve the writ out of the jurisdiction, and to serve notice of motion on C. B. in Calcutta, in order to have a declaration deciding the question, the evidence on the summons to be used on the motion. *Bullen-Smith, In re, Berners* v. *Bullen-Smith*, 57 L. T. 924.

The court cannot order service of an originating summons out of the jurisdiction. *Busfield, In re, Whaley* v. *Busfield*, 55 L. J., Ch. 467; 32 Ch. D. 123; 54 L. T. 220; 34 W. R. 372—C. A.

3. Other Points.

Form—Question of Construction.]—An originating summons issued to obtain the construction of a document, and the ascertainment of the persons entitled thereunder, should set out specific questions which the court can answer categorically. *Harman, In re, Lloyd* v. *Tardy*, 63 L. J., Ch. 822; [1894] 3 Ch. 607; 8 R. 549; 71 L. T. 401.

Statement of Facts.]—Where an originating summons is taken out to determine the construction of a will, the statement of facts supplied to the judge should set out the material portions of the will verbatim and not in the indirect narrative. *Bence, In re, Smith* v. *Bence*, 64 L. T. 282.

District Registry—Removal of Proceedings.]—See *Thwaites, In re, Yerburgh* v. *Aston*, 63 L. T. 747.

Third Party Procedure not applicable.]—The procedure directed for originating summonses under Ord. LV., and the relief intended to be thereby given, are not of such a nature as the third-party rules were intended to apply to, and the court has no power to give a defendant to an originating summons leave to issue a third-party notice. *Wilson, In re, Att.-Gen.* v. *Woodall*, 60 L. J., Ch. 101; 45 Ch. D. 266; 63 L. T. 100; 39 W. R. 58.

Point not raised by Plaintiff.]—Semble, in an originating summons the court will not at the instance of the respondent decide a point not raised by the plaintiff taking out the summons. *Carter, In re*, 41 W. R. 140.

Costs.]—A public body paying money into court under the Lands Clauses Act, 1845, must pay the costs of an originating summons for payment out issued with its concurrence, although there is no jurisdiction to deal with the matter on a summons. *Hicks, In re, North Eastern Railway, Ex parte*, 63 L. J., Ch. 568; 8 R. 319; 70 L. T. 529.

—— **Objection to Jurisdiction.**]—See *Davies, In re*, supra.

XVIII. NOTICES.

See R. S. C. 1883, Ord. LXVI.

In Writing.]—Where a writ of summons has issued for a sum under 20*l.* the notice mentioned in the indorsement thereon, of the defendant's intention to oppose the plaintiff's application for costs, must be in writing. *Woodward* v. *North*, 5 H. & N. 790; 29 L. J., Ex. 471; 8 W. R. 694.

Service on Person not a Party to Judgment.]—In an action for administration, judgment for administration was delivered on the 2nd June, 1883, and in November, 1884, notice of the judgment was served by the plaintiffs, under an order of the court on P., a purchaser of part of the testator's estate in which the plaintiffs were not interested. He was not a party to the action, and it did not appear from the judgment how he was affected. In order to ascertain his position, he entered an appearance on the 22nd November, 1884, under Ord. XVI. r. 41. On finding that he was not affected by the judgment, he served notice of motion on the plaintiffs that the order directing service might be discharged for irregularity, that the service might be declared irregular and set aside, that the appearance entered by him thereupon might be vacated, and that the costs of the application and consequent on the service might be paid by the plaintiffs. The motion was ordered to stand over, and P. was kept in the proceedings till the hearing on further consideration, when Bacon, V.-C. refused to give him any costs:—Held, on appeal, that P. was not a person who ought to have been served under Ord. XVI. r. 40, and that the service was irregular; that P. was right in appearing to the notice, that his appearance must be vacated, and that the plaintiffs must pay the costs in both courts, including the costs of appearance and all costs consequent on the service. *Symons, In re, Betts* v. *Betts*, 54 L. T. 501—C. A.

See also ante, cols. 574 et seq.

Publication of Statutory Notice.]—Where a statute required notices "to be affixed on the principal outer door of the church of such parish, or if there shall not be any church in such parish, then upon the principal outer door of every known place of religious worship in such parish," it was held that posting the notices on a notice-board fixed on a gate pier facing the principal entrance to a place of worship, but on the opposite side of the road, was not a compliance with the statutory requirement. *Reg.* v. *Meath JJ.*, [1897] 2 Ir. R. 21.

In Particular Cases.]—*See* SPECIFIC TITLES.

XIX. PROCEEDINGS IN DISTRICT REGISTRY.

See R. S. C. 1883, Ord. XXXV.

Appearance to Writ Issued out of.]—When a writ is issued out of a district registry and is served without the district, it is imperative that

notice of appearance be sent to the address for service within the district; notice of appearance given at the address for service in London is insufficient. *Smith* v. *Dobbin*, 47 L. J., Ex. 65; 3 Ex. D. 338; 37 L. T. 777; 26 W. R. 122—C.A.

Jurisdiction of Registrar—Solicitor's Bill—Order of Course.]—A company, having its registered office in Liverpool, had employed a solicitor living at Sheffield to take certain legal proceedings in London. The company obtained from the registrar of the Liverpool district registry an order on a petition of course for delivery and taxation of the solicitor's bill of costs:—Held, that the registrar had exceeded his authority, and that the order must be discharged. *Porrett, In re*, 60 L. J., Ch. 396; [1891] 2 Ch. 433; 64 L. T. 752; 39 W. R. 531—C. A.

—— **Interpleader.**]—The judicature rules confer no jurisdiction upon a district registrar of the high court to make an interpleader order. *Hood* v. *Yates*, 63 L. J., Q. B. 218; [1894] 1 Q. B. 240; 70 L. T. 557; 42 W. R. 412. *But see* Ord. XXXV. r. 5a.

—— **To Rectify Judgment.**] — A district registrar has, by r. 6 of Ord. XXXV., concurrently with a master of the high court, the jurisdiction of a master to set aside a judgment entered in the district registry. *Hood* v. *Yates* (63 L. J., Q. B. 218; [1894] 1 Q. B. 240), considered. *Townend* v. *Kirkham*, 67 L. J., Q. B. 5; [1898] 1 Q. B. 51; 77 L. T. 419; 46 W. R. 65—C. A.

—— **To open Accounts and Receive Moneys.**]—The treasury order of the 1st of April, 1876, relating to the official banking accounts, applies to fees and other moneys collected by district registrars, and does not authorise them to open accounts and receive moneys (e.g. on sale of real estate) in chancery actions. *Macdonald* v. *Foster*, 25 W. R. 602. In C. A., *see* infra.

—— **To appoint Receiver and direct Accounts.**]—District registrars have no power to appoint receivers, direct banking accounts to be opened, and money to be paid in to those accounts; nor have they any power to take accounts directed by the judge in actions commenced in the district registries, unless the judgment specially directs them so to do. *Smith, In re, Hutchinson* v. *Ward*, 6 Ch. D. 692; 36 L. T. 178; 25 W. R. 452.

By virtue of rr. 1a and 4 of Ord. XXXV., a district registrar has power to make an order for an account under r. 1 of Ord. XV., and if the order so directs (but not otherwise) he can then proceed to take the account himself. *Bowen, in re, Bennett* v. *Bowen*, 51 L. J., Ch. 825; 20 Ch. D. 538; 47 L. T. 114. *But see* Ord. XXXV. r. 6 *and* Ord. LV. r. 15.

—— **Account—Form of Report.**]—In making a report to the court under s. 66 of the Judicature Act, 1873, of the result of an account in an administration action, the district registrar ought to adopt the form of a chief clerk's certificate, and to state in the report the persons who were present before him, and the materials upon which he proceeded. *Bowen, In re, Bennett* v. *Bowen*, supra.

—— **To Direct Administration Account and Inquiries.**]—In the Liverpool district registry an action was commenced by a writ of summons for the administration of real and personal estate, and statements of claim and defence having been filed, the action came on for trial. The district registrar issued an administration summons, and made, by consent, a decree for administration of the real and personal estate, directing accounts and inquiries, and reserving further directions. The accounts and inquiries having been prosecuted, on application for directions as to setting down the action on further consideration:—Held, that the proceedings in the district registry were irregular, the district registrar having no power to make a decree, even by consent. *Irlam* v. *Irlam*, 2 Ch. D. 608; 24 W. R. 292, 949.

The action coming on for trial as a short cause:—Held, that, having regard to Ord. XXXV. r. 1, it is only in default of appearance that a district registrar can make an order under Ord. XV. r. 1, and that accounts and inquiries cannot be prosecuted in a district registry, except by direction of the court or the judge of the division, under the Judicature Act, 1873, s. 66. *Ib.*

An application for a decree, with liberty to adopt the proceedings in the district registry, was refused, but the usual administration decree was made, with a direction that the accounts and inquiries should be taken and made in the district registry, and that the sale of the real estate should take place in London under the supervision of the judge in chambers. *Ib.*

Where an action is intituled in the chancery division and a district registry, the usual inquiries may be made in the district registry, but the application for a sale should be made in the chambers of the judge of the chancery division to whom the action is attached. *Sykes* v. *Schofield*, 49 L. J., Ch. 833; 14 Ch. D. 629; 42 L. T. 822; 29 W. R. 68.

Order directing Accounts, Inquiries or Sale.]—Although the court has power under the Judicature Act, 1873, s. 66, in any action to direct accounts and inquiries to be taken and made in a district registry, it has no jurisdiction to appoint a receiver in such district registry for the purposes of the action. *Walker* v. *Robinson*, 34 L. T. 229; 24 W. R. 427.

When the accounts and inquiries in an action for the administration of an estate which was insufficient to pay legacies in full had been prosecuted in a district registry, the court allowed the minutes of the order on further consideration to be altered by directing the apportionment amongst the legatees to be made by the district registrar instead of by the chief clerk. *Day* v. *Whittaker*, 46 L. J., Ch. 680; 6 Ch. D. 734; 36 L. T. 683; 25 W. R. 767.

When a decree in an administration action directed the accounts to be taken in a district registry, and the real estate to be sold with the approbation of the judge, Hall, V.-C., directed that the sale should take place in his chambers:—Held, that although it might have been more convenient that the sale should take place in the district registry, yet the place and manner of the sale was a matter entirely within the discretion of the judge, and the court refused to interfere with his exercise of such discretion. *Macdonald* v. *Foster*, 6 Ch. D. 193; 37 L. T. 296; 25 W. R. 687—C. A.

Appointment of Receiver.]—In a creditor's action for the administration of a testator's real and personal estate, which was commenced in a district registry, on motion for judgment the chancery division has jurisdiction to appoint a receiver, who must give security in London, but may pass his accounts in the district registry. *Capper, In re, Robertson* v. *Capper*, 26 W. R. 434. And see *Walker* v. *Robinson*, supra.

—— **Payment of Money to Credit of District Registrar.**]—When an action is commenced in a district registry and money is ordered to be paid by a receiver into court to the credit of the action, it is not a compliance with that order to pay the amount into a bank "to the credit of the district registrar." That mode of payment is irregular, and the money will be ordered to be brought into court under the chancery funds act and rules. *Finlay* v. *Davis*, 12 Ch. D. 735; 39 L. T. 662; 27 W. R. 352.

Removal of Proceedings.]—A motion made in the chancery division in an action commenced in a district registry has the effect of removing such action to London, so that no further proceedings can be taken in the district registry. *Dyson* v. *Pickles*, 27 W. R. 376.

Ord. XXXV. r. 16, provides that, "In any case not provided for by rr. 13 and 14, any party to a cause or matter proceeding in a district registry may apply to the court or a judge, or to the district registrar, for an order to remove the cause or matter from the district registry to London, and the court, judge, or registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just." Circumstances under which an order for transfer to the high court will not be made. *Neath and Bristol Steamship Co., In re*, 58 L. T. 180.

An originating summons was taken out in the Liverpool district registry by a tenant for life against the trustees of a testator's will and infants, asking for an account and the appointment of a new trustee. The testator's property was situate in Leicestershire, Lancashire, Scotland, and London, and comprised a large brewery in Lancashire. The testator, by his will, appointed three persons living in Lancashire as trustees of his will, and the defendant A. The plaintiff and the defendant A. lived in London, and the surviving trustee in Lancashire. On summons by the defendant A. asking as a matter of right that the proceedings might be removed from the Liverpool district registry to London:—Held, that the proceedings did not come within the terms of Ord. XXXV. rr. 13 and 14, of the Rules of Court, 1883, the proceedings not having been commenced by writ. Held, that r. 16 of Ord. XXXV. applied, and an important part of the property being situate in Lancashire, and three of the trustees appointed by the will being Lancashire men, the summons must be refused. *Thwaites, In re, Yerburgh* v. *Aston*, 63 L. T. 747.

A plaintiff commenced an action in the Bradford district registry for administration of the estate of a deceased party. The statement of claim was marked as delivered on 19th November, 1875, and as assigned to the chancery division, Bacon, V.-C. The defendant made default, whereon the plaintiff became entitled to set down the action on motion for judgment. On the plaintiff's motion under Ord. XXXV. r. 13, Bacon, V.-C., ordered the cause to be transferred to his court. *Walker* v. *Robinson*, 33 L. T. 779; 24 W. R. 137.

When a plaintiff is entitled, under Ord. XXIX. r. 10, to set down on motion for judgment an action which has proceeded in a district registry, the court will not make an order, under Ord. XXXV. r. 13, for the removal of the action to London, but will direct the papers and documents to be sent to London, and upon this being done, the action may be set down for trial without further direction from the court. *Birmingham Waste Co.* v. *Lane*, 24 W. R. 292.

Trial of Chancery Actions commenced in.]—Notwithstanding Ord. XXXV. r. 1a, chancery actions commenced in district registries ought to be tried in London before the judge of the chancery division to whom they have been assigned. *Smith, In re, Hutchinson* v. *Ward*, 6 Ch. D. 692; 36 L. T. 178; 25 W. R. 452.

Power to vary Order as to Costs.]—The enactment in s. 49 of the Judicature Act, 1873, that no order by the high court, or any judge thereof, as to costs only which by law are left to the discretion of the court, shall be subject to any appeal, does not apply to the order of a master or district registrar, and therefore a judge of such court has power to vary as to costs an order of a district registrar dismissing the action without costs. *Foster* v. *Edwards*, 48 L. J., Q. B. 767.

Charging Order after Trial.]—Upon a petition by a solicitor for a charging order on property preserved in an action marked "Chancery Division, Liverpool District Registry, Hall, V.-C.," which had been tried by a judge and jury at Liverpool:—Held, that the judge who had dealt with the substantial part of the case was the only judge who could deal with the application. *Owen* v. *Henshaw*, 47 L. J., Ch. 267; 7 Ch. D. 385; 26 W. R. 188.

Taxation of Costs.]—The court will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by the taxing-master in London. *Day* v. *Whittaker*, 46 L. J., Ch. 680; 6 Ch. D. 734; 36 L. T. 683; 25 W. R. 767.

When an administration decree directed accounts and inquiries to be taken in the district registry and ordered that upon the result being reported the action should be heard in London on further consideration, the court refused to allow the costs of the action to be taxed in the district registry. *Irlam* v. *Irlam*, 2 Ch. D. 608; 24 W. R. 949.

The court can, in its discretion, order the taxation of costs in an administration action, commenced and prosecuted in a district registry, to be made by the district registrar. The term "taxing officer" in rr. 3, 11, and 12 of Supreme Court Funds Rules, 1884, these rules being read in conjunction with Ord. LXV. r. 27, sub-s. 43, of Rules of Supreme Court, 1883, includes "district registrar," where the court has directed taxation to be made by that officer, and the paymaster is bound to act on the certificate of taxation of a district registrar, when the court, in the exercise of its discretion, has directed taxation in the district registry. The court, however, following *Day* v. *Whittaker* (6 Ch. D. 734), will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by a

taxing master of the chancery division. *Wilson, In re, Wilson* v. *Alltree*, 53 L. J., Ch. 989; 27 Ch. D. 242; 32 W. R. 897.

—— **Review of Taxation—Appeal.**]—A taxation of sheriff's costs and charges by a master of the supreme court or district registrar of the high court, under the general order as to fees of the 31st of August, 1888, made in pursuance of the Sheriffs Act, 1887, is not the subject of review under the provision of Ord. LXV. r. 27 (39-41), of the rules of the supreme court. Such taxation is a mere calculation of amount, and, per se, fixes no liability on the person assessed. *Townend* v. *Yorkshire (Sheriff)*, 59 L. J., Q. B. 156; 24 Q. B. D. 621; 62 L. T. 402; 38 W. R. 381; 54 J. P. 598.

Where a taxation of costs has been carried out in a district registry, and objections have been delivered to and disallowed by the registrar, a judge of the high court has jurisdiction on a summons to review the taxation to make an order that the items referred to in the objections be referred to a master of the supreme court for re-taxation. *Stevens* v. *Griffin*, 66 L. J., Q. B. 698; [1897] 2 Q. B. 368; 76 L. T. 803; 45 W. R. 658—C. A.

XX. PROCEEDINGS IN CHAMBERS.

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a. CHANCERY DIVISION.

1. Matters Referred to Chambers.

See R. S. C. 1883, Ord. LV. r. 2.

Private Act.]—A private act of parliament directed a reference to a master of the court of chancery from time to time for various purposes connected with the management of an estate:—Held, that the reference may now be directed to the chief clerk in chambers. *Thornhill* v. *Thornhill*, 1 Eq. R. 397; 22 L. J., Ch. 985; 17 Jur. 252; 18 Jur. 31; 1 W. R. 251, 459.

Question of Law.]—Where the question in the suit is a question of law, the inquiry must be made at chambers unless the parties can come to an agreement. *Duffield* v. *Lenny*, 1 W. R. 74.

Inquiry.]—When a plaintiff is allowed to go into evidence in chambers in support of a point in his case raised at the hearing, but which formed no part of the prayer of the bill (as, for instance, whether valuable consideration was really given, when the settlement under which he claims appears primâ facie to have been voluntary), there must be an order drawn up directing the inquiry, and the case cannot proceed before the chief clerk on a simple adjournment to chambers. *Kelson* v. *Kelson*, 9 Hare (App.) lxxxvi.; 17 Jur. 129; 1 W. R. 196.

Proceedings by inquiries in chambers, and by certificate, in a case where the consideration of the result of the evidence was adjourned for argument in court. *Rogers* v. *Mort*, 10 Hare (App.) liii.

Foreclosure.]—In foreclosure suit, the reference should be to the judge's chief clerk in chambers. *Staines* v. *Rudlin*, 16 Jur. 965; 1 W. R. 13.

Leases.]—An application for a renewal of a lease ought to be by summons in chambers. *Bickford* v. *Chalker*, 1 Eq. R. 236.

Leases to be granted by trustees under the provisions of the 19 & 20 Vict. c. 120, must be settled in chambers. *Procter's Settled Estates, In re*, 26 L. J., Ch. 464; 3 Jur. (N.S.) 534; 5 W. R. 643.

Damages.]—Inquiry as to damages for polluting a stream sent to chief clerk and not to a referee. *Slack* v. *Midland Ry.*, 50 L. J., Ch. 196; 16 Ch. D. 81; 43 L. T. 434; 29 W. R. 302.

Conduct of Proceedings.]—The question, who is to have the conduct of the proceedings, will be decided in chambers, as well where the proceedings are in two causes as where they are in one cause. *Stone* v. *Van Heythuysen*, 18 Jur. 344.

Fund in Court.]—Questions respecting the payment of money out of court are properly settled before the chief clerk, or in case of difficulty by the judge in chambers, and ought not to be made the subject of an application in open court. *Bentley* v. *Craven*, 1 W. R. 362, 401.

The court having ordered certain small leaseholds to be sold and the proceeds distributed, together with a fund in court, among numerous parties, upon the certificate of the chief clerk, in order to save expense, directed the purchasers to be served with a summons to show cause at chambers why the proceeds should not be distributed pursuant to the order; and no cause having been shown, the proceeds were distributed by the chief clerk. *Thorp* v. *Owen*, 2 Sm. & G. (App.) i.

Where 300*l.*, part of a fund in court, was to be settled by the court, the petition for the settlement was referred to chambers; and after consideration the trusts were inserted in the order,

instead of the settlement being referred to the conveyancing counsel. *Chamberlain* v. *Chamberlain*, 1 Sm. & G. (App.) xxviii.

All questions of title relating to land, in which money in court is to be invested under the order of the court, are, as a general rule, referred to chambers for consideration, and the judge in chambers will there consider whether he can approve of the title without sending it to the conveyancing counsel of the court. *Jones' Settled Estates, In re*, 3 Eq. Rep. 735; 24 L. J., Ch. 504; 1 Jur. (N.S.) 817; 3 W. R. 564.

Guardian.]—Application for the appointment of a guardian to concur in a special case (*see* 9 Hare (App.) xlviii.) made in court and not by summons at chambers. *Thornhill* v. *Copleston*, 10 Hare (App.) lxvii.

Sale.]—Evidence of the propriety of a sale of an estate by private contract heard and approved of in court, and not referred to chambers. *Pim* v. *Insall*, 10 Hare (App.) lxxiv.

See also LANDS CLAUSES ACTS—TRUSTEE ACTS—TRUSTEE RELIEF ACTS—INFANT—SETTLED LAND, and other Specific Titles.

2. Authority of Chief Clerk.

To decide Necessary Questions.]—Where an inquiry as to personal estate was directed in a suit, commenced by administration summons, and a question arose, in the course of such inquiry, as to whether there was a binding agreement for a settlement, which it became necessary to determine, in order to ascertain what the personal estate consisted of, and the chief clerk determined that question, and this finding was objected to as being ultra vires:—Held, that the chief clerk had power to decide the question, it being necessary to do so to carry out the inquiry. *Wadham* v. *Rigg*, 2 Dr. & Sm. 78; 8 Jur. (N.S.) 206; 6 L. T. 180; 10 W. R. 365.

Witnesses.]—An alleged contributory under a winding-up order was summoned before the chief clerk as a witness, and to produce papers. He refused to be sworn, on the ground that it was important that he should have the assistance of counsel. Upon a motion to commit:—Held, that the witness had no right to refuse to be sworn, but that the proper course was, after he was sworn, to apply to the chief clerk to have his examination taken before the judge or an examiner, and, if necessary, to have the question determined by adjournment in court. *Electric Telegraph Co., In re, Bunn, Ex parte*, 24 Beav. 137; 26 L. J., Ch. 614; 3 Jur. (N.S.) 1013.

The chief clerks of the vice-chancellors have power to administer an oath under the winding-up acts. *National Alliance Assurance Co., In re*, 1 L. T. 131; 8 W. R. 75.

Compromise.]—An official manager, having entered into a compromise with a contributory, believing that some of the statements made by the contributory were untrue, sought to set aside the compromise, on the ground that it had only received the sanction of the chief clerk, and had not received that of the judge, or been brought before his attention:—Held, that the compromise was valid, although it had not been brought before the judge. *Home Counties Life Assurance Co., In re, Garstin, Ex parte*, 6 L. T. 374; 10 W. R. 457.

General Administration.]—The proviso in Ord. LV. r. 15, that no judgment or order for general administration shall be made under r. 4 of that order by the chief clerk, extends to orders for general administration of trusts constituted by deed. *Davidson* v. *Young*, 54 L. J., Ch. 747.

Reference to Accountant.]—A reference made by a chief clerk to an accountant of questions arising in an action is irregular. *Hill* v. *King*, 3 De G. J. & S. 418; 1 N. R. 341; 9 Jur. (N.S.) 527; 8 L. T. 220.

Inquiry as to Debts—Purchase of Debts by Plaintiff's Solicitor.]—The solicitor to the plaintiff in a creditor's action bought up debts; the estate was insolvent:—Held, that the question whether the solicitor was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the chief clerk, in the absence of any direction on the subject in the order under which the certificate was made. *Tillet, In re, Field* v. *Lydall*, 55 L. J., Ch. 841; 32 Ch. D. 639; 54 L. T. 604; 35 W. R. 6.

Short Notice—Vacation.]—Leave to serve short notice of motion cannot be given by the chief clerk in vacation any more than during the sittings. *Conacher* v. *Conacher*, 29 W. R. 230.

3. Adjournment to Judge or Court.

Right of Parties.]—The chief clerk in chambers never makes any order of his own authority, but all the orders made in chambers are orders of the judge, and are, in fact, made by him in the presence of the parties, unless they agree, for their own convenience, to take the order without actually going before the judge in chambers, or unless the order is such an order of course as would be made in court without communication with the judge, upon simply handing in a brief to the registrar; such last-mentioned order, when made in chambers, being made upon the communication of the chief clerk to the registrar without the actual intervention of the judge. The judge in chambers is always accessible to any of the parties who are engaged in proceedings there; and any party suggesting that he wishes to see the judge personally can at once do so. *Hayward* v. *Hayward*, 1 Kay (App.) xxxi.; 23 L. J., Ch. 549; 2 Eq. R. 436; 2 W. R. 332.

It is the absolute, unqualified right of the suitor to adjourn a summons in chambers from the chief clerk to the judge, at his own risk as to costs. The suitor has a right to go to the judge at any time before the chief clerk's order becomes operative—that is, before the order is drawn up and passed, or until something has been done under it. *Scott* v. *Homer*, 60 L. J., Ch. 238; 63 L. T. 618.

Upon proceedings in chambers any party has a right at any time to have any question brought before the judge personally, there being no such thing as an appeal from the chief clerk's decision. *Rigg, In re, Wadham* v. *Rigg*, 6 L. T. 180; 10 W. R. 365.

Every suitor of the court has an unqualified right to have his case heard before the judge in person, whether under the ordinary proceedings of the court or under the winding-up acts.

Agricultural Cattle Assurance Co., In re, Lowe, Ex parte, 30 L. J., Ch. 619; 7 Jur. (N.S.) 590; 4 L. T. 430; 9 W. R. 682—L.JJ.

When either party is dissatisfied with the chief clerk's decision, the matter should be brought before the judge in chambers. *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. (N.S.) 600; 6 W. R. 201.

Objections to the finding of the chief clerk as to title should be made and at once referred to the judge in chambers before certificate made. *Parr* v. *Lovegrove*, 4 Jur. (N.S.) 600; 6 W. R. 201.

Either party has a right on the minutest point to require an adjournment before the judge himself in chambers. *London and County Assurance Co., In re*, 5 W. R. 794.

Where accounts are being taken in chambers before the chief clerk, either party has a right to have an item which has been found against him adjourned before the judge without taking out a summons for that purpose; and where a question of principle is involved in a particular item it may be necessary to do this. But the ordinary practice is to wait till the account is completed, and then take the adjournment once for all before the judge. If a solicitor were to insist upon his right to take particular items before the judge in an unreasonable manner, the court might make him pay the costs personally. *Upton* v. *Browne*, 20 Ch. D. 731; 47 L. T. 289; 30 W. R. 817.

Discretion of Judge.]—It is in the discretion of the judge to hear matters in chambers, or to adjourn them into court. *Agricultural Cattle Assurance Co., In re*, 3 De G. F. & J. 194; 11 W. R. 386.

Not an Appeal.]—An adjournment from the chief clerk to the judge in person is not in the nature of an appeal. *Watts, In re, Smith* v. *Watts*, 52 L. J., Ch. 209; 22 Ch. D. 1; 48 L. T. 167; 31 W. R. 262. S. P., *Rigg, In re*, supra.

Adjournment into Court.]—Practice as to discussion in court of a question raised in chambers. *Hudson* v. *Carmichael*, 23 L. J., Ch. 893; 18 Jur. 851. See 1 Kay, 613; 2 W. R. 503.

On a summons adjourned from chambers to the court, it is the practice to certify for counsel. *Graham* v. *Graham*, 1 Johns. 624; 5 Jur. (N.S.) 1237.

The practice on proceedings in chambers is, that if one side only desires to be heard by counsel, the judge hears the argument in chambers; if both desire to be so represented, the matter is adjourned to be heard in court. *Rumbold* v. *Forteath*, 3 Kay & J. 44.

—— **Evidence.**]—On the hearing of a summons adjourned from chambers into court, affidavits filed after the time fixed by the chief clerk for the filing of evidence cannot be used before the judge in court unless special leave to use the new affidavits has been given either by the judge or the chief clerk. This rule does not apply where no time has been fixed by the chief clerk for the filing of evidence. *Chifferiel, In re, Chifferiel* v. *Watson*, 58 L. J., Ch. 137; 58 L. T. 877; 36 W. R. 806.

—— **Rehearing.**]—It is at the option of a party, who is dissatisfied with a certificate of the chief clerk, to have his objections to it argued before the judge in chambers or in open court; but where objections have been argued before a judge in chambers, no rehearing will be allowed in open court, except under special circumstances. *York and North Midland Ry.* v. *Hudson*, 2 Eq. Rep. 295; 18 Beav. 70; 17 Jur. 1090; 2 W. R. 90.

Where a party wishes to appeal from a certificate of the chief clerk which has been confirmed by a judge in chambers, the proper course is to make an application in open court, when the judge will make an order, pro formâ, in conformity with the decision in chambers, against which the party can appeal. *Ib.* *See also* APPEAL.

—— **Form of Order.**]—On an adjourned summons from chambers, the court will not make any declaration, but, if necessary, will direct a certificate to the same effect to be drawn up by the chief clerk for its approval. *Morgan* v. *Hatchell*, 19 Beav. 86; 24 L. J., Ch. 135; 1 Jur. (N.S.) 125; 3 Eq. R. 121; 3 W. R. 126.

—— **In what Cases.**]—Important questions are to be discussed in court. *Mildmay* v. *Methuen*, 1 Drew. 215; 22 L. J., Ch. 297; 16 Jur. 965; 1 W. R. 13.

A creditor's summons was taken out in chambers in a cause. Upon the return of the summons, the chief clerk, finding that he had no jurisdiction, adjourned the summons into court at the suggestion of all parties, to come on with the cause upon further consideration: —Held, that the application by summons was regular, but that it ought to have been referred to the judge in chambers, and not adjourned into court. *Halliley* v. *Henderson*, 4 Jur. (N.S.) 202.

If any point arises in the judge's chambers of sufficient importance to require the assistance of counsel, the point should be argued in court. *Bennett's Estate, In re*, 2 Eq. Rep. 4; 18 Jur. 33.

The proceeding by adjourned summons is inconvenient; the chief clerk's opinion should be taken, and the matter should be brought on by motion to discharge his order. *Ware* v. *Watson*, 1 Jur. (N.S.) 1083; 4 W. R. 36.

—— **Costs.**]—It is the right of every party to have the opinion of the judge, as of course, and if a matter is adjourned into court with a view to obtain the judge's opinion, the costs of the proceedings in court must, as a general rule, be borne in the same way as the costs in chambers would have been. *Mitchell, In re*, 33 L. J., Ch. 187; 9 Jur. (N.S.) 1272; 9 L. T. 282; 12 W. R. 39.

Therefore, where a matter was, without opposition, adjourned into court in order to obtain the opinion of the judge on a question of domicil, and on the matter coming on in court the counsel for the party opposing the view taken by the chief clerk considered the question not arguable on the part of his client: —Held, that this was no sufficient ground for fixing this party with the costs of the proceedings in court. *Ib.*

A reservation of costs is implied without express direction where the cause is adjourned before the judge at chambers. *Wallis* v. *Bastard*, 2 Eq. Rep. 508; 17 Jur. 1107; 2 W. R. 47. *See also* ante, col. 688.

Order drawn up.]—Where the chief clerk expresses his opinion, and any of the parties are dissatisfied with it, they have always a right to

have the hearing adjourned into court; but it is no appeal—it is merely a continuation of the hearing begun before the chief clerk. If the chief clerk makes an order which is drawn up, then a motion may be made to discharge that order; but that is a different proceeding. *Leeds* v. *Lewis*, 3 Jur. (N.S.) 1290.

4. Chief Clerk's Certificate.

a. *General Form and Contents.*

On Sale by the Court.]—*See* VENDOR AND PURCHASER.

"Without Prejudice."]—When the chief clerk in distributing a fund, by consent of all the claimants, waives a question of title as to some of the claimants, the certificate should be made "without prejudice." *Waterton* v. *Burt*, 39 L. J., Ch. 425.

Incidental Question.]—Under an order of reference to take an account of assets, the master having reported that there were assets sufficient to satisfy the plaintiff's legacy, although assets to an amount sufficient to satisfy the trusts of the will were not shewn by the accounts, the master grounding his general finding upon the evidence of the defendant's admission of assets by his answer, upon which a personal decree against him had been made, but which the plaintiff had been advised to abandon and take a new decree for an account of assets under the circumstances, with a view to more effectual relief:—Held, that the report was right, this being an inference directly arising from, although not strictly within, the terms of the reference, and the master not being so purely ministerial as to be precluded from drawing such inferences, but, on the contrary, bound to do so. Even if matter so reported beyond the terms of the order was surplusage, that is not a ground of exception, it not being of course to send back the report to the master to expunge a few unnecessary words. *M'Carthy* v. *M'Carthy*, 1 Moll. 136.

Facts and Reasons.]—Masters in chancery, in reports which are special, are only to state bare matters of fact. *Marlborough (Duke)* v. *Wheat*, 1 Atk. 454.

Master, in his report, is always at liberty, though not directed by decree, to state his reasons for disallowance of a claim. *Champernown* v. *Scott*, 4 Madd. 209; 22 R. R. 248.

On a reference to a master in bankruptcy, with liberty for him to examine parties on interrogatories if he should think fit, it seems that if the master should decline to examine any party when required so to do, he should state the grounds on which he declines to do so. *Charter, Ex parte*, 2 Cox, 168.

Accounts referred to the master. Afterwards an order of reference was made to arbitrators to take an account of all dealings and transactions in like manner as if the same was referred to the master, and that the parties should be concluded and bound by the award, and should observe it; and further directions were reserved. This reference is not in nature of a reference to the master; therefore the parties are bound by a general award of a balance due without particulars stated, the decision being final, because upon matter of fact, and no corruption or misconduct imputed; and the court will not require particulars merely as a ground for costs. *Dick* v. *Milligan*, 4 Bro. C. C. 117; 2 Ves. J. 23.

In a suit between a contractor and a railway company, praying a settlement of accounts between them, a decree was made directing an inquiry whether anything, and what, was due to the contractor in respect of the works executed and materials supplied under the contracts. That decree was not appealed from. The chief clerk found that a lump sum was due, and that in a schedule he had set forth the particulars of such sum, and that the evidence adduced on the inquiry was that set forth in another schedule. On an objection to the form of the certificate:—Held, that the certificate must be discharged, for that the chief clerk ought, in finding the lump sum to be due, to have stated how that amount was arrived at, so as to enable the court to judge whether he had come to a right conclusion. *M'Intosh* v. *G. W. Ry.*, 1 De G. J. & S. 443; 2 N. R. 210; 32 L. J., Ch. 412; 8 L. T. 479; 11 W. R. 788.

An exception does not lie to a master's report upon the ground that he has therein stated irrelevant matter. *Rufford* v. *Bishop*, 5 Russ. 346; 7 L. J. (o.s.) Ch. 108; 29 R. R. 40.

One Report—Two Actions.]—One report was directed to be made in two suits (a creditors' and legatee's) for the administration of an estate. *Budgen* v. *Sage*, 3 Myl. & C. 683.

Special Circumstances.]—The master is not at liberty to state special circumstances unless authorised by the court; and where in a creditors' suit the decree directed the usual accounts, and the master found the amount of the debt appearing to be due to the plaintiff, but stated, without the authority of the court, special circumstances not supported by evidence, raising a doubt as to the amount of the appointment to which the plaintiff would be entitled out of the intestate's estate, which was insolvent, upon the debt so found due, the court refused to enter into the consideration of such special circumstances. Semble, that the decision would have been the same had the special circumstances been supported by evidence before the master. *Gayler* v. *Fitzjohn*, 1 Keen, 469; 1 Jur. 101.

Consequences of Facts found.]—Where the master, by his report, finds a fact involving, according to the practice of the court, a particular consequence, the court will act upon the fact so found, and it is not a ground of exception that such consequence is not stated in the report. The master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix when they were both largely indebted to that estate, and that the sums so received by them were debts provable under their respective commissions, both executors having become bankrupt:—Held, that interest at 5 per cent., as the consequence of the devastavit, was to be added to the principal sums found to be provable against the bankrupt estate of the executors. *Beck* v. *Motley*, 2 Myl. & K. 312; 4 L. J., Ch. 63.

Setting out Accounts.]—Schedules of accounts referred to in the master's report must be annexed

to, and filed with, the report. *Smith* v. *Smith*, Dick. 789. S. P., *Kilbee* v. *Sneyd*, 2 Moll. 196.

Where a surplus to be distributed is an uncertain sum, the master ought to report the shares in aliquot parts, not in money. *Att.-Gen.* v. *Haberdashers' Co.*, 1 Ves. J. 295.

The master's report speaks from its date, and if a creditor of a deficient estate proves a debt in respect of bills of exchange indorsed to him by the testator, and, before the master has made his report, receives certain sums from the estates of other persons liable on the bills, such sums will be properly deducted in the report from the amount of the debt proved. *Jennings* v. *Elster*, 1 Myl. & K. 440; 2 L. J., Ch. 72.

Decree made upon report having directed a sale of real estate in six months according to the course of the court, and more than six months having elapsed, decree on further directions will order an immediate sale; but the personal estate being first to be applied, and the master finding that it was very small, if any, although the report was not excepted to, Lord Chancellor refused to act upon a report not setting out exactly the account of the personal estate without first having the consent of the heir and others interested in the real estate. *Knox* v. *Neary*, 1 Moll. 214.

Discussion as to the conclusiveness of the dates contained in the schedule of accounts annexed to a master's report. *Campbell* v. *Campbell*, 2 Y. & Coll. C. C. 607; 8 Jur. 28.

Setting out Documents and Evidence.]—The master's report is in too brief a form unless the evidence is set out upon the face of the report, and a schedule annexed, when a debtor and creditor account has been taken shewing the way in which the balance is formed. *Kilbee* v. *Sneyd*, 2 Moll. 196.

The master's report should contain such a statement of the evidence as will enable the court to judge of the justness of the findings if questioned by either party, not detailing the evidence, but giving such a specification of it as will enable the court to see with certainty the grounds upon which the master acted. *Johnston* v. *Reardon*, 1 Moll. 54.

It is not sufficient for a report ascertaining that a party is a trustee within the 1 Will. 4, c. 60, to state merely that such party is a trustee: the documents which make out the trust must be stated on the face of the report. *Purdon, In re*, 1 Dr. & War. 500.

Construction of the 48th Order of the 26th August, 1841, on the framing of the master's reports. *Meux* v. *Bell*, 1 Hare, 73; 11 L. J., Ch. 77; 6 Jur. 123.

Under the 48th Order of August, 1841, it is not sufficient for the master to give a short description of the documents laid before him, and then to state his finding, but he ought to mention on which of those documents he proceeded, and to shew what were the contents thereof from which he drew his conclusion, and then to state his finding. *Grant, In re*, 10 Sim. 573; 11 L. J., Ch. 91.

Where very numerous exceptions were taken to a master's report which referred generally to the evidence laid before him without distinguishing the same, the report was referred back to him to state on what evidence and grounds he had acted. *Mayhew* v. *Brettingham*, C. P. Coop. 43.

b. *Direction to Report specially.*

When required.]—The direction to the master not to disturb settled accounts applies only to mutual accounts between the parties, by which they would be bound, and is a special direction; but the direction to report special circumstances is one of course, and very often introduced without any object. *Milford* v. *Milford*, M'Clel. & Y. 151.

Partnership accounts having been directed to be taken by the master in a case in which some of the books had been lost, the court directed the master if it should appear in taking the account that any necessary books, &c., should be wanting, to report the same specially, and whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts. *Millar* v. *Craig*, 6 Beav. 433.

Order empowering the master from time to time to receive proposals for leases and to report on them. *M'Dermott* v. *Kealy*, Jac. 374.

Authority given to the master to report specially, if, from lapse of time, the death of parties, the loss of evidence, or other circumstances, he should find himself unable to proceed. *Kirkman* v. *Booth*, 11 Beav. 273; 18 L. J., Ch. 25; 13 Jur. 525.

Under the direction in an order of reference, "with liberty to state special circumstances," the master is not restricted to special circumstances relating to the precise subject of inquiry referred to him. *Neate* v. *Pink*, 3 Macn. & G. 476; 21 L. J., Ch. 574; 16 Jur. 69.

Where the master has liberty to state special circumstances, it is entirely within his discretion to state any circumstances specially or not, and if he refuses to do so, exceptions to his report on that ground will be disallowed. *Knott* v. *Cottee*, 16 Beav. 82; 16 Jur. 752.

No direction in a decree for liberty to state special circumstances is henceforth necessary. *Williamson* v. *Jeffreys*, 9 Hare (App.) lvi.

c. *Separate Report.*

In what Cases.]—A separate report directed of what was due to a doweress without entangling her in a general account of incumbrances. *Eccleston* v. *Berkley*, Ridgw. 253.

As to master's power to make an ex parte report, see *Bernado* v. *Duran*, 1 Barnard. K. B. 319.

Court of Exchequer will not direct deputy remembrancer to proceed to make a general report until the previous orders for separate reports are regularly disposed of, although he have before him a full statement of facts. *Lewes* v. *Morgan*, 3 Price, 175.

Separate report under circumstances allowed as to costs alone without waiting for general report in the cause. *Edes* v. *Rose*, 2 Madd. 448.

A separate report is never allowed except for the purpose of expediting the general proceedings. *Hare* v. *Ruscombe*, M'Clel. 101; 13 Price, 277.

Motion by plaintiff to restrain masters from making a separate report until a month after the trial of an indictment for perjury, upon affidavit carried on by that party in support of charges, or until further order, or that the report might be without prejudice to plaintiff thereafter prosecuting his claims, refused with costs. *Bolaffey* v. *Bendelack*, M'Clel. 573.

Where a party to a suit objects to a separate report, he must except to it in the usual manner, and not by petition. *Drever* v. *Maudesley*, 7 Sim. 240 : 4 L. J., Ch. 162.

Upon reference of a claim, the master having made a separate report as to part :—Held, to be not improperly confirmed by orders nisi and absolute. *Beavan* v. *Gilbert*, 8 Beav. 308 ; 14 L. J., Ch. 365.

A creditors' suit stayed on the application of the executors after a decree in a suit by residuary legatees for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit which would not have been necessary in the creditors' suit, it being competent to the master to make a separate report, and thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate. *Golder* v. *Golder*, 9 Hare, 276.

d. *Practice as to.*

Appointment to sign.]—No attendance is necessary by any of the parties on an appointment before a chief clerk to sign the certificate, as such attendance for signature is a purely formal matter. *Ingham, In re, Lawes' Chemical Manure Co.* v. *Ingham*, 74 L. T. 21.

Enforcement of.]—An order made by the chief clerk in chambers cannot be enforced by writ of attachment until after entry. *Ballard* v. *Tomlinson*, 52 L. J., Ch. 656.

The chief clerk, by his certificate, found that a certain sum was due from the defendants as occupation rent. Before the certificate had become binding on the defendants the plaintiffs moved for leave for the receiver in the action to distrain for the rent, or that the defendants should give some security :—Held, that the motion must stand over until the certificate had become binding. *Craven* v. *Ingham*, 58 L. T. 486. S. P., *Douthwaite* v. *Spensley*, 18 Beav. 74.

After a decree to take the accounts of a partnership the chief clerk directed that two accountants, one of whom was employed by the plaintiff and the other by the defendant in investigating the accounts for the purposes of the suit, should report on the accounts, shewing what items were undisputed and what were disputed, and verify their report by affidavit. The accountants verified an account shewing 541*l.* due from the defendant to the plaintiff on the undisputed items, and verified also an account of disputed items. These were items of charge against the defendant, so that, however they were decided upon, the 541*l.* would not be reduced :—Held, that the 541*l.* ought to be ordered into court ; for that, although no certificate had been made, the fact that 541*l.* at least was due from the defendant was ascertained with sufficient certainty to entitle the plaintiff to have it ordered into court. *London Syndicate* v. *Lord*, 8 Ch. D. 84 ; 38 L. T. 329 ; 26 W. R. 427—C. A.

Held, also, that under the circumstances of the case the defendant must be taken to have admitted by his agent that at least 541*l.* would be found due from him. *Ib.*

Opinion of Court.]—Motion cannot be made for opinion of court to obviate difficulties of master in drawing up his report. *Agar* v. *Gurney*, 2 Madd. 389.

Filing.]—A party obtaining a master's report adverse to himself will be compelled to file it. *London Dock Co., In re*, 11 Beav. 78 ; 17 L. J., Ch. 111 ; 12 Jur. 405.

Taking off the File.]—When the chief clerk's certificate was filed after the birth of an infant who was a necessary party to the suit, but before the infant had been made a party, the court, upon the application of all parties, and in order to avoid the expense of a supplemental suit, directed the certificate to be taken off the file. *Cuthbert* v. *Wharmby*, 41 L. J., Ch. 216 ; L. R. 13 Eq. 202.

Stay of Proceedings.]—Where inquiries had been ordered by a decree, and a summons had been taken out on the plaintiff's behalf, which was adjourned in order to enable the plaintiff to complete his evidence, and the chief clerk had certified that the plaintiff had made default in producing evidence to answer the inquiry, the court, on motion to stay the certificate, and that the plaintiff might be permitted to prosecute the inquiry, refused the motion with costs. *James* v. *Gwynne*, 2 Jur. (N.S.) 436.

Assessment of Damages before Certificate.]—The court refused to appoint an expert to assess damages before the chief clerk had made his certificate. *Llynvi Iron Co.* v. *Brogden*, 24 L. T. 612.

Failure to proceed.]—Parties neglected for ten years to prosecute a reference, and the master reported that he was unable to dispose of the cause. On an application to the court the matter was transferred into chambers, and it was ordered that the reference should be prosecuted with effect within a month, the court intimating that, in default, the cause would be disposed of summarily. *Parkinson* v. *Lucas*, 28 Beav. 627.

Court Fees.]—A person suing in formâ pauperis is entitled to the chief clerk's certificate without paying the court fees, even though the order enabling him so to sue has been made after the certificate was ready. *Thomas* v. *Ellis*, 8 Ch. D. 518 ; 26 W. R. 839.

Statute of Limitations.]—In an administration suit instituted by a residuary legatee more than twenty years after the testator's death, the chief clerk's certificate found that certain legacies remained unpaid ; and, by the order on further consideration, liberty was given to any persons claiming to be entitled to the legacies to apply as to their payment. The legatees, who were not parties to the suit, having applied under the order for payment of their legacies :—Held, that the residuary legatee was precluded by the certificate and order from setting up the Statute of Limitations. *Prowse* v. *Spurgin*, 37 L. J., Ch. 251 ; L. R. 5 Eq. 99 ; 17 L. T. 590 ; 16 W. R. 413.

Interest.]—The chief clerk's certificate, finding money to be due to a party, though adopted by the judge, is not an order for payment of money within 1 & 2 Vict. c. 110, s. 18, so as to make the sum found to carry interest. *Mansfield (Earl)* v. *Ogle*, 4 De G. & J. 38 ; 28 L. J., Ch. 422 ; 5 Jur. (N.S.) 419 ; 7 W. R. 423.

Examination of Witnesses.]—A party attending proceedings in chambers under an administration decree is entitled to cross-examine before

an examiner of the court as to matters in question connected with the accounts an executor, whose accounts are being settled by the chief clerk. But notice of such cross-examination should be given before the chief clerk's decision has been given, and the cross-examination should be strictly confined to the particular matter in dispute. *Glover* v. *Ellison*, 41 L. J., Ch. 288; 26 L. T. 234; 20 W. R. 408.

Evidence.]—The chief clerk in his certificate stated certain facts, but reserved the point to which they referred for the consideration of the court:—Held, that the evidence used in chambers was admissible before the court. *Stott* v. *Meanock*, 31 L. J., Ch. 746; 6 L. T. 592; 10 W. R. 605.

Appeal before Certificate.]—On a summons that in taking accounts the chief clerk might treat a certain statement as conclusive evidence, the judge, after deciding the question, thought fit only to give a direction to his chief clerk without making any formal order:—Held, that no appeal could be brought from his decision, but that the party aggrieved must wait for the certificate. *Vyse* v. *Foster*, 44 L. J., Ch. 344; L. R. 10 Ch. 236; 23 W. R. 299.

Hearing Counsel.]—When the question is one that has been reserved by the chief clerk for the opinion of the court on further consideration, the counsel in support of the affirmative has a right to be heard first. *Lyle* v. *Ellwood*, 23 W. R. 157.

Appeal from Refusal to vary—Time.] — A summons to vary the chief clerk's certificate was adjourned into court and directed to come on with the hearing of the cause on further consideration. At the hearing on further consideration an order was made refusing to vary the certificate and disposing of the cause:—Held, that the refusal to vary the certificate was distinct from the order on further consideration, and being an interlocutory order, could not be appealed from after twenty-one days from the making of it. *Cummins* v. *Herron*, 46 L. J., Ch. 423; 4 Ch. D. 787; 36 L. T. 41; 25 W. R. 325—C. A. *See also* APPEAL.

Where an order has been made upon the cause coming on for further consideration and also upon a summons to vary the chief clerk's certificate, an appeal by motion as to the latter only is irregular. *Bloxam* v. *Whipham*, 8 W. R. 2.

e. *Varying.*

i. Time for Application.

Eight Clear Days.]—A summons to vary a certificate which has been signed and adopted by the judge in chambers, if obtained within eight clear days after the certificate has been filed, although not returnable within that period, is sufficient under the 51st Order of the 16th October, 1852, to arrest the certificate and prevent its being absolute until the summons has been disposed of. *Wycherley* v. *Barnard*, 1 Johns. 41; 28 L. J., Ch. 562; 5 Jur. (N.S.) 818; 7 W. R. 254.

Where, under the 52nd rule of the 35th of the Consolidated Orders, it is impossible to move to discharge the chief clerk's certificate on any seal day within eight clear days of the filing, the court will allow notice for some day, not a seal day within the eight days, to save the time. *Cross* v. *Maltby*, 8 W. R. 646.

The eight days within which, under the 15 & 16 Vict. c. 80, s. 34, and the 51st Order of October, 1852, an application to vary a chief clerk's certificate must be made, run during vacation. *Ware* v. *Watson*, 25 L. J., Ch. 199; 2 Jur. (N.S.) 129; 4 W. R. 223—L.JJ.

It is not sufficient to serve notice of motion to vary the chief clerk's certificate within eight clear days from the filing of the certificate, but the motion itself must be made within that time. *Henshaw* v. *Angell*, 39 L. J., Ch. 524; L. R. 9 Eq. 451; 21 L. T. 784.

—— **When Inapplicable.**]—Ord. LV. r. 70, of the Rules of the Supreme Court, 1883, does not apply to a certificate settling a list of contributories in a winding-up. *Liverpool Household Stores Association, In re, Weld-Blundell, Ex parte*, 63 L. T. 383.

—— **How computed.**] — In computing the eight days within which cause must be shewn against confirming a report absolutely, the day on which the order nisi was served must be reckoned; but if the eighth day is a holiday one day more will be allowed. *Manners* v. *Bryan*, 5 Sim. 147. Affirmed, 1 Myl. & K. 453.

If the eighth day after service of an order nisi for confirming a report is a Sunday, that day is not to be reckoned. *Milburn* v. *Lyster*, 5 Sim. 565. *See now* Ord. LXIV. and infra, TIME.

Special Circumstances.]—A certificate finding A. to be the purchaser of an estate sold under the direction of the court was filed on the 9th August. On the 29th October a person desirous to become the purchaser took out a summons to have the property resold, offering a considerable advance of price:—Held, that the application could not be granted unless such special circumstances were shewn as would under the old practice have justified the opening the biddings after a report finding A. the purchaser had been absolutely confirmed. *Ware* v. *Watson*, 25 L. J., Ch. 199; 2 Jur. (N.S.) 129; 4 W. R. 223—L.JJ.

Where the certificate of the chief clerk is filed, it is absolute after eight days, and will not be discharged or varied except under special circumstances. *Howell* v. *Kightley*, 8 De G. M. & G. 325; 25 L. J., Ch. 341; 2 Jur. (N.S.) 455; 4 W. R. 477.

Confirmation of master's report opened, and the report allowed to be excepted to or reviewed, under particular circumstances, although previous exceptions had been disallowed after argument. *Hawkins* v. *Day*, 1 Ves. 189.

—— **What constitute.**]—Leave given to move to vary the chief clerk's certificate, although application was not made until after the expiration of the eight days allowed by the order; the omission to make the application having arisen from pressure of business, and mistake as to time on the part of the solicitor. *Briant* v. *Tibbut*, 20 L. T. 62; 17 W. R. 274.

Leave granted (in a suit for specific performance) to move to vary the chief clerk's certificate against the title, although the application was not made until after the expiration of the eight days allowed by the 51st Order of October 16th, 1852, the omission to make this application having arisen from a slip or misapprehension of the practice on the part of the solicitor's clerk

Ashton v. *Wood*, 8 De G. M. & G. 698; 26 L. J., Ch. 275; 3 Jur. (N.S.) 146; 5 W. R. 271.

Though the chief clerk's certificate has been signed, a final decree made, and an allocation order issued, the court has power to reopen or review the certificate so long as the funds are still in court. *Hegarty, In re, Perry* v. *Twomey*, 23 L. R., Ir. 15.

There is a difference in consideration of law, and the strict rules of the court, as to the case of a lunatic being let in to take exceptions to a master's report after its being confirmed, and that of an infant, but it is equally open to the discretion of the court in either case. *Bath (Earl)* v. *Bradford (Earl)*, 2 Ves. 587.

Effect of—When Time expired.]—The chief clerk's certificate, signed and approved by the judge, becomes, after the eight days, equivalent to a report absolutely confirmed under the old practice. *Ware* v. *Watson*, supra.

In Exchequer, if defendant conceives himself aggrieved by master's report, he must file exceptions thereto, and such exceptions must be set down to be argued in court; but if no exceptions are taken, the court confirms the report as of course, and thereupon gives proper directions. *Kay* v. *Bruere*, 2 Bro. P. C. 420.

A will contained the following passage: "I forgive my nephew the debt of 2,000*l.* which I advanced to him on loan." The testator had, on occasion of his nephew going into partnership, advanced to him 2,000*l.* for his own use, and had also, at the same time, lent to the partnership different sums, the nephew's proportion of which would have amounted to about 2,000*l.*:—Held, that, whether the 2,000*l.* was to be treated as having been a gift to the nephew or not, the testator intended in the above passage to refer to it, and not to the proportion of the partnership debt due from the nephew. And, on an inquiry directed at the hearing, the chief clerk certified that the advance of the 2,000*l.* was a gift, and not a loan:—Held, that, whatever effect this certificate might have on the hearing on further consideration, it could not be disputed by a party who had neither taken out a summons nor moved to have it varied. *Smith* v. *Armstrong*, 6 De G. M. & G. 150; 2 Jur. (N.S.) 359.

A. devised a freehold to his widow for life, and after her death, to trustees to sell and divide the produce amongst B. and others. B. died in the lifetime of the widow, having bequeathed his residue to charities. The certificate having found the residue to be pure personalty:—Held, that it was too late, in the absence of a motion to vary the certificate, to raise an objection that the bequest of B.'s interest in the leasehold was void under the 9 Geo. 2, c. 36. *Aspinall* v. *Bourne*, 29 Beav. 462.

On an application by a contributory to vary the certificate by expunging a debt:—Held, that the association in course of winding-up came within the Companies Act, 1862, s. 4, and ought to have been registered; that it was therefore an illegal company, and that an order for winding it up ought not to have been made, but that this objection could not be entertained on the present application. *Arthur Average Association, In re, Hargrove, Ex parte*, 44 L. J., Ch. 569; L. R. 10 Ch. 542; 32 L. T. 525; 23 W. R. 939.

A party comes too late to complain of a decree after joining in the inquiry directed by it, and the result is against him; and he is not entitled to question the master's report after it is confirmed, having taken no exceptions. *Aldborough (Earl)* v. *Trye*, 7 Cl. & F. 436; West, 221.

Extension of Time—Summons.]—On an application upon the further consideration of an action for an extension of the time under r. 71 of Ord. LV. for applying to vary a finding in a chief clerk's certificate:—Held, that the applicant should take out a summons for the purpose. *Dove, In re, Bousfield* v. *Dove*, 53 L. J., Ch. 1099; 27 Ch. D. 687; 33 W. R. 197.

ii. Grounds for.

Mistake, Fraud or Surprise.]—The court has power to set right an obvious mistake in the chief clerk's certificate, as it has in the case of a master's report. *Cradock* v. *Owen*, 2 Eq. Rep. 381; 2 Sm. & G. 241; 2 W. R. 319.

Mere mistakes in report rectified after confirmation. *Turner* v. *Turner*, 1 Swan. 154; 1 Jac. & Walk. 39.

After a report has been confirmed, the master has no authority to correct even clerical errors therein; but it may be done with the authority of the court. *Richardson* v. *Ward*, 13 Beav. 110; 20 L. J., Ch. 227.

A report confirmed may be reviewed; but a case must be made of fraud, surprise, or mistake: Lord Chancellor holding that there is no rule of the court not flexible in such a case, if shewn, refused a motion grounded merely on the parties' affidavit with costs, excluding, however, costs of superfluous papers of which notice had been given that they would be used on the motion. *Drought* v. *Redford*, 1 Moll. 572.

After the confirmation of a report, a review will not be ordered unless on a very strong case; and objections affecting the substance of it will not be permitted, but mere mistakes may be rectified. *Turner* v. *Turner*, 1 Jac. & Walk. 39.

The master ordered to review his report after confirmation. *S. C.*, 1 Swan. 157.

A report was confirmed by orders nisi and absolute:—Held, that the court might still vary the report as to that portion of it which related to the maintenance of infants. *Ramsdale* v. *Ramsdale*, 11 Beav. 220.

In a suit of *M.* v. *P.*, a decree was made whereby the residuary personal estate of a testator in the cause was declared to be divisible into moieties, to one of which P. (the present plaintiff) was entitled, and M. (the present defendant) to the other. It was ordered that the chief clerk should ascertain the residuary personal estate not specifically bequeathed; but instead of having the residue so ascertained, the plaintiff and the defendant undertook to state for themselves what the particulars of the residuary estate were; and the chief clerk thereupon made his certificate, by which he certified that the residuary estate was admitted by the parties to consist of certain particulars. On this admission an order was at chambers made, and various sales, transfers, payments, and carryings over were made in pursuance thereof. The plaintiff, having afterwards discovered that a great error had been made in the amount of the residuary estate stated in the certificate, owing to which the defendant had been largely overpaid, filed a bill setting forth the alleged error and praying

that the defendant might be decreed to recoup and pay to him the sum which he had received in excess. The court held itself bound to interfere in the plaintiff's behalf, it being satisfied that an error had really been made in the certificate; that the case was free from the objection of delay on the part of the plaintiff; that the conduct of the plaintiff and the defendant had been such as not to have deprived the former of his right to be relieved; and that the rights of third parties would not be invaded by any interference. The court, however, refused to make an order in the terms prayed, but gave the plaintiff leave to move to vary the certificate in the former suit, and to present a petition of re-hearing of the cause on further consideration upon payment of costs up to the hearing. *Purcell* v. *Manning*, 3 Jur. (N.S.) 1070.

Where, on the investigation of a complicated demand for work and labour done, and other matters, or performance of work under a contract with a railway company for works of enormous extent, the chief clerk's certificate, after a laborious examination, ascertained the amount, the court will not allow the amount so certified to be varied as to the whole or any part of it unless a case of clear mistake or manifest abuse is shewn. In such cases the certificate should not be varied on any ground which would not be a ground for moving for a new trial or setting aside the verdict of a jury. *Mackintosh* v. *G. W. Ry.*, 4 Giff. 683; 6 N. R. 336.

Where the chief clerk in taking accounts has admitted books of account to be taken as primâ facie evidence of their truth, without any order under the 54th section of the act 15 & 16 Vict. c. 86, a motion to vary the certificate as to the result of the accounts dismissed without costs, it being a case which, under ordinary circumstances, would have been dismissed with costs. *Newberry* v. *Benson*, 2 W. R. 648.

iii. Practice on.

Summons.]—No step can be taken in opposition to a finding in a chief clerk's certificate, even in respect of matters appearing by the record, unless there is a summons or motion to vary the certificate. *Leigh* v. *Turner*, 14 L. T. 8; 14 W. R. 361.

—— **Setting Down.**]—The chief clerk's certificate is no longer varied on motion, but on being set down. *Cooper* v. *Everett*, 2 W. R. 388.

Filing exceptions alone does not prevent the confirmation of a report; they must be set down. *Mole* v. *Smith*, 1 Jac. & Walk. 670. S. P., *Abel* v. *Nodes*, 10 Ves. 730; 2 Cox, 169.

Filing exceptions is not cause against confirmation of report; they must be set down to be argued. *Hall* v. *Mulliner*, Dick. 604.

After an order for confirming the report nisi, filing exceptions, and making the deposit with the registrar, are no cause to prevent that order being made absolute, unless an order for setting down the exceptions to be argued is obtained, which may be done either by the plaintiff or defendant. The order confirming the report was discharged on payment of costs. *Gildart* v. *Moss*, 4 Ves. 617.

Further Consideration.]—The rule is, that a case coming on before Stuart, V.-C., upon motion to vary the chief clerk's certificate, must at the same time be heard upon further consideration. *Crompton* v. *Huber*, 1 Jur. (N.S.) 465; 3 W. R. 347.

After a master's report had been absolutely confirmed, a petition was presented for leave to except to it. The petition was heard with the cause for further directions, and the court, without directing a reference back to the master, made an order in accordance with the prayer of the petition. *Jowett* v. *Board*, 16 Sim. 352; 18 L. J., Ch. 53; 12 Jur. 933.

The chief clerk's certificate, when signed and approved of, cannot be objected to at the hearing afterwards. *Lambe* v. *Orton*, 29 L. J., Ch. 286; 6 Jur. (N.S.) 61; 8 W. R. 111.

Upon a motion to vary a chief clerk's certificate upon a point which has been already argued before the judge himself, the court will not hear any further argument. The party moving ought to inform the other side that the motion is only made pro formâ, otherwise he will have to pay the costs of the motion. *Charlesworth* v. *Gartsed*, 2 N. R. 568.

No Summons.]—Where the chief clerk's certificate carries upon its face the means of rectifying an error in its conclusion, the court on further consideration of the certificate should rectify the error, notwithstanding that no summons to vary the certificate was taken out. *Martin* v. *White*, 21 L. R., Ir. 521—C. A.

Where a decree has been made in a suit, and the certificate made under it has been discharged for irregularity, the summons for obtaining a fresh certificate must be taken out upon the original decree, and not upon the order discharging the certificate. *Cross* v. *Maltby*, 8 W. R. 646.

Where there was error apparent in the decree and the clerk's certificate, by directing payments out of personal estate, instead of apportionment between real and personal estate, the court altered and corrected the decree and certificate without a re-hearing, notwithstanding the 15 & 16 Vict. c. 80, s. 34, and the 51st of the Orders of the 16th October, 1852. *Cradock* v. *Owen*, 2 Sm. & G. 241; 2 Eq. Rep. 381; 2 W. R. 319.

Objections should be Stated.]—One general exception was taken to the master's report of a good title, which did not point out the objections to the title. The court disapproved of this inconvenient mode of proceeding. *Flower* v. *Hartopp*, 6 Beav. 476; 12 L. J., Ch. 507; 7 Jur. 613.

Exceptions to the master's report ought to follow, in form as well as in substance, the objections carried in before the master. Upwards of thirty separate objections were taken to the draft report, in respect of the same number of items allowed in an account; one exception, including all the objections, was taken to the report, for that the master ought to have disallowed the same items, or some or one of them:—Held, that this was informal, for the exceptant requiring the judgment of the court on every item, the exceptions should have been in the same form as the objections, and thereby have called for such judgment; that this exception must be allowed, if it should be found that any item ought to have been disallowed; but that, notwithstanding the informality, the court might, if it thought fit, hear the exception upon all the items, and make a special declaration as to any or all which had been improperly allowed. *Ballard* v. *White*, 2 Hare, 158; 7 Jur. 506.

Every exception to a report ought to tender some proposition on which the court may decide. The simple allowance of an exception by the court, unaccompanied either by an express declaration or a reference back to the master, implies an adoption by the court of the proposition tendered by the exception. *Stocken* v. *Dawson*, 2 Ph. 141.

Objections and exceptions to report should state the exact proposition which the court is called on to decide. *Cullen* v. *Kildare* (*Dean*), 2 Ir. Ch. R. 133.

On a general objection being taken to a chief clerk's certificate, where some only of the items were in dispute, the case was adjourned to chambers, and the plaintiff ordered to furnish a list of the items to which he objected. *Maw* v. *Pearson*, 3 N. R. 99.

Parties Heard.]—All persons interested in the master's report, are entitled to be heard in support of it, but none but the excepting party can be heard against it. *Bonser* v. *Cox*, 4 Beav. 379. And see *S. C.*, 10 L. J., Ch. 395; 13 *Ib.*, 260.

A party who has not excepted to a master's report cannot be heard in opposition to it on the argument of the exceptions of another party; he may, however, be heard in support of that report. *Knight* v. *Davis*, 5 L. J., Ch. 11.

Where one of several defendants takes exceptions to the master's report, he ought to serve them on the other defendants. *Milne* v. *Clegg*, 7 Jur. 367.

Bill by parties claiming as next of kin against executors. Report that other persons not parties were the sole next of kin. Exceptions by the plaintiffs to the report. Objection that the plaintiffs before the exceptions were argued must make parties the persons found next of kin by the master, overruled. *Topham* v. *Lightbody*, 4 Hare, 312; 9 Jur. 1055.

Where a third person's rights are injured by an ex parte report, he should move to have the report sent back to the master to review it, having regard to applicant's rights. *Ivers, In re*, 2 Moll. 440.

A creditor, first making himself a party by coming into the master's office and proving his debt, excepted to the master's report. By proving in the cause he acquires a right to except to the report. *Wilson* v. *Wilson*, 2 Moll. 328.

Where the master had determined that warrants should be served upon those parties only who were entitled in possession, and accounts were taken in the absence of a party who was at the commencement entitled in remainder, but afterwards became entitled in possession, but who never appealed from the determination of the master, nor ever claimed a right to attend him, a petition presented by him to the effect that the master's report might be discharged and that the accounts might be taken over again, was dismissed with costs, reversing the decision of the court below. *Morison* v. *Morison*, 17 L. J., Ch. 65.

Upon the hearing in court of an adjourned summons from chambers to vary the certificate of the chief clerk, parties in the same interest with the party who took out the summons but did not join therein, will not be heard in support. *Jaquet* v. *Jaquet*, 7 W. R. 543.

On an application for the confirmation of a report approving a scheme for the administration of a charity estate, of which the churchwardens and overseers of the parish were the trustees (one of the purposes of which scheme was to provide for the repair of the church), it was held, that a churchwarden who had been newly appointed, and had not been served with the proceedings, was at liberty to present a cross-petition for the purpose of opposing the confirmation of the report, upon grounds not appearing upon the report nor brought before the master. *Loppington Parish, In re*, 8 Hare, 198.

What Evidence Admissible.]—An affidavit, not used before a chief clerk in chambers, was not allowed to be used in court on motion to vary certificate. *Hooper, In re. Bayliss* v. *Watkins*, 1 N. R. 46; 32 L. J., Ch. 106; 9 Jur. (N.S.) 570; 7 L. T. 347.

An affidavit as to the conduct of the defendants in chambers, filed on behalf of the plaintiffs after the chief clerk's certificate has been signed, cannot be received at the hearing of a summons to vary that certificate. *Pierce* v. *Hammond, Read, In re*, 10 L. T. 261.

After the certificate of a chief clerk has been signed and approved by the judge, no cross-examination upon any affidavit produced before the chief clerk during the proceedings in chambers will be allowed. *Dawkins* v. *Morton*, 6 L. T. 214; 10 W. R. 339.

Upon the hearing of a summons to vary the chief clerk's certificate, only such evidence as is mentioned in the certificate is admissible. *Budge* v. *Gummow*, 42 L. J., Ch. 22; 26 L. T. 683.

Upon a summons to vary a chief clerk's certificate the court will not have regard to any evidence other than that which is entered in the certificate as the evidence upon which the finding of the chief clerk is based. *Miller, In re, Chapman* v. *Miller*, 58 L. J., Ch. 728; 60 L. T. 634.

Where, however, the court was of opinion that the finding of the chief clerk was not warranted by the evidence before him, but further evidence had been adduced upon a summons to vary, the court considering that it had before it all the materials necessary for a decision, instead of sending the matter back to chambers, dealt with it upon the fresh evidence. *Ib.*

The court will not grant an order to prove exhibits at the hearing of exceptions, because you can offer nothing at the hearing that was not before the master. *Anon.*, 1 Mos. 191.

Upon exceptions to the master's report, affidavits made subsequent to it cannot be read, notwithstanding the affidavits of the adverse party were filed but the evening before the report. *Davis* v. *Davis*, 2 Atk. 21.

On the hearing of exceptions to a master's report, no parts of the answer can be read, except those which were read before the master. *Rands* v. *Pushman*, 6 Sim. 46.

On the hearing of exceptions to the master's report, those affidavits only in support of or against the original petition can be read, which were used in evidence before the master. *Grylls, Ex parte*, 2 Deac. & C. 290.

Upon exceptions to a report, it is entirely contrary to the rule of the court to suffer the exceptant to go into a new case. The court acting merely in revision of the report, cannot entertain an objection raised on an extrinsic ground. But a just allowance, the proper time for claiming which has been passed by, may always be got at by independent application. *Kilbee* v. *Sneyd*, 2 Moll. 239.

The court refused to treat the master's finding of the age of a party as erroneous, on an affidavit of a person stating the day of the birth, and that the day taken by the master for the birthday was the day of baptism, it not appearing what evidence was before the master. *Barnes* v. *Kemp*, 1 Jur. 540.

Order to Vary—Original not Altered.]—Where a formal order is made to vary the chief clerk's certificate, it is not the practice actually to alter the original certificate. Where a trifling error in the certificate is ordered to be amended, the practice is not to draw up a formal order, but to make a note of the amendment in the margin of the certificate. *Fox* v. *Bearblock*, 46 L. T. 145; 30 W. R. 342—C. A.

f. *When Referred Back.*

In what Cases.]—When it is suggested at the bar that the party prosecuting a reference has, since the report was made, acquired information, which, if it had been laid before the master, would probably have led him to a different result, the court, though it will not upon the mere suggestion refer the matter back to the master, will order the cause to stand over, with leave to present a petition on the point; and a sufficient case being stated in the petition, and supported by affidavit, the matter will be ordered to be referred back. *Hunt* v. *Dickenson*, 3 L. J. (o.s.) Ch. 207.

The respondent, in the affidavit made by him to shew cause against the appointment of a receiver upon a judgment on a bond in a penal sum, admitted that the entire sum due by him on foot of the judgment was a certain specified sum, exceeding the amount of the principal sum mentioned in the bond, and six years' interest thereon, and did not rely on the 3 & 4 Will. 4, c. 27, s. 42, as a bar:—Held, that a report, finding that the principal money, with six years' interest thereon only, was due on foot of the judgment, was erroneous, it being contrary to the admission in the affidavit. *Tristram* v. *Harte*, 3 Ir. Eq. R. 386; Longf. & T. 186.

Testator bequeathed 5,000*l.* in trust for all and every the child and children of his niece, C. A., and of his nephew, the late James C., to be divided amongst them, if more than one, share and share alike; and if there should be but one such child, then in trust for such only child; the shares of sons to be paid to them at twenty-one, and the shares of daughters at that age, or on their marriage. The testator never having had a nephew named James C. who had died leaving issue, the children of his late nephew Henry C. (who was the only one of his nephews who had left issue) claimed to be interested under the bequest: upon which the master was directed to inquire what persons were meant by the testator. It appeared (amongst other things) from the evidence before the master, that the testator had had four nephews surnamed C.: that two of them were named James, and another Henry: that one James died forty years ago, and the other about sixteen years before the date of the will; and that Henry died about ten years before the date of the will, and was the only nephew of the testator who left issue: and the master found that his children were the persons intended. The court, however, on hearing exceptions to the report, held, that the finding was not warranted by the evidence, and referred it back to the master to review his report. *Daubeny* v. *Coghlan*, 12 Sim. 507; 11 L. J., Ch. 177; 6 Jur. 230.

On exceptions taken by the plaintiff to a master's report, it appearing that a material element of the inquiry had been overlooked by the master, the court referred it back to him to review his report, not allowing or disallowing the exceptions, but ordered the deposit of 10*l.* to be returned, although the omitted inquiry had not been suggested, nor any evidence offered upon it by the plaintiff before the master, the court being of opinion that from the nature of the reference, the onus of suggesting such inquiry lay on the defendant rather than on the plaintiff. *Mitford* v. *Reynolds*, 1 Ph. 706.

Two suits having been instituted on behalf of the same infant plaintiffs, it was referred to the master to inquire and state whether the bills were for the same matters, and if so, which of the suits it would be most for the benefit of the infants to prosecute; but the order did not give the master liberty to state special circumstances. The master reported that the two bills were substantially for the same matters, and that it would be most for the benefit of the infants to prosecute the first suit; but that as the same person was solicitor both for the next friend and for the defendants in that suit, he was of opinion that some other solicitor should be appointed for the plaintiffs, and that part of the funds in the cause, which were in a country bank, should be brought into court:—Held, that the master had given a qualified answer to the question referred to him, and added suggestions which he was not at liberty to make; and therefore it was referred back to him to review his report. *Ganderton* v. *Ganderton*, 13 Sim. 182; 6 Jur. 938.

Where on a reference as to title, the master has reported in favour of the title, but, upon exceptions, the court thinks he has done so erroneously or on insufficient grounds, the course is to give the respondent the option of a reference back to the master to review his report. *Curling* v. *Flight*, 2 Ph. 613; 17 L. J., Ch. 359; 12 Jur. 423.

The former reports of the debts of a lunatic having been lost, the master in lunacy was directed to receive and consider any secondary evidence as to the debts. The master made his report accordingly, but did not therein state the grounds upon which he proceeded, whereupon it was referred back to the master to state the evidence on which he based his report. *Iredale, In re*, 1 H. & Tw. 254.

Exception to the master's report in a tithe cause, on the ground that he had overvalued the tithe of milk, overruled, it not appearing that the master had proceeded on any wrong principle. *Olivier* v. *Adderley*, 4 Y. & Coll. 423.

Master by report had refused to allow discharge for want of sufficient evidence. To support exceptions thereto, it must be shewn that from the evidence before him master ought to have allowed it, and a distinct motion must be made to order him to receive additional evidence in support of discharge. *Ridifer* v. *O'Brien*, 3 Madd. 43.

Where a decree directed certain accounts to be taken, and in anticipation of difficulty in taking them gave one master liberty to make a separate report, stating the circumstances, and the master reported accordingly, stating that he could not take the accounts further than mentioned in his report; an exception, on the ground that the

master ought to have taken the accounts as far as he possessed information, and he ought to have certified that no attempt had been made to take them to that extent, was overruled. *Rowley* v. *Adams*, 5 Jur. 906.

A reference was made to the master to ascertain certain facts. Under this reference a witness was examined upon written interrogatories, and his depositions were published. The witness was afterwards examined vivâ voce. The evidence of the witness given vivâ voce was objected to before the master, but not on the ground of his having been examined before on interrogatories. The master received the evidence. Exceptions were taken to the report on this ground. On the hearing of the exceptions :—Held, that the objection to the vivâ voce evidence on the ground of the witness having been examined before, could not be raised. *Andrew* v. *Andrew*, 18 L. J., Ch. 222 ; 13 Jur. 400.

5. Further Consideration.

a. *Reservation of.*

Further consideration may be reserved on motion, without a hearing, on trial of the cause. *Bennet* v. *Moore*, 45 L. J., Ch. 275 ; 1 Ch. D. 692 ; 24 W. R. 690. *See* Ord. XXXVI. r. 39.

An order was made in a suit, and no further consideration was reserved ; one of the parties by whom the order was to have been carried out afterwards died. On a summons by the survivor for the purpose of carrying out the order :—Held, that as no further consideration was reserved, no order could be made on the summons, and a petition must be presented. *Lewis* v. *Allenby*, 25 L. T. 785 ; 20 W. R. 198.

b. *Liberty to apply.*

The rule that an order of the court carries with it "liberty to apply," though not expressly reserved, only applies where the order is one not of a final character. *Penrice* v. *Williams*, 52 L. J., Ch. 593 ; 23 Ch. D. 353 ; 48 L. T. 868 ; 31 W. R. 496.

The plaintiff's motion for an interim injunction to restrain a nuisance committed by the defendant was ordered to stand over till the trial of the action, no order being made as to costs. At the trial the judges awarded the plaintiff damages in lieu of an injunction, and ordered the defendant to pay the plaintiff's costs of action, the order reserving liberty to apply. The judgment as passed and entered was silent as to the costs of the previous motion. The taxing officer having refused to allow the costs of the motion without a special order of the judge :—Held, on motion, that the court might order the costs of the motion to be paid by the defendant. Semble, that all orders of the court carry in gremio liberty to apply. *Fritz* v. *Hobson*, 49 L. J., Ch. 735 ; 14 Ch. D. 542 ; 42 L. T. 677 ; 28 W. R. 722.

When by a decree the costs of the suit are given to one party, but further consideration is not reserved, the costs of all subsequent accounts and inquiries necessary to the working out of the decree are included, whatever may be the result of the accounts and inquiries. But if the party to whom the costs are given by the decree brings in under an inquiry irrelevant matters not coming within its terms, he will be ordered to pay his opponent's costs of the inquiry, so far as it relates to the irrelevant matters. An application for such an order may be made by motion under the liberty to apply to the court reserved by the decree. *Krehl* v. *Park*, 44 L. J., Ch. 286 ; L. R. 10 Ch. 334 ; 33 L. T. 83 ; 23 W. R. 475.

The direction in a decree that "any of the parties are to be at liberty to apply to the court as they shall be advised" :—Held, not to extend to an application by the plaintiff to be allowed costs, as to which there was no express direction given by the decree. *Kendall* v. *Marsters*, 2 De G. F. & J. 200.

c. *Setting down and Hearing.*

Setting down by whom.]—Either party may set down cause for further directions. *Carmichael* v. *Wilson*, 2 Moll. 537.

Plaintiff may set down cause for further directions at same time that he excepts to report. *Yeo* v. *Frere*, 5 Ves. 424 ; *Bowerbank* v. *Collasseau*, *Ib.*

Notice to Persons who have not appeared after being served with Notice of Judgment.]—It is a matter in the discretion of the court whether notice of the setting down of an action for further consideration should be served on persons who have been served with notice of judgment, but have not entered appearances. *Rees, In re, Rees* v. *George* (15 Ch. D. 490), considered. *Rolfe, In re, Fyson* v. *Johnson*, 8 R. 335 ; 70 L. T. 624.

Parties Heard.]—A party permitted to intervene as a defendant in a cause after it had been heard on further directions, he having been out of the jurisdiction during the previous proceedings, and now admitting to be bound by them. *White* v. *Hall*, 1 Russ. & M. 332. And see also *Pitt* v. *Brewster*, Dick. 37 ; *Banister* v. *Way*, Dick. 686 ; *Capel* v. *Butler*, 2 Sim. & S. 457. *S. C.*, 4 L. J. (o.s.) Ch. 69. And dicta in *Harford* v. *Browning*, 1 Cox, 307.

Appointees of a fund, not being parties to the suit for administering the fund, are not entitled, adversely to the parties to the suit, to appear by counsel on the hearing of the cause for further directions, for the purpose of claiming their costs of proving their title in the master's office ; they ought, with a view to obtain such costs, to present a petition. *Grace* v. *Terrington*, 2 Colly. 53 ; 14 L. J., Ch. 352 ; 9 Jur. 421.

Where, upon a bill filed by a simple contract creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out, upon the master's report, that the assets are insufficient to pay the specialty creditors, the executor will have his costs out of the assets, but not the plaintiff. In such a case the specialty creditor, though not a party to the suit, may appear at the hearing on further directions without presenting a petition, if the case which he has to make depends only upon what appears in the master's report. *Young* v. *Everest*, 1 Russ. & M. 426.

—— **Priority.**]—When the question is one that has been reserved by the chief clerk for the opinion of the court on further consideration, the counsel in support of the affirmative has a right to be heard first. *Lyle* v. *Ellwood*, 23 W. R. 157.

Filing Certificate.]—An order founded on a master's report is irregular, if the report be not

actually upon the file at the time when the order is obtained. *Harris* v. *Cotter*, 1 Myl. & K. 568.

Non-appearance.]—Where the cause is set down on further directions, and the defendant does not appear at the hearing, the plaintiff need not produce an affidavit of service of the order to set down the cause before the rising of the court. It is sufficient if he produce such affidavit to the registrars. *Trewick* v. *Paramore*, 7 Jur. 1123.

Where a plaintiff sets down a cause to be heard on exceptions to the master's report, but does not appear at the hearing, the court will, at the defendant's request, overrule the exceptions, and hear the cause on further directions. *Rookes* v. *Rookes*, 7 Jur. 1104.

Separate Report.]—A cause ought not to be set down in the paper for further directions, when only a separate report has been made, and there is no general report. *Cochrane* v. *Chambers*, 2 L. J. (O.S.) Ch. 47.

A cause cannot be set down for further directions on a separate report: an order on a separate report must be sought by petition. *Van Kamp* v. *Bell*, 3 Madd. 430.

When unnecessary.]—The decree had reserved further directions and costs; but further directions having become unnecessary, the costs were disposed of upon a petition. *Winthrop* v. *Winthrop*, 1 Coop. C. C. 201.

Petition to set down cause for further directions, or such further order as the court should think fit, dismissed, though the parties could not proceed; an inquiry before the master being rendered useless by the event of a verdict upon issue directed, and further directions having been reserved till after trial and report. *Dixon* v. *Olmius*, 1 Ves. J. 153; *see* 9 R. R. 286.

Objection to Certificate.]—In all cases coming before the court, by way of exception to the certificate, the further consideration of the cause will be heard at the same time, unless a special reason be shown to the contrary. *Crompton* v. *Huber*, 1 Jur. (N.S.) 465; 3 W. R. 347.

d. *Orders made and Matters determinable on.*

No Objection taken or Relief asked.]—Upon further directions, a question decided by master was opened without any exception, all the circumstances appearing by report. *Adams* v. *Claxton*, 6 Ves. 226; 5 R. R. 263.

A debt of 2,400*l.* having been found due by the master's report, to which no objections or exceptions were taken, and no error appearing upon the face of the report:—Held, that this report could not, by order made upon further directions, be reviewed. *Morgan* v. *Evans*, 8 Bligh (N.S.) 777; 3 Cl. & F. 159.

Effect of decree at hearing on the discretion of the court upon the construction of a will on further directions. *Clarke* v. *Lubbock*, 1 Y. & Coll. C. C. 492; 6 Jur. 548.

At the hearing on further directions, and on a supplemental suit, the plaintiffs were held bound by the terms of a decree taken by consent in the original suit, and were refused relief inconsistent with it, notwithstanding a change of circumstances. *Rome* v. *Young*, 3 Y. & Coll. 199; 4 *Ib.*, 204; 9 L. J., Ex. Eq. 41; 2 Jur. 963.

Where the master's report stated that he had allowed the defendant, in his discharge as executor, payments amounting to a certain sum, "including therein" a particular item, which, from circumstances appearing on the face of the report, clearly ought not to have been allowed:—Held, that inasmuch as the report had been confirmed, and no exceptions taken, the error could not be corrected on further directions. *Cooper* v. *Cooper*, 7 L. J., Ch. 253.

In a suit by a vendor for specific performance, the decree, at the original hearing, having directed merely a reference of title, the court will not at the hearing on further directions enter into the consideration of any other objection which the answer has set up against the execution of the contract. *Le Grand* v. *Whitehead*, 1 Russ. 309.

In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill:—Held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard* v. *Draper*, 1 Russ. & M. 191; Taml. 332.

A case of breach of trust was alleged on the pleadings against trustees and executors for not having sold an estate, but at the first hearing the common accounts only were directed:—Held, on further directions, that the defendants could not be then charged with the breach of trust, and that inquiries could not be then directed with that object. *Green* v. *Badley*, 7 Beav. 274.

If the decree at the hearing make no provision for the costs of a trustee, the court will not entertain any petition in respect of them at the hearing on further directions. *Malins* v. *Greenway*, 7 Hare, 391; 18 L. J., Ch. 154.

By the decree, arrears of maintenance were ordered to be paid out of a fund in court, consisting both of corpus and rents of real estate, and it was referred to the master to calculate interest on the arrears. Upon the matter coming before the court upon the master's report:—Held, that it was not then competent for the parties to contend that the arrears and interest were not payable out of the corpus, for the point must be considered settled by the prior decree. *Davis* v. *Browne*, 14 Beav. 127.

Matters at issue at the first hearing, which are neither decided, put into a train of investigation, nor reserved, must, on further directions, be regarded either as abandoned, or as points on which the plaintiff was entitled to no order. *Passingham* v. *Sherborn*, 9 Beav. 424.

The general rule is, that if the question of wilful default be not raised by the pleadings, it cannot be raised either at the original hearing or on further directions, but where the pleadings do raise the point, it is the duty of the plaintiff, if he can make a case for it, to get a declaration by the decree, or, if he cannot make a case for an immediate decree, to get an inquiry of such a character that on the result of it the court may, on further directions, make a declaration. But if the point is raised in the pleadings, and the court, by its decree, passes it by, and neither makes any declaration nor directs an inquiry, it must be taken that the court did not mean to give any such relief. *Jones* v. *Morrall*, 2 Sim. (N.S.) 241; 21 L. J., Ch. 630.

After order made on further directions and

enrolled, in a suit to administer the trust of a creditors' deed, a bond creditor seeks to be allowed to come in and prove, alleging certain facts in excuse for not having come in before the order, and that the dissolution deed included the debt in the general words, coupled with the object of the instrument as expressed:—Held, that although the general words might include the debt, and the existence of it was morally certain, the order formed an insuperable obstacle, and petition dismissed with costs. *Clowes* v. *Waters*, 2 W. R. 308.

Amendment.]—The master's report had been confirmed, and neither objection nor exception had been taken thereto. The cause came on for further directions, when the court, from the facts stated in the report, entertaining great doubt as to the correctness of the master's finding, declined to act upon it, though it refused then to alter it. *Gregory* v. *West*, 2 Beav. 541.

A report was directed to be amended according to the final decree, by substituting a statement that the defendant was seised in fee of premises decreed to be sold, instead of for lives renewable for ever. *Hatchell* v. *Cremorne* (*Lord*), Sau. & Sc. 675.

Want of Parties.]—On further directions, it is competent for the court to entertain a question of liability, if, by reason of want of parties or facts, the suit is not in a condition at an earlier hearing to enable the discussion of such a question in the presence of all persons interested. *Puttenden* v. *Hobson*, 22 L. J., Ch. 697; 1 W. R. 282; 17 Jur. 406.

Fresh Facts.]—After hearing and rehearing, a receiver having been refused, the party may be entitled, on the cause coming on for further directions, shewing a new state of facts, as a balance reported in the hands of the defendants, to renew the application for a receiver. *Att.-Gen.* v. *Galway Corporation*, 1 Moll. 95.

Compromise.] — After decree and master's report, a motion, founded on a compromise, for payment out and division of money in court between the parties, was refused, the proper course, under such circumstances, being to set down the cause for further directions. *Spencer* v. *Mostyn*, 11 Jur. 234.

As to Funds.]—An order for payment to the husband, of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. *Campbell* v. *Harding*, 6 Sim. 283.

After decree, the bill cannot be dismissed by consent: but an arrangement for disposing of the fund in court may have effect by consent on further directions. *Lashley* v. *Hogg*, 11 Ves. 602.

In a creditors' suit for the administration of the estate of a testator it appeared from the master's report that there were forty-eight creditors, that many of the debts were for small amounts, and that the fund distributable among them was small and insufficient to pay the debts in full. Upon the cause coming on for further directions, the court, on the request of the counsel for the defendants, the executors, made an order for the ratable apportionment of the fund among the creditors, on the amounts apportioned being verified by the joint affidavit of the plaintiff and one of the defendants, the executors; and that the sums apportioned under 10*l.* should be paid to the plaintiff's solicitor on his undertaking to pay the same to the creditors respectively. Form of such order. *Bear* v. *Smith*, 5 De G. & Sm. 92; 21 L. J., Ch. 176; 16 Jur. 708.

Interest.]—The reference to compute interest, under the 46th Order of August, 1841, on debts not by law carrying interest, may be made on further directions, although not made at the hearing. *Flintoff* v. *Haynes*, 4 Hare, 309.

In an administration suit, the pleadings raised questions of wilful default and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received:—Held, that the court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open, inasmuch as, although there was no declaration at the hearing, yet, applying the above rule, there was that which was the first step towards it, a direction to take the common account of what had been received, which, if properly answered by the master, ought to show what personal estate had been received from time to time, and then the court might, on further directions, either make an immediate declaration, or direct further inquiry. *Jones* v. *Morrall*, 2 Sim. (N.S.) 241; 21 L. J., Ch. 630.

Generally executor making advances for maintenance beyond income in his hands is not entitled to interest, but on further directions the executor may be able to show that common justice requires the allowance of interest. *Kilbee* v. *Sneyd*, 2 Moll. 235.

An executor may be charged, on further directions, with interest on his balances, though it be not prayed by the bill. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722.

Document set aside—Instruments depending on it.]—When the decree on the hearing declares that a certain indenture ought to be set aside, the decree on further directions will not only set aside such indenture, but all instruments depending upon it conveying estates to parties before the court; nor will the fact that the decree on the hearing directed an inquiry as to the circumstances under which the consideration-money for the conveyance effected by the first-mentioned indenture was paid into court, and that the master found that it was paid in, previously to the execution of such indenture, by the parties claiming under the instruments depending thereon, enable the latter to claim the money as ear-marked against persons in whose favour the original indenture was set aside, though it may as against the original takers under such indenture. *Cookson* v. *Lee*, 23 L. J., Ch. 473—L.JJ.

Administration Action.]—In an administration suit, commenced by summons, the chief clerk certified that the testatrix had contracted to sell a house and furniture, that the executors had completed the contract by an assignment of the property, and that they had in such assignment included another house, without having received

any additional consideration. On the cause coming on upon further consideration, an attempt was made to charge the executors with a breach of trust in respect of the house :—Held, that this could not be done in a suit commenced by administration summons, but offered to direct an inquiry as to the value of the house. *Delevante, In re, Delevante* v. *Child*, 6 Jur. (N.S.) 118 ; 1 L. T. 397.

e. *Direction of Further Inquiries.*

In what Cases.]—A reference, on further directions, for the purpose of ascertaining whether certain charitable bequests could be carried out, made after the confirmation of a report, certifying that they could not, is irregular. *Lyons Corporation* v. *East India Co.*, 1 Moore, P. C. 175.

Where administratrix, under usual decree for account, attempted to support her discharge before master by forgery and fraud, court, upon petition and further direction, directed inquiry as to balances in her hands from time to time, and a computation of interest thereon. *Parnell* v. *Price*, 14 Ves. 502.

If, at the hearing in a suit by the cestuis que trustent against the trustees, the common accounts only were directed, without any inquiry as to the default or neglect of the executors and trustees in not possessing themselves of the testator's estate, further directions at such an inquiry will not be directed, though a case for such a direction was stated by the bill, and appeared on the report. *Garland* v. *Littlewood*, 1 Beav. 527 ; 8 L. J., Ch. 369.

A bill was filed by cestuis que trustent to administer the trusts of a settled fund, and seeking to charge the estate of a deceased trustee with sums which he might have received but for his wilful default. At the hearing the ordinary accounts were only directed, and no inquiry was directed or reservation made with reference to wilful default. In the course of the inquiries in the master's office, some documents were in evidence, which were relied upon by the plaintiffs as leading to an inference that the trustee might have received more than was admitted to have been actually invested on account of the trust fund :—Held, that it was not proper, on further directions, to direct an inquiry as to wilful default. *Coope* v. *Carter*, 2 De G. M. & G. 292 ; 21 L. J., Ch. 570.

A bill for partition of a freehold estate stated the death of one tenant in common in fee, having devised her moiety to the defendant's husband, and the death of the other tenant in common intestate leaving the plaintiff her heir-at-law, but that the defendant's husband, who was an illegitimate son of a deceased brother of the intestate, and claimed to be her heir-at-law, concealing his illegitimacy, had entered upon and enjoyed the entirety, and had settled it by an antenuptial settlement, under which the defendant claimed. The bill also sought an account of rents and profits received by the defendant. The defendant by her answer submitted that her settlor was the intestate's heir, but did not claim as a purchaser for value without notice. By the decree a reference was directed to ascertain who was the intestate's heir-at-law, and the result of it was in favour of the plaintiff :—Held, that a further inquiry, whether the defendant was a purchaser without notice, could not be directed on further consideration. *Lyne* v. *Lyne*, 8 De G. M. & G. 553.

In a suit to administer the trusts of a settlement, the chief clerk having certified that the most beneficial way of letting the premises which formed the subject of the suit would be to let them on lease, two persons (one of whom was the defendant and also a cestui que trust and the receiver of the property) carried in equally beneficial proposals, and that of the defendant was accepted, and a conditional contract for a lease was signed by him accordingly, and approved by the judge. The defendant, having afterwards declined to perform the contract, the Master of the Rolls, on the hearing of the cause on further consideration, directed an inquiry as to the damages occasioned to the estate by the defendant's breach of contract. On appeal, the court, on the ground that the order of the Master of the Rolls was made without any proper notice to the defendant and without any constat before the court, directed an original notice of motion to be served on the defendant with respect to the inquiry as to damages, and upon the hearing of that motion, affirmed the order of the Master of the Rolls, but gave no costs to either side. *Carne* v. *Brancker*, 20 L. T. 797 ; 17 W. R. 837.

Where the decree in a suit instituted by an annuitant against a subsequent mortgagee, with a power of sale, and the mortgagor, ordered the estate to be sold and accounts to be taken, but did not contain any direction as to costs, charges, and expenses incurred by the mortgagee, in respect of certain attempted sales under his power, though there was the usual clause as to costs in his mortgage deed, and he claimed them by his answer :—Held, that the decree having reserved further directions, a further reference might, on petition, be directed to the master, to take an account of such costs, &c. *Thompson* v. *Rumball*, 3 Jur. 53.

f. *Practice.*

Evidence—Only such as before Chief Clerk.]—If a document has not been proved, nor has any order been obtained for proving it vivâ voce at the hearing, the court will not allow it to be proved on the cause being heard, either on the equity reserved, or for further directions. *Blundell* v. *Gladstone*, 11 Sim. 467 ; 12 L. J., Ch. 225 ; 5 Jur. 481.

An affidavit cannot be received on further directions ; therefore, where a plaintiff on further directions produced an affidavit that certain defendants, having no further interest in the matters, had signed a consent, waiving service on them of any subsequent proceedings, and asked that the decree might be drawn up without an affidavit of service on them, the court rejected such affidavit. *Att.-Gen.* v. *Gell*, 8 Beav. 362.

An inquiry was directed to be made by the master ; the master made his report, which was not excepted to. The parties were held to be at liberty, at the hearing of the cause for further directions, to refer to the affidavits and other materials used before the master on his inquiry. *Nedby* v. *Nedby*, 5 De G. & Sm. 377 ; 21 L. J., Ch. 446.

The examination of a party may be read on further directions, for the purpose of having inquiries directed, though no foundation for those inquiries appears on the report itself. *Dymock* v. *Ashton*, 7 L. J. (O.S.) Ch. 120.

In 1843 a tenant in tail joined in resettling one of two family estates. He disputed the validity of the transaction, and subsequently, in

1845, married. On that occasion a settlement was executed, making provision for the younger children only of the marriage. The instructions stated that it was desired to keep his landed estates free from any settlement, and contained this note: "N. B.—The eldest son will take the family estate." In a suit to set aside the resettlement of 1843, affidavits were produced on behalf of the infant eldest son of the marriage, to show that, on the negotiation for the marriage, it was understood, that under existing settlements, the eldest son would become entitled to considerable landed estates, and therefore, that it was only necessary to provide for the younger children:—Held, that these affidavits were inadmissible under Sir George Turner's Act (13 & 14 Vict. c. 35). *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

Affidavits as to matters directly in issue in the cause, which are filed after the filing of the certificate of the judge's clerk, will not be admitted at the hearing on further consideration; but, if necessary, upon the suggestion of counsel, an inquiry may be directed. *Fleming* v. *East*, 1 Kay (App.) lii.; 18 Jur. 1112; 2 W. R. 643.

A bill filed for redemption of a mortgage and an injunction to restrain a sale under a power alleged to have been fraudulently inserted in the deed, contained various charges of oppression and misconduct against the defendant, on the ground of which it prayed that he might pay the costs of the suit. On a motion for an injunction, supported by affidavits of those charges, the defendant submitted to an immediate account, the plaintiff undertaking to pay what should be found due, and further directions and costs were reserved:—Held, on a subsequent hearing of the cause for further directions, that the affidavits filed on the former occasion could not be read, the first order having shut out all the merits except the account. And an order, giving the plaintiff the costs of the suit on the ground of those affidavits was, on appeal, dismissed, and the defendant was allowed his costs, according to the ordinary rule. *Dunston* v. *Patterson*, 2 Ph. 341; 16 L. J., Ch. 404; 11 Jur. 595.

An affidavit is not receivable in evidence on further directions. *Nicholson* v. *Haines*, 1 Colly. 196.

—— **On Question of Costs.**]—Affidavit filed after the date of the master's report received in evidence, on the ground that it stated circumstances material in guiding the judgment of the court on the question of costs. *Fallows* v. *Dillon (Lord)*, 2 Eq. Rep. 1181; 2 W. R. 507.

An affidavit as to defendant's conduct in the master's office rejected on a question of costs. *Bateman* v. *Margerison*, 2 W. R. 607.

—— **Newly Discovered.**] — Evidence discovered after the original hearing, and raising a new issue and a new defence, cannot be admitted under the 13 & 14 Vict. c. 35, s. 28, upon the hearing on further directions. But if justice cannot otherwise be done, the court will direct an inquiry. *Howard* v. *Chaffers*, 2 N. R. 10; 9 Jur. (N.S.) 634; 11 W. R. 585.

—— **Cross-examination.**]—After the certificate of the chief clerk has been signed and approved by the judge, no cross-examination upon any affidavit produced before the chief clerk during the proceedings in chambers will be allowed. *Dawkins* v. *Morton*, 6 L. T. 214; 10 W. R. 339.

—— **"Further Evidence."**]—Affidavits admitted at the hearing, under the stat. 13 & 14 Vict. c. 35, s. 28, as evidence that no appointment of trust funds had been made by deceased persons, in support of a suit by a party claiming in default of appointment. *Devey* v. *Thornton*, 9 Hare, 233.

The hearing of the cause on further directions was ordered to stand over for the production of evidence, by affidavit, of the value of the houses built, and the approbation of the lessor's surveyor at the time. *Hume* v. *Bentley*, 21 L. J., Ch. 760; 16 Jur. 1109.

Affidavits, which had been used before the chief clerk, were rejected by the vice-chancellor, on the ground that no notice of intention to read them had been given by the defendant. The plaintiff in his notice of appeal gave notice of motion for leave to read them on the appeal:—Held, that they were "further evidence" within the meaning of the Judicature Act, Ord. LVIII. r. 5, and leave to read them was given. *Chennell, In re, Jones* v. *Chennell*, 47 L. J., Ch. 80; 8 Ch. D. 492; 26 W. R. 595.

Costs.]—By a decretal order specific performance was decreed against a vendor; an inquiry was directed what damage had been sustained by the plaintiff by reason of the acts complained of in the bill, and the defendant was ordered to pay the costs of suit, liberty to apply being given, but further consideration not being reserved. The acts complained of by the bill were commencing to pull down buildings and removing the materials, and cutting and carrying away the crops on the land. The plaintiff carried in a very large claim for damages under various heads, most of which were at once rejected in chambers, but a certificate was made (which the vice-chancellor refused to vary) giving damages for pulling down buildings, and also under four other heads. The lords justices, on appeal, held that no damage was shown, on the ground that, under the peculiar circumstances, pulling down the buildings caused no damage, and that the other heads of damage were not within the scope of the inquiry. The defendant subsequently applied for the costs of the inquiry, on the ground that it had resulted wholly in his favour. This application having been refused by the vice-chancellor:—Held, that the plaintiff, though unsuccessful, was entitled to the costs of the inquiry so far as they related to pulling down buildings, removing materials, and cutting and carrying away crops; but must pay all the other costs of the inquiry. *Krehl* v. *Park*, 44 L. J., Ch. 286; L. R. 10 Ch. 334; 33 L. T. 83; 23 W. R. 475.

Varying Orders.]—Under the Judicature Act, 1873, s. 50, an order made on further consideration in chambers may be varied on an adjourned summons. *Hodges, In re, Davey* v. *Ward*, 47 L. J., Ch. 335; 7 Ch. D. 754; 26 W. R. 390.

6. Accounts and Inquiries—*See* ACCOUNTS AND INQUIRIES.

b. JUDGE AT CHAMBERS.

1. Jurisdiction.

Generally.]—The expression, "the court or a judge," in the rules and orders, invariably means a divisional court or a judge at chambers. *Baker*

v. *Oakes*, 46 L. J., Q. B. 246 ; 2 Q. B. D. 171 ; 35 L. T. 832 ; 25 W. R. 220—C. A.

Sect. 39 of the Judicature Act, 1873, merely confers on the judges of the supreme court the power to exercise in chambers such of the functions of the court as were exercised in chambers by the judges before the act. *Ib.*

All powers possessed by the superior courts at common law, as well as those given by statute to the court in general terms, without any special limitations, may be exercised by a single judge, as the delegate of the court. *Smeeton* v. *Collier*, 1 Ex. 457 ; 5 D. & L. 184 ; 17 L. J., Ex. 57.

Chancery Division—Discharge of Order in Chambers.]—A judge of the chancery division has still jurisdiction to hear a motion to discharge an order made on a procedure summons in chambers, notwithstanding the Judicature Act, 1894, s. 1 (4) :—Semble, such applications should be discouraged. *Boake* v. *Stevenson*, 64 L. J., Ch. 261 ; [1895] 1 Ch. 358 ; 13 R. 171 ; 71 L. T. 722 ; 43 W. R. 189.

When an order has been made by a judge in chambers, the court has no power to alter that order unless upon motion, under s. 50 of the Judicature Act, 1873, to discharge the order. Where all parties concerned have been represented by counsel in chambers, the practice is for the chief clerk to give a certificate, and upon that the parties may go direct to the court of appeal. *Att.-Gen.* v. *Llewellyn*, 58 L. T. 367.

See also APPEAL.

Hearing in Judge's Private Room.]—A judge has jurisdiction to make an order, which can be made in judge's chambers, when sitting in the judge's private room at Westminster. *Hartmont* v. *Foster*, 51 L. J., Q. B. 12 ; 8 Q. B. D. 82 ; 45 L. T. 429 ; 30 W. R. 129—C. A.

Prohibition.]—An application for a writ of prohibition to a county court may be made to a judge sitting at chambers, notwithstanding Ord. LIX. r. 8a, of the Rules of the Supreme Court, December, 1888, which provides that "every application for a prohibition to a county court . . . shall be brought by notice of motion." *King* v. *Charing Cross Bank*, 59 L. J., Q. B. 24 ; 24 Q. B. D. 27 ; 62 L. T. 42 ; 38 W. R. 287.

A judge sitting at chambers has jurisdiction to set aside a writ of prohibition issued out of the petty bag office. *Salm Kyrburg* v. *Posnanski* (13 Q. B. D. 218) followed. *Amstell* v. *Lesser*, 55 L. J., Q. B. 114 ; 16 Q. B. D. 187 ; 53 L. T. 759 ; 34 W. R. 230.

Attachment.]—A judge at chambers has power to give leave to issue a writ of attachment. *Salm Kyrburg* v. *Posnanski*, 53 L. J., Q. B. 428 ; 13 Q. B. D. 218 ; 32 W. R. 752.

Power to refer to Court.]—The transfer of appeals from a judge at chambers in matters of practice and procedure to the court of appeal instead of to a divisional court has taken away the power of the judge to refer matters to the divisional court, and does not empower him to refer them directly to the court of appeal : he should now in every case himself make or refuse the order asked for. *Roberts* v. *Plant*, 64 L. J., Q. B. 347 ; [1895] 1 Q. B. 597 ; 14 R. 222 ; 72 L. T. 181 ; 43 W. R. 308—C. A.

Staying Proceedings.]—In an action against a surety upon a bond conditioned for the due payment to the receiver-general of all sums received by a collector of assessed taxes, a judge has no authority to order the proceedings to be stayed as to certain items in the particulars of demand, upon payment of that amount into court. *Kepp* v. *Wiggett*, 4 C. B. 678 ; 5 D. & L. 164.

Where a judgment irregularly signed by the plaintiff is set aside with costs, it is competent to a judge to stay the proceedings until such costs are paid. *Wenham* v. *Downes*, 5 N. & M. 244 ; 3 A. & E. 450 ; 1 H. & W. 324.

So a judge at chambers has jurisdiction under 15 & 16 Vict. c. 75, s. 219, to order a stay of proceedings, on payment of principal, interest, and costs. *Lawrence* v. *Hogben*, 26 L. J., Ex. 55.

Habeas Corpus.]—A writ of habeas corpus ad subjiciendum, issued into the island of Jersey by a baron of the exchequer, returnable in the queen's bench, is well issued under 1 & 2 Vict. c. 45. *Carus Wilson, In re*, 7 Q. B. 984 ; 14 L. J., Q. B. 105, 201 ; 9 Jur. 393.

It is no objection to an order made by another judge at chambers, under the general jurisdiction given by 1 & 2 Vict. c. 45, that the judge of the court in which the matter was pending was in attendance at the time. *Bennett* v. *Dean*, 5 Scott (N.R.) 196.

Procedendo.]—A judge sitting at chambers has power to issue a procedendo. *Reg.* v. *Scaife*, 2 Den. C. C. 513 ; 18 Q. B. 773 ; 3 Car. & K. 211 ; 21 L. J., M. C. 221 ; 17 Jur. 232.

Execution against Shareholder.]—Where judgment has been recovered against a company, a judge of any court sitting at chambers has the same jurisdiction, under 7 & 8 Vict. c. 110, s. 68, to order execution to issue against a shareholder, as a judge of the court in which judgment was obtained. *Palmer* v. *Justice Assurance Society*, 6 El. & Bl. 1015 ; 26 L. J., Q. B. 73 ; 3 Jur. (N.S.) 44 ; 5 W. R. 55.

Mandamus.]—An order for a mandamus to issue for the examination of witnesses under 43 Geo. 3, c. 63, s. 44, must be made by the court, and cannot be made by a judge at chambers. *Clarke* v. *East India Co.*, 2 B. C. Rep. 319 ; 6 D. & L. 278 ; 18 L. J., Q. B. 23.

Waiver of Objection to Jurisdiction.]—The acceptance of costs under a judge's order, which otherwise could not have been received at all, or the whole or part of which could not have been received so soon, is a waiver of any objection to the order for want of jurisdiction. *Tinkler* v. *Holder*, 7 D. & L. 61 ; 18 L. J., Ex. 429.

Costs.]—A judge at chambers has no power to make an order as to costs under Ord. LV. ; nor to extend the time for making such order under Ord. LVII. r. 6, so as to enable the judge who tried the cause to make such order at any time after the trial. If no application has been made to the judge at the trial, the only way of obtaining such an order is by a substantive application to a divisional court. *Baker* v. *Oakes*, 46 L. J., Q. B. 246 ; 2 Q. B. D. 171 ; 35 L. T. 832 ; 25 W. R. 220—C. A.

A judge has jurisdiction to fix the amount of costs to be paid as the condition of making an order. *Collins* v. *Aaron*, 6 D. P. C. 423 ; 4 Bing. (N.C.) 223 ; 5 Scott, 595 ; 1 Arn. 54 ; 7 L. J., C. P. 134.

A judge has discretion to allow a plea to be amended on payment of a stated amount of costs, instead of payment of costs generally. *Tomlinson* v. *Bollard*, 3 G. & D. 607; 4 Q. B. 642; 12 L. J., Q. B. 257; 7 Jur. 969.

To proceed Ex parte.]—By 6 & 7 Will. 4, c. 71, s. 82, it is provided that in case a rent-charge be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the premises for payment, it shall be lawful for any of the judges, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff, requiring him to summon a jury to assess the arrears remaining unpaid:—Held, that, upon production of a sufficient affidavit of the facts, a judge may grant such order ex parte, and that no previous summons or notice to the parties is necessary. *Hammersmith Rent-charge, In re*, 4 Ex. 87; 7 D. & L. 41; 19 L. J., Ex. 66.

Setting aside Judgment.]—A judge has power to make an order setting aside a judgment in ejectment for want of a plea, and admitting the tenant to appear and defend, although possession had been given under the judgment. *Doe* d. *Mullarky* v. *Roe*, 11 A. & E. 333; 3 P. & D. 316; 9 L. J., Q. B. 53; 4 Jur. 314.

As to Evidence of Documents.]—In an action founded upon a document in which both parties had an interest, and which was in the possession of one, but was said by him to have been lost, a judge cannot order that if such party does not produce the document to be stamped, a copy duly stamped shall be read in evidence at the trial, and that the original shall not then be produced on the other side, nor objection taken to the want of a stamp on the original. The court rescinded such an order, after it had been enforced by the judge at nisi prius, and made a rule of court. *Rankin* v. *Hamilton*, 15 Q. B. 187; 14 Jur. 930.

Reference to Judge.]—Judgment having been given in an action of trover for a book belonging to the plaintiffs as churchwardens of a parish, and proceedings pending in a court of error, by the consent of the parties an order was made by a judge on the 26th February, 1848, "that the judgment of the common pleas do stand; the costs of both sides to be paid out of the parish funds." This order was made a rule of court on the 22nd March, 1848. Difficulties arose in carrying out this order, and the case was taken to the court of error, which awarded a venire de novo. On the second trial, by an order of nisi prius, with the consent of all parties, it was ordered that the cause, and all matters relating to it, be referred to a judge, who was to have power to direct in what manner the former rule of the 22nd March, 1848, was to be carried into effect, and from time to time to direct and decide what ought to be done. The judge directed the costs on both sides to be taxed as between attorney and client, and on the 10th August, 1852, made an order, by which, after reciting that "doubts had arisen respecting matters relating to the order of the 26th February, 1848, viz. as to how the rule of the 22nd March, 1848, was to be carried into effect, and what from time to time ought to be done for such purpose," the judge "ordered, directed, and decided that the defendant should pay to the plaintiffs on the 1st March, 1853, the sum so taxed as the plaintiffs' costs, unless in the meantime the sum be paid to the plaintiffs out of the parish funds":—Held, first, that as the mode in which the judge was to act was not pointed out in the order of nisi prius, it must have been intended that he should act as a judge usually acts, viz. by order, and that he therefore had authority to make the order. *Gibbs* v. *Flight*, 13 C. B. 803; 22 L. J., C. P. 256; 17 Jur. 1034.

Held, secondly, that as the parties had selected him to interpret the order of the 26th February, 1848, they were bound by his decision. *Ib.*

Amendment.]—A declaration stated that defendant had agreed to pay plaintiff (an actor) a weekly salary during three successive seasons, but had dismissed him without cause during that period; the plaintiff claimed 400*l.* damages. Plea, to the further maintenance of the action, that the defendant after declaration pleaded payment of 32*l.* into court, and paid the 32*l.* into court, which the plaintiff took out of court and replied, accepting the 32*l.* in satisfaction, and that the defendant paid the plaintiff's costs; that afterwards, a judge made an order on the plaintiff's application against the defendant's will, setting aside the replication, and allowing the plaintiff to amend his declaration and the defendant to plead de novo, and directing the plaintiff to pay back the money and costs which he had received from the defendant; that the plaintiff afterwards amended his declaration by claiming 400*l.* instead of 100*l.* and his particulars by claiming 216*l.* instead of 32*l.* Replication that the plaintiff replied accepting the 32*l.* paid in under an erroneous belief that notwithstanding such acceptance, he should be at liberty to bring fresh actions for the remainder of the salary, and as it from time to time became due under the agreement:—Held, that the plea was no answer to the replication, as the judge had jurisdiction to make the order for the amendment, and that the court of error could not interfere to say whether he acted rightly or wrongly in the particular case. *Webster* v. *Emery*, 10 Ex. 901; 24 L. J., Ex. 186; 3 C. L. R. 713; 1 Jur. (N.S.) 381; 3 W. R. 250—Ex. Ch.

2. Summons—*See* ORDER LIV. and supra, SUMMONSES, cols. 685 et seq.

3. Orders—Service, &c.—*See* supra, JUDGMENTS AND ORDERS, cols. 547 et seq.

4. Appeals from—*See* APPEAL.

5. Fees on entering Appeal—*See* infra, COURT FEES, col. 800.

c. THE MASTERS.

Jurisdiction.]—*See* Rules of Supreme Court, 1883, Ord. LIV. r. 12.

—— **Staying Execution pending Appeal.**]—A master has jurisdiction under Ord. LVIII. r. 16, to stay execution on a judgment pending an appeal to the Court of Appeal. *Oppert* v. *Beaumont*, 56 L. J., Q. B. 216; 18 Q. B. D. 435; 35 W. R. 266—C. A.

Filing Affidavit—Interlineation.]—A master of the queen's bench division has no jurisdiction

to initial an interlineation in an affidavit sworn in support of an application in the chancery division. According to the practice in the chancery division, such an affidavit ought not to be filed without an order of the court. *Cloake, In re*, 61 L. J., Ch. 69 ; 65 L. T. 455 ; 40 W. R. 74.

Reference to.]—Upon the argument of a rule, facts were not ascertained by the affidavits on either side, and the court referred the matter to the master, to inquire and report as to them. Upon the report being read, the court refused, upon the facts stated in the report, the other parts of the case having been argued previously to the reference, to make the rule absolute. *Reg.* v. *Cheshire JJ.*, 13 L. J., Q. B. 261 ; 8 Jur. 645.

Reference to Master to Report.]—*See* ARBITRATION.

Master's Practice not binding on Court.]—No practice of the masters, however long established, however continuous it may have been, is of any legal authority, or in any way binds the court, unless it has been determined by the court itself to be a right practice. The masters of the court, however distinguished they may be, have no authority to determine the law. Their practice ought, no doubt, to be examined with the greatest care, but it is of no authority to bind the court. *Stumm* v. *Dixon*, 58 L. J., Q. B. 183 ; 22 Q. B. D. 529 ; 60 L. T. 560 ; 37 W. R. 457—C. A.

Appeal from.]—*See* APPEAL.

XXI. FUNDS AND SECURITIES IN COURT.

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5. Of Lunatic—*See* LUNATIC.
6. Of Married Woman—*See* HUSBAND AND WIFE.
7. Payment of Debts out of, pending Suit—*See* EXECUTOR AND ADMINISTRATOR.
8. Payment of Legacies out of, pending Suit—*See* WILL.
9. On Sales by Court—*See* EXECUTOR AND ADMINISTRATOR—VENDOR AND PURCHASER.
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a. ADVANCES OUT OF.

In General.]—A sum of money being in court to be laid out in lands, which, when purchased, would be subject to the bond debts of testator, the debts decreed to be paid out of the fund in court. *Cattell* v. *Money*, 3 Bro. C. C. 256.

The court has no jurisdiction to make an allowance out of the rents of defendant's life estate in possession of receiver, appointed in suit instituted by a creditor, for defendant's maintenance, except by consent of creditors. *Hickson* v. *Aylward*, 3 Moll. 35.

Order made upon petition, that part of a small sum of stock bequeathed to an infant should be sold, and the proceeds applied in paying a debt incurred for necessaries on his account, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance. *Swift, Ex parte*, 1 Russ. & M. 575.

An order was made for payment of the dividends of a fund in court to the executors, for distribution amongst the parties interested, before the accounts of the estate were taken, the executors admitting assets of the testator for all purposes. *Shewell* v. *Shewell*, 2 Hare, 154 ; 12 L. J., Ch. 250.

Where the court orders payment of arrears out of a particular fund, it is tantamount to a decision, not only that such fund is liable to make such payment, but also the interest directed to be computed thereon. *Davis* v. *Brown*, 14 Beav. 127.

Upon motion to lay out part of the capital of a fund in which children had a reversionary interest :—Held, that the court had no power to deal with the fund. *Mills, In re*, 1 W. R. 75, 380.

The court will only make an order for advancement of income or principal under s. 57 of 15 & 16 Vict. c. 86, where it sees that parties are clearly entitled and there is some pressing reason for so doing. *Rawley* v. *Burgess*, 2 W. R. 652.

A married woman, having a life interest to her separate use in real estate, with her husband cut timber. A suit was instituted in one branch of the court to carry into effect the trusts of the settlement. In another branch a suit was in existence, in which a claim was made on the married woman's separate use, in respect of the timber cut :—Held, that in the first suit the court could not decide the question as to the right to cut the timber ; but the married woman, securing the value of the timber cut, was allowed her income pending the suit. *Stacey* v. *Southey*, 1 Drew. 400.

The court, where it sees fit, will order money to be paid out of court for past maintenance. *Davey* v. *Ward*, 26 W. R. 390.

For Carrying on Litigation.]—Where a pauper claimed as heir-at-law against a will and deed which were disputed, and the bill had been retained with liberty to bring an action, the tenants were ordered to pay plaintiff 150*l.* to enable him to go to trial. *Perishal* v. *Squire*, Dick. 31. *S. C.*, Beam. Costs, 379, inserted from the register book, from which it appears that this indulgence was extended also to one of the defendants.

The court has no authority to advance part of the fund in the cause, to enable indigent parties to prosecute. *Peck* v. *Beechey*, 2 Sim. 40.

Persons who were found by the master to be the next of kin of the intestate, and were named by the court to be defendants, in an issue directed to try the rights of other persons who claimed also to be the next of kin, were allowed a sum of 500*l.* out of the estate of the intestate, on giving security to account for it. *Gregg* v. *Taylor*, 4 Russ. 279; 28 R. R. 87.

Motion that defendants, whose title in trust lands was in question in the cause, might have advanced to them a sum of money to answer the expense of executing a commission in America refused. *Tillotson* v. *Hargreaves*, 4 Madd. 172.

The plaintiffs claimed, as next of kin of an intestate, a fund which was in the possession of the defendant as the nominee of the crown; and, after the master had reported against the plaintiff's title, the court directed certain issues for the purpose of trying it. The plaintiffs applied for an advance out of the fund, to enable them to try the issues, but this, which was opposed by the crown, the court refused. *Nye* v. *Maule*, 4 Myl. & C. 342; 8 L. J., Ch. 329; 3 Jur. 669.

A proportion of a residue was bequeathed in trust, for A., for life, with remainder to his children who should attain twenty-one, but if he should have no child who attained twenty-one, to B. and her children in a similar manner. The testator had, after making his will, granted underlease, and transferred stock in favour of B. and her children; A. and his children filed a bill to set aside these transactions on the ground that the testator was not, at the date of them, of sound mind. Issues were directed at the hearing. Before any child of A. attained twenty-one, A. and his children presented a petition in a suit for the administration of the testator's estate, seeking an advance out of the capital of their contingent shares to enable them to try the issue:—Held, notwithstanding the opposition of B. and her family, that the advance ought to be made, on an adult petitioner and his solicitor undertaking to abide by any order of the court for its replacement, if the trial should be unsuccessful. *Coombs* v. *Brooks*, 3 De G. & Sm. 452; 13 Jur. 784.

The court will not make any order for an allowance to the bankrupt, for the purpose of meeting the expenses of an issue to try the validity of the commission, unless the assignees consent. *Chambers, Ex parte*, 1 Deac. 197.

Disapproval of the practice of advancing money out of funds in court, to enable parties to try an issue directed by the court. A negotiation for a compromise:—Held, to be a reasonable cause. *Johnstone* v. *Todd*, 3 Beav. 218.

—— **Inquisition.**]—Upon a wife's petition, the court has no power to order money to be paid to her out of the produce of the lunatic's property, to enable her to traverse the inquisition, which she had got leave to do. *Nugent, Ex parte*, 2 Moll. 486.

Costs incurred or to be incurred.]—When a widow, who was appointed sole executrix and testamentary guardian, had by her conduct made it necessary to have the estate administered and another guardian appointed, and had besides incurred costs of contempt, the court allowed a small sum out of the corpus to be retained by her in payment of such costs, and for the interim maintenance of herself and children. *De Coombe* v. *De Coombe*, 3 Jur. (N.S.) 712.

The master approved of some suits being instituted by the receiver, who was to be indemnified out of the estate. The funds appearing by affidavit to be "abundantly ample," the court ordered the institution of the suits, and the payment of costs out of the fund standing to the general credit of the cause, upon service on those only whom the master had authorised to attend him on the reference. *Lockhart* v. *Hardy*, 6 Beav. 267.

A suit was instituted before the passing of the Joint-Stock Companies Winding-up Acts, for the winding-up of the affairs of a company. The bill was dismissed, with costs, as against some of the defendants. An order was afterwards made under the Joint Stock Companies Winding-up Acts for the winding up of the company's affairs, and the official manager petitioned to have the money in court in the suit paid to him. The defendants, against whom the bill had been dismissed, with costs, appeared, although not served with the petition, and asked for payment of those costs out of the fund, on the ground that they had no means of getting them from the plaintiff; and the court ordered those costs, and also their costs of appearing on the petition, to be paid out of the fund accordingly. *Walworth* v. *Holt*, 15 Jur. 853.

Although the solicitor of a defaulting receiver cannot have the costs of his proceedings, until the sum found to be due from the receiver, with interest, shall have been paid in; yet when at his own proper costs, and under the orders of the court, the solicitor of the receiver brought certain actions at law against defaulting tenants and their sureties, &c.:—Held, that the solicitor was entitled to be paid the costs of such proceedings out of the fund in court. *M'Bride* v. *Clarke*, 1 Ir. Eq. R. 203.

The court will not make an order ex directo, that the costs of an attorney be paid out of a fund in court, upon which he has a lien; he must wait until his client applies to be paid the fund, and then insist upon his lien. The reason for not giving the costs to the attorney upon his own motion is, that there are not two litigant parties before the court. *Crosbie* v. *Molloy*, 2 Jones, 588.

b. Increment.

Who Entitled to.]—Money lodged in court by plaintiff, afterwards, on the application of the defendant, invested in debentures, defendant entitled to the benefit of a rise on the price, though it exceed the amount of his claim against the plaintiff, the application by defendant amounting to an undertaking to abide the result of a rise or fall of the debentures. *Garnett* v. *Nugent*, 2 Ball & B. 434.

A mortgagee having commenced an action against the mortgagor to recover the mortgage

money upon a collateral security, the mortgagor obtained an injunction against the action, upon the terms of his paying into court the sum which appeared to be really due upon the mortgage. The sum was accordingly paid in and invested in stock, and that stock was afterwards blended with other stock purchased with another sum of money paid into court in the same suit. The mortgaged property having been afterwards sold under a decree in a different suit between the mortgagee and mortgagor, the mortgagee became the purchaser, and he was allowed to deduct from the purchase-money the amount due to him on the mortgage:—Held, that the mortgagor was entitled to receive back the stock which had been purchased with the sum paid in by him upon obtaining the injunction, and also the accumulated dividends which had accrued on that stock. *Taylor* v. *Waters*, 1 Myl. & C. 266; 5 L. J., Ch. 210.

Money paid for the use of a railway, under protest as overcharges, was afterwards paid into court under an order made by consent, and invested in the public stocks to abide final judgment in an action brought to try the legality of the charges, which the judgment declared to be illegal:—Held, that the party who paid the money was entitled to the stocks and dividends and accumulations thereon. *Barrett* v. *Stockton and Darlington Ry.*, 1 H. L. Cas. 18; 11 Cl. & F. 590. And see *S. C.*, at law, 2 Man. & G. 134; 3 *Ib.*, 956; 8 Scott, 646.

The money brought into court having been, on the motion of the plaintiff, invested in stock:—Held, that he was entitled to the benefit of a rise in the price of stock. *Wynn* v. *Brady*, 5 Ir. Eq. R. 239.

c. Retaining.

In what Cases.]—A court will retain moneys decreed to parties, on the applications of persons having claims upon them. *Bolton* (*Duke*) v. *Williams*, 4 Bro. C. C. 430.

Fund in court detained, until the party by whom it has been paid is secured against all conflicting claims to it. *Francklyn* v. *Colhoun*, 3 Swan. 309; 19 R. R. 204.

A party entitled at twenty-one to money invested in the name of the accountant-general, petitioned that the money should still continue in his name, but the court refused to make such order, and compelled him to take the money. *Isaac* v. *Gompertz*, 1 Ves. J. 44.

Where a decree was made, directing a fund to be paid out of court to a defendant, and afterwards another defendant to the same suit, who claimed an interest in the fund, moved to stay that fund in court, until his claim could be determined, the court refused the motion with costs. *D'Alton* v. *Trimleston* (*Lord*), 9 L. J. (O.S.) Ch. 202.

A. conveyed to B. his reversionary interest in a fund in court, and B. obtained a stop-order. When the fund fell into possession, B. presented a petition for payment to him. On the hearing of the petition A. insisted that the purchase was invalid, being a purchase of a reversionary interest at an undervalue. The court would not decide the point, but proposed to retain the funds in court for a limited time if A. would undertake to file a bill to set aside the conveyance. A. not giving the undertaking, the fund was paid out to B. *Bethune* v. *Kennedy*, 3 Beav. 462. *And see* 1 Myl. & C. 114.

Vendor may acquire lien on fund in court under contract for sale, and, if vendee refuses to complete contract, may prevent him by injunction from drawing out of court fund which was appropriated by contract to be applied in part payment of purchase-money. *Doyne* v. *Hervey*, 1 Hog. 3.

If a bill filed by a creditor is dismissed, and there is money in bank to the credit of the cause, it will be detained until a defendant, also a creditor, who is about to file a bill, can apply to have it transferred to the credit of his cause. *Woods* v. *Creaghe*, 1 Hog. 313.

Stop-order.]—*See* infra, col. 776 et seq.

d. Transfer and Carrying Over.

To Credit of Cause.]—Where the bankrupt has been ordered to pay a sum into court in a suit in chancery pending at the time of his bankruptcy, it was ordered by the court of review that a claim should be entered for that sum on behalf of the plaintiff in the suit, and that the dividends of that sum should be paid into the court of chancery, and invested in the name of the accountant-general. *Hancock, Ex parte, Gilburd, In re*, 3 Deac. & C. 523; 1 Mont. & Ayr. 220.

Where a sum had been ordered to be paid into court by the bankrupt in a suit in chancery still pending against him, a claim was ordered to be entered on the proceedings for that amount, and the assignees were directed to reserve dividends on that sum to be paid to the accountant-general to the credit of the suit in chancery. *Farden, Ex parte, Peters, In re*, 3 Deac. & C. 479; 1 Mont. & Ayr. 219.

Purchase-money paid into the court of exchequer, under the Southampton and London Railway Act, cannot be paid to the accountant-general of the court of chancery, though the property out of which the land is purchased by the company is under the administration of that court. *Winchester* (*Bishop*), *Ex parte, Southampton and London Railway, In re*, 6 L. J., Ex. Eq. 72; 1 Jur. 283.

Upon application for the transfer to the credit of a cause of a fund already paid into court as purchase-money by a public company, under an act of parliament, the practice hitherto has been for notice of the motion to be served on all the parties, and for the company to pay the costs of the appearances of all. In future it will be enough for the plaintiff to move without serving notice of motion upon the defendants. *Eden* v. *Thompson*, 4 N. R. 87; 10 L. T. 335, 522; 12 W. R. 789.

By the statute 23 & 24 Geo. 3, of the parliament of Ireland, for securing the moneys of suitors of the courts of chancery and exchequer, by depositing the same in the National Bank, which provides for the appointment of an accountant-general for the court of exchequer, it is enacted, that "so long as he observes the rules thereby or by the court to be prescribed, he shall not be answerable for any moneys which he shall not actually receive, but that the bank be answerable for all moneys deposited with them"; and regulations for the transfer of stock are specified in the act. Under this act, A. was appointed accountant-general of the court of exchequer in 1796. In 1810 A. executed a power of attorney, authorising S. B., his chief clerk, to make transfers in the bank books, of any stock of which A. should first have executed a transfer

draft under his hand, of check paper, pursuant to the orders of the court. This power was deposited at the transfer office at the bank. Under this power, S. B. producing a certificate or transfer draft, purporting to be signed by A., but in fact forged, and in several respects not conformable to the particulars required by the power and the statutory regulations, obtained a transfer of stock from one cause to another, for the purpose of supplying deficiencies in the stock in the latter cause, which had been caused by transfers under certificates formerly forged by S. B. Upon the discovery of this transfer from the first to the second cause, two creditors in the first cause, who had proved their debts, made a motion in the cause, calling upon A. to refund the stock transferred, which, after hearing affidavits of the appellant and the Bank of Ireland, was ordered by the court. Upon appeal against this order, it was questioned whether the court of exchequer had jurisdiction to make such order by a summary proceeding not in a cause, and whether the house of lords had jurisdiction to entertain such appeal; but eventually the order was reversed. *O'Neill* v. *Fitzgerald*, 3 Bli. (N.S.) 24.

H., being an accounting defendant in one of two suits in different branches of the court and a party to the other, and entitled to a fund under a decree in that suit, is ordered to pay a sum of money as such defendant; but failing so to do, sequestration issues, and there being no return, the sequestrators petition for payment to them of the fund ordered to be paid to H. into the other suit, or a transfer of such fund into the other suit:—Held, that there being no dispute as to H.'s title, a petition might be presented in both suits to the Lord Chancellor, asking for a transfer, this court granting an injunction to restrain H. receiving the fund, with liberty to apply to discharge the injunction in case the superior court should refuse the application. *Knight* v. *Knight*, 4 W. R. 771.

A fund ordered to be transferred from one cause to another, upon a petition entitled only in the former cause. *Weeding* v. *Weeding*, 1 John. & H. 424; 4 L. T. 616; 9 W. R. 131.

To Irish Court of Chancery.]—Where it is desired to transfer consols standing in the name of the accountant-general to the credit of a suit in Ireland, the court will order it to be transferred into the names of the brokers of the accountant-general in England and of the accountant-general in Ireland, to be by them transferred to the account in Ireland. *Massereene* (*Lord*), *In re*, 10 L. T. 834; 12 W. R. 1095.

When a fund in court in a cause or matter is required to be transferred to the court of chancery in Ireland, the proper form of order is to direct that it be transferred to the accountant-general of the court of chancery in Ireland, to be by him forthwith transferred into his name as such accountant-general, to the credit of the cause or matter to which it is required to be transferred. *Vaughan* v. *Headford* (*Marquis*), 42 L. J., Ch. 456; L. R. 15 Eq. 173.

To Separate Account.]—A. B., being entitled to a fund in court, died, and administration was granted to a person as "the natural and lawful sister" of A. B. It appearing from the proceedings in the cause that A. B. was illegitimate, the court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of court without notice to the crown. *Long* v. *Wakeling*, 1 Beav. 400.

Where eleven grandchildren were entitled on coming of age each to a share of an inconsiderable aggregate fund, the court, to save the expense of costs on each share becoming payable, allowed the fund to be severed and carried to separate contingent accounts. *Handley* v. *Metcalfe*, 9 Beav. 445.

When a fund is carried over to a particular separate account, it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account. *Jervoise, In re*, 12 Beav. 209.

In an administration action under an order made in the presence of the plaintiffs, a fund was carried to the separate account of an annuitant and her issue, the dividends thereon to be paid to her for her life, and she charged her interest in favour of persons who obtained stop-orders thereon. She was afterwards found to be indebted to the estate, and the plaintiffs sought to have the dividends applied in satisfaction of her liability in priority to the charges she had created:—Held, that the effect of carrying the fund to a separate account being to release it from the general questions in the cause, the persons who had made the advances on the faith of the order were entitled to priority over the plaintiffs' claim. *Eyton, In re, Bartlett* v. *Charles*, 59 L. J., Ch. 733; 45 Ch. D. 458; 63 L. T. 336; 39 W. R. 135.

Where a sum of money, distributable in shares, has been paid into court, on an application for payment out of some of the shares, the petitioner should ask that the other shares may be carried to separate accounts. *Hawke's Trust, In re*, 2 Eq. Rep. 3; 18 Jur. 33.

Moneys found due to the estate of a deceased person will not be paid over to the representative appointed under s. 44 of 15 & 16 Vict. c. 86, but will be carried over to a separate account. *Byam* v. *Sutton*, 19 Beav. 646.

A fund bequeathed in aliquot parts, on distinct trusts, ought not to be paid by the trustees to the joint account of the several trusts, but ought to be carried to separate accounts. *Tillstone's Trust, In re*, 9 Hare (App.) lix.

In an administration suit the court refused to allow the share of a deceased residuary legatee to be paid out to her sole executor for immediate distribution amongst the legatees named in her will, but directed such share to be carried to a separate account of the deceased testator, with liberty to apply at chambers. *Gouldsmith* v. *Luntley*, 32 L. T. 535.

—— **Service on Parties.**]—Where a fund bequeathed to one for life, with remainder to a class (the members of which, as well as their shares, had been ascertained by the master), had been carried to a separate account, the court, on petition, presented after the death of the tenant for life, directed the transfer of one-ninth part of the fund to the persons who appeared on the report to be entitled thereto, without service of the petition on the persons entitled to the other eight-ninths. *Lambert* v. *Newark*, 3 De G. & Sm. 405; 13 Jur. 998.

A suit had been instituted for redemption, and the mortgage-money had been paid into court by

the mortgagor. The mortgagees were trustees for three infant sisters, and an order had been made that the sums should be divided and carried to their separate accounts; but this order had not been carried out, and the fund remained to the general credit of the cause. Two-thirds had been paid out to two sisters, and the third, having come of age, now applied for payment, serving the trustees only. The registrar objected, that the mortgagor and the other sisters, being parties to the suit, ought to have been served:—Held, that there was no necessity to serve the mortgagor; and with respect to the other sisters, the practice now was in such cases, where the previous orders for payment had been regularly made, that the other parties need not be served. *Dallimore* v. *Ogilby*, 16 Jur. 443.

Title of Account.]—The amount of two legacies bequeathed to infants was paid into court by the trustee under the general title of the will of the testatrix, but this affidavit stated that no other person than the legatees was interested in the fund:—Held, that the legatees were entitled to a transfer of the funds without the necessity of altering the title of the account. *Coulson's Trust, In re*, 4 Jur. (N.S.) 6.

Where it is proposed upon a petition for payment out of part of a fund in court to carry over a share in such fund to the separate account of the person entitled, the account should be in the name of such person, and not in the name of such person or his incumbrancer—i.e. "the account of A. B." not "the account of A. B. or his incumbrancers." *Hargrave* v. *Kettlewell*, 55 L. T. 674; 35 W. R. 136.

Application to have some money paid out of court which had been paid in to an account intituled "The Trusts of the Will of J. Robinson, deceased," the application being by the nine children of the testator, all of whom were adult and sui juris, and claimed as residuary legatees. The court, however, declined to pay out to residuary legatees a sum which had been paid in on so general a trust. After consideration of the will, however, the fund was directed to be carried over to an account intituled "The Account Residue," subject to the particular legacies; and then the residuary legatees claiming would be in their right *Robinson's Trust, In re*, 1 Jur. (N.S.) 750.

Form of Order.]—Form of order where cash and stock not admitting of division below 1*l.* are paid and transferred into court to separate accounts. *Perry, In re*, 22 W. R. 433.

When the chief clerk in distributing a fund, by consent of all the claimants, waives a question of title as to some of the claimants, the certificate should be made "without prejudice." *Waterton* v. *Burt*, 39 L. J., Ch. 425.

Where the title to a fund carried over to a legacy account is clear, the court will on motion order a transfer of such fund. *Linford* v. *Cooke*, 6 W. R. 5.

Where a fund to be settled is small, the court, to save expense, inserts the trusts in the order itself. *Chamberlain* v. *Chamberlain*, 1 Sm. & G. (App.) xxviii.

e. INVESTMENT OF.

See R. S. C., 1883, Ord. XXII. r. 17.

In what Securities.]—Under the provisions of a will, the testator's widow was entitled durante viduitate to the income of his residuary estate (about 10,000*l.*) subject to an annuity of 200*l.* a year for his son. If she married again the corpus became divisible between the son and certain charities. The trustees of the will were given an unlimited power of investment. By electing to take under the will the widow forfeited an income of 120*l.*, to which she would have been otherwise entitled under her marriage settlement. The court, upon the application of the widow, and the son not opposing, sanctioned the investment of the trust fund in India stock. *Phelan, In re*, 23 L. R., Ir. 336.

In ordinary cases cash in court will be ordered to be invested only in the securities which were sanctioned for that purpose before the rules of court of the 4th February, 1889, came into force. It is only by special permission of the court that the additional securities authorised as investments in these rules can be made available; and it is necessary in every application for this purpose to make a clear case, and to assign such reasons as may be necessary to enable the court to see that the proposed investment will be for the benefit of all persons interested. Where a fund has been transferred to a separate credit it ceases to be the duty of the person having carriage (except under special circumstances) to move for its investment; and the person desiring an investment, whether entitled to the fund as trustee, or having an individual interest therein, should make the application himself and on his own responsibility; if a trustee, he must shew that the investment contemplated would be consistent with the trust; if not a trustee, he must inform the court of the special circumstances under which the application is made, and satisfy it that all persons interested have an opportunity of appearing and expressing their views on the matter. *Roberts* v. *Morgan*, 23 L. R., Ir. 118.

In the absence of special grounds influencing the discretion of the court, cash under its control will be invested in the funds, and not in the other securities sanctioned by the rules of court of 4th February, 1889. *Dublin, Wicklow and Wexford Ry., In re*, 23 L. R., Ir. 562.

Funds in court were ordered to be invested in debenture and guaranteed stocks of Irish railways. What are special circumstances to influence the discretion of the court in dealing with applications under the rule of 4th February, 1889, considered. *Nesbitt's Trusts, In re*, 25 L. R., Ir. 447—C. A.

See also LANDS CLAUSES ACT.

Costs of Application to Change.]—The costs of the application to change the investment ordered to be paid by the applicants, the tenants for life of the funds. *Nesbitt's Trusts, In re*, supra.

f. CHANCERY FUNDS ACT, 1872.

In urgent cases, and especially in injunction suits, parties should proceed under the Chancery Funds Act and Rules, 1872, r. 12, and thereby obviate all unnecessary delay in obtaining their orders. *Brand* v. *Blow*, 43 L. J., Ch. 528.

Form of order when securities of a miscellaneous character are brought into court under the Court of Chancery (Funds) Act, 1872, ss. 3, 6, 10. *Povah* v. *Walker*, L. R. 15 Eq. 316; 21 W. R. 472.

When stock in a public company is transferred into court under the above act, the deed should express the transfer to be made to the account

of the paymaster-general, and not to the paymaster-general. *Stephens, In re*, L. R. 8 Ch. 465; 29 L. T. 7; 21 W. R. 494.

g. ASSIGNMENT OF.

Duty of Assignee as to Notice.]—When an assignment is made of an interest in trust funds, part of which is in court and part in the hands of trustees, the assignee in order to complete his title must, as regards the funds in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regards the fund in court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop-orders. An assignee who has obtained a stop-order is entitled (as regards the fund in court) to priority over a prior assignee (of whose assignment he had no notice) who had given notice to the trustees before the date of the stop-order, but who had not himself obtained a stop-order. *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A. Affirming, 53 L. J., Ch. 996; 32 W. R. 791. *See also* post, STOP-ORDER, col. 776 et seq.

h. PAYMENT OF COSTS.

By an interlocutory order, the defendant was ordered to pay the plaintiff certain costs. The defendant kept out of the way, and the plaintiff, being unable to obtain payment, presented a petition for payment thereof out of rents in court. It was a question in the cause, whether they belonged to the plaintiff or defendant. The court held, that it could make no order. *Hargrave* v. *Hargrave*, 13 Beav. 102.

Costs occasioned by the fund being paid into court in the case of a trust for maintenance to come out of the corpus. *Reid's Trust, In re*, 1 W. R. 13.

Where costs are ordered to be paid out of a particular fund, that does not determine that that fund is ultimately to bear them. *Sheppard* v. *Sheppard*, 33 Beav. 129.

Costs had been ordered to be paid out of income instead of out of corpus:—Held, that this did not preclude the matter being afterwards set right. *Ib.*

But an order to pay over a fund to persons by name is, incidentally, a determination that other persons, who are not named, are not entitled. *Ib.*

Defendants who have been dismissed from a suit with costs, and have registered the order dismissing them, will not be allowed their costs out of funds subsequently realised in the suit. *Miller* v. *Pridden*, 26 L. J., Ch. 183; 3 Jur. (N.S.) 78; 5 W. R. 171.

The costs of all parties were in 1857 ordered to be taxed and paid out of a fund in court, and the residue was directed to be paid to the parties entitled. Solicitors who had acted for some defendants down to 1840, had no notice of the order, and their costs had been omitted in the taxation. Upon their petition these costs were ordered to be taxed, and paid by the parties to whom the residue of the fund had been paid over. *Armstrong* v. *Storer*, 27 Beav. 471.

During the progress of a suit the costs were ordered to be paid out of a fund in court, part of which was invested. A. B., who was entitled to a share in the estate and was liable to pay his share of the costs, had in his hands a portion of the assets greater than his share; on finally winding up the suit, he was ordered to repay his share of the costs, with interest at 4*l.* per cent. *Bromhead* v. *Hunt*, 5 L. J., Ch. 343.

It is within the discretion of the court to order all costs reasonably incurred in ascertaining the sum due under articles of partnership to be paid out of the fund. *Butcher* v. *Pooler*, 52 L. J., Ch. 930; 24 Ch. D. 273; 49 L. T. 573; 32 W. R. 305—C. A.

i. IN PARTICULAR CASES.

1. Under Lands Clauses Act—*See* LANDS CLAUSES ACT.

2. Under Settled Estates Act—*See* SETTLED LAND.

3. Under Trustee Relief Acts—*See* TRUST AND TRUSTEE.

4. Of Infant—*See* INFANT.

5. Of Lunatic—*See* LUNATIC.

6. Of Married Woman—*See* HUSBAND AND WIFE.

7. Payment of Debts out of, Pending Suit—*See* EXECUTOR AND ADMINISTRATOR.

8. Payment of Legacies out of, Pending Suit—*See* WILL.

9. On Sales by Court—*See* EXECUTOR AND ADMINISTRATOR—VENDOR AND PURCHASER.

10. Lien of Solicitor on—*See* SOLICITOR.

j. PAYMENT OUT OF COURT.

1. In what Cases.

a. *Appointment under Powers.*

Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators and assigns:—Held, that each of the legatees, whether married or unmarried women, was entitled, upon petition, without executing any formal appointment, to an immediate transfer or payment to herself of the corpus of her share of the fund. *Holloway* v. *Clarkson*, 2 Hare, 521; 6 Jur. 923.

Money in court stood limited to a widow for life, and afterwards as she should by deed or will appoint. The court directed payment to her, without requiring an appointment. *Cambridge* v. *Rous*, 25 Beav. 574.

Trust moneys settled on such trusts as the plaintiff should by deed or will appoint, ordered to be paid to the plaintiff. *Watts* v. *Campbell*, 2 Giff. 112.

A married woman was entitled to an annuity of 200*l.* out of the dividends of 10,500*l.* 4 per cent. stock, which, subject to the annuity, was divisible amongst the children of herself and her husband, as he should appoint. Husband appointed 2,500*l.* to his eldest son. Court refused

to order that sum to be transferred to the son, although the remainder would have been much more than sufficient to pay the annuity. *Breton* v. *Clifden* (*Lord*), 1 Sim. & S. 363.

A sum of 682*l.* 16*s.* 2*d.* consols, representing the accumulated dividends arising from the purchase-money of settled freeholds let for a long term of years at a peppercorn rent taken by a railway company, paid out to the tenant for life, who had an absolute testamentary power of appointment, with consent of the remaindermen. *Allason's Trusts*, *In re*, 36 L. T. 653.

b. *To Assignee of Fund.*

Service of Notice.]—Where assignee of money in court to credit of cause, claiming under an assignment from party entitled to it, petitions to have it paid out to him, he must shew that party (or if dead his personal representative) has had notice of petition. *Hurd* v. *Davenport*, 13 Price, 735.

The court, on the petition of the assignee of a reversion, will order the accountant-general not to transfer the stock, although the assignor has not been served with notice of the application. *Salmon* v. ——, Taml. 74.

Upon a petition by an assignee for the payment out of court of a fund standing to the credit of an assignor, the court requires the assignor to be served, unless there has been an absolute assignment of the precise fund even where the total funds assigned exceed the fund in court. *Briant* v. *Dennett*, 4 Drew. 550; 5 Jur. (N.S.) 563.

—— **Death of Assignor.**]—See *Smith* v. *Butler*, post, col. 754.

Petition.]—When tenant for life assigns his interest in the dividends of a fund in court, the course is for the assignee to present a petition stating the purchase and verifying the facts by affidavit, upon which an order will be made on the accountant-general to pay the future dividends to the assignee. *Anon.*, 1 Moll. 500.

Equitable Interest.]—Assignees of an equitable interest should, if they desire to be perfectly secured, obtain a distringas on the fund; or have their deed indorsed on the original deed; or obtain a transfer of the funds into court. *Phipps* v. *Lovegrove*, 42 L. J., Ch. 892; L. R. 16 Eq. 80; 28 L. T. 584; 21 W. R. 590.

c. *Powers of Attorney and Notarial Acts.*

In what Cases.]—A legacy of 100*l.* was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorising him to receive the legacy specifically. *Carr* v. *Eastabrook*, 2 Cox, 390.

A general written authority by a foreigner and his wife, resident abroad, to a solicitor in this country, to take all necessary measures for obtaining payment to the wife of a legacy, which had been paid into court under the Legacy Duty Act:—Held, upon the petition of the husband and wife, to authorise payment to the solicitor. *De Beaumont*, *Ex parte*, 13 Jur. 354.

Contra, as to a fund in court in a suit. *Waddilove* v. *Taylor*, 18 L. J., Ch. 406; 13 Jur. 1023.

Legacy of stock at a particular age; order made upon the petition of one legatee having attained the age, for a transfer of his share to his attorney. *Hill* v. *Chapman*, 11 Ves. 239.

Money in court, belonging to a person beyond the seas, will be ordered to be paid to his attorney immediately; but the attorney must give an undertaking to return it, in the event of his principal having died previously to the making of the application to the court. *Brown*, *Ex parte*, 5 L. J., Ch. 24.

By an order of the court, a fund was directed to be transferred to the plaintiffs in a suit, who were entitled as trustees only. The plaintiffs executed to their solicitor a power of attorney to receive the money, but before the money was paid, one of them became bankrupt:—Held, that the accountant-general was right in refusing payment, until that circumstance had been brought to the knowledge of the court. *Gage* v. *Watmough*, 5 Jur. 404.

Petition for payment out of money should name the person to whom it is intended to give the power of attorney. *Anon.*, 1 Moll. 173.

An Indian power of attorney to receive funds in a suit is valid, if the party executing it be proved to be living at the date of the decree. *Goodson* v. *Alexander*, 1 Jur. 39.

Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue to receive the dividends of stock, notwithstanding fluctuations in the number and identity of the members of the corporation. *Annesley*, *Ex parte*, 2 Y. & Coll. 350; 6 L. J., Ex. Eq. 81.

Dividends of small amount, which have accrued due on a sum of stock, ordered to be transferred to a party, between the date of the order and the transfer of the stock, will be ordered to be paid to the attorney of the party who was authorised to accept the transfer. The application was made shortly after the transfer. *Pidgeon* v. *D'Alton*, 3 Ir. Eq. R. 134.

A., B. and C. being entitled to a sum of money in the bank, petitioned that it might be paid, not to themselves, but to their banker. An order was made according to the prayer. *Warwick and Leamington Ry.*, *In re*, 13 Sim. 31.

Payment into and out of court of money to a married woman resident abroad and under power of attorney. *Allen* v. *Forbes*, 40 L. J., Ch. 530.

H. having assigned to C. a portion of a residue now in court, C. became insolvent, and X., resident in India, was their official assignee. X. gave a general power of attorney to G. to act for him in England. On a joint petition of H., X. and G., the fund was ordered to be paid to G. *Fell* v. *Jones*, 17 Beav. 521.

Whether an attorney can act under a power of attorney during the mental incapacity of the principal. Quære. *Beaufort* (*Duke*) v. *Glyn*, 3 W. R. 463. *S. C.*, on appeal, 3 W. R. 502.

To Trustees.]—Orders for the payment or transfer of funds to trustees should direct it to be made to them personally, and not contain the words "to their attorney lawfully authorised." But if the trustees cannot personally accept the transfer, it will be made to them on their attorney signing a receipt for same in the accountant-general's book. *Fishbourne*, *In re*, 3 Jo. & Lat. 584; 9 Ir. Eq. R. 340.

So, if the trust funds consist of cash, and the trustees be not here to receive it, the court will direct it to be paid into some respectable bank, to the credit of the trustees, or adopt some mode by which the trust funds will be brought into the hands of the trustees. *Ib.*

Verification of Power of Attorney.]—The execution of a power appointing a sum of stock standing in the name of the accountant-general, must be verified by affidavit, notwithstanding the probate of the will in the ecclesiastical court. *Smith* v. *Somers (Lord)*, 19 L. J., Ch. 148.

On an application by petition for payment of money out of court to a person holding a power of attorney from the petitioner, who, as well as the attesting witness, was resident in New Zealand, the court allowed the execution of the power to be proved by an affidavit verifying the petitioner's handwriting. *Jerrard* v. *Tracey*, 7 L. T. 654; 11 W. R. 97.

Where the powers of attorney were of an old date, the court, although the sums to be received are small, must be satisfied by recent evidence that the creditors who executed the powers are still living. *Bird* v. *Bird*, 9 Hare (App.) xxxi., xliv.

—— **Notarial Acts.**]—Power of attorney executed abroad and authenticated by notary, and affidavit verifying signature of notary, ordered to be acted on by accountant-general, without certificate of chief magistrate of place. *Kinnaird (Lord)* v. *Saltoun (Lady)*, 1 Madd. 227.

Money was ordered to be paid under a power executed in America, attested by a notary, and authenticated by an American secretary of state. And an affidavit made before a mayor of a foreign town requires evidence of his holding that situation. *Garvey* v. *Hibbert*, 1 Jac. & Walk. 180.

So as to a magistrate. *Hutcheon* v. *Mannington*, 6 Ves. 823.

Where money is asked to be paid out of court to an attorney, under a power of attorney from the party entitled to the money, his signature is not sufficiently attested by the certificates of a notary public under hand and seal, and the official seal of the mayor of the foreign city where he resides, but the same must be proved by affidavit. *Salvidge* v. *Tutton*, 22 L. J., Ch. 883.

A petition by A., resident in a British colony, that a sum of money might be paid to his agent, appointed by his power of attorney. A power of attorney to that effect was executed by A., in the presence of a notary public resident in the colony, who certified such signature by his official seal:—Held, that such authority was sufficient, under s. 22 of the 15 & 16 Vict. c. 86. *Armstrong* v. *Stockham*, 3 Eq. Rep. 130; 24 L. J., Ch. 176.

Where a fund only amounted to 35*l.* the court dispensed with the verification of the signature to an affidavit abroad of a notary public, on the personal undertaking of the solicitor. *Mayne* v. *Butler*, 11 L. T. 410; 13 W. R. 128.

d. *To Personal Representative.*

Form of Order.]—Order to pay a fund in court to a purchaser will not be framed to include his personal representatives. *Windsor* v. *Tyrrell*, 1 Jur. 469.

Payment ordered of a sum of money in court to F. G., her executors and administrators. *Gates* v. *Gates*, 12 Jur. 510.

Infant Executrix.]—The court will not direct money to be paid out to an infant executrix, but will refer it to the master to inquire whether there are any debts or legacies, and to consider of a maintenance. *Campart* v. *Campart*, 3 Bro. C. C. 195.

Proof of Death.]—To obtain payment to representatives, mere production of probate is not sufficient; proof of death is now required, and that testator was the party in the cause. *Clayton* v. *Gresham*, 10 Ves. 289.

Death of Executor.]—Where a fund stands to the general credit of a cause, it will not be paid out in the absence of the legal personal representatives. But if after decree, and where the fund is clear, the executor dies, a supplemental bill is not always necessary, for the fund may be distributed on petition, upon the appearance of the new personal representatives. *Parsons* v. *Groome*, 12 Beav. 180. *And see Ib.*, 181, n.

Where legacy was, by order, directed to be paid to A. B., and he dies, leaving executors, and one executor dies, on application to court, order made to pay legacy to surviving executors, without acquittance from executor of deceased co-executor. *Moodie* v. *Bainbridge*, 6 Madd. 107.

Lapse of Time.]—Where a fund in court has not been dealt with for a number of years, the court will not order payment of it out in the absence of the parties beneficially interested. *Edwards* v. *Harvey*, 32 L. J., Ch., 482; 9 Jur. (N.S.) 453; 7 L. T. 662; 11 W. R. 330.

Administrator ad Litem.]—Moneys are never paid out of court to an administrator ad litem. *Williams* v. *Allen*, 32 Beav. 650.

Separate Account.]—Moneys found due to the estate of a deceased person will not be paid over to the representative appointed under the 15 & 16 Vict. c. 86, s. 44, but will be carried over to a separate account. *Byam* v. *Sutton*, 19 Beav. 646.

The 44th section of 15 & 16 Vict. c. 86, does not apply to paying money out of court. *Rawlins* v. *M'Mahon*, 1 Drew. 225.

Letters of Administration.]—Evidence of death of a legatee before a testator uncertain. On petition for payment of the legacy to the next of kin:—Held that administration must be taken out to such legatee. *Atkinson's Trust, In re*, 1 W. R. 47.

The personal estate of an intestate consisted of a reversionary share in the proceeds of trust property, which at her death was unsold, and situate within the jurisdiction of an archdeaconry court. Administration was not taken out to her till after the reversion had fallen into possession, the trust property had been sold, and the intestate's share had been paid into the court of chancery under the Trustees Relief Act. Letters of administration were then granted by the archdeaconry court:—Held, that they were sufficient to entitle the administrator to payment of the share out of court, and that a prerogative administration was not requisite. *Spencer, In re*, 1 De G. M. & G. 311; 21 L. J., Ch. 314; 16 Jur. 233.

Probate.]—To obtain payment to representatives, mere production of probate is not sufficient; proof of death is now required, and that testator was the party in the cause. *Clayton* v. *Gresham*, 10 Ves. 289.

To get money out of the court, however small the amount, a prerogative probate is necessary. *Thomas* v. *Davies*, 12 Ves. 417.

However small the sums, a prerogative probate is, in all cases, necessary to authorise the accountant-general in paying a testator's money out of court. *Challnor* v. *Murhall*, 6 Ves. 118; 3 R. R. 1: *Newman* v. *Hodgson*, 7 Ves. 409. Though in Lord Thurlow's time, and until he put a stop to it, the sum on which an order for a prerogative probate could be obtained was limited to 40*l*.

Prerogative probate necessary for the accountant-general to pay money out of court. It seems that the sum was limited to 30*l*. *Docker* v. *Horner*, 3 Bro. C. C. 240. And see *S. C.*, Dick. 746.

A party had a power to appoint by will executed without any particular formality. Upon a petition to obtain the fund out of court:—Held, that it was not necessary to produce the original will, but that the evidence of the probate was sufficient. *Ward* v. *Ward*, 11 Beav. 377.

Application that payment out of court of a sum of 38*l*. might be made on a York probate refused. The practice has since been modified. *Cope* v. *Cope*, 14 Beav. 649.

Upon petition for the payment out of court of a sum of money by a party representing the next of kin of the testator, and who could only produce probates and letters of administration taken out of the consistorial court of London, the accountant-general was directed to pay the money, without requiring probate from the prerogative court of Canterbury. *Druce* v. *Denison*, 17 L. J., Ch. 149; 12 Jur. 254.

Semble, that a diocesan administration is sufficient to entitle a party to claim a fund in court, if at the time of the death of the party represented he had no bona notabilia out of the diocese. *Jones* v. *Howells*, 2 Hare, 342; 12 L. J., Ch. 365.

The court will distribute a fund in court, payable to a personal representative upon a diocesan probate, if the intestate has not bona notabilia. *Graves* v. *Graves*, 8 Ir. Eq. R. 36.

A testator to whom probate had been taken out in the court of Chester was declared entitled to one-third of 1,000*l*. stock which had been paid into court under the Trustee Relief Act:—Held, under s. 87 of the 20 & 21 Vict. c. 77, that it was not necessary for the executors to take out probate in Canterbury in order to obtain payment out of court of this one-third of the 1,000*l*. stock. *Porter's Will, In re*, 6 W. R. 304.

Where a person had at his death, and when letters of administration were granted, bona notabilia in one diocese only, the subsequent payment of a portion of them into the court of chancery does not render a prerogative probate necessary to obtain payment out of court. *Knowles, In re*, 1 De G. M. & G. 60; 21 L. J., Ch. 142; 15 Jur. 1163.

Where a diocesan probate is proper with reference to the situation of the assets at the death, it remains so notwithstanding they may afterwards be rightfully or wrongfully removed out of the diocese. *Spencer, In re*, 9 Hare, 410.

A testator died in New Zealand, having by his will appointed to his son, in exercise of a power, the proceeds of sale of certain English leaseholds, which had been taken by a local board of works, and the proceeds paid into court. The will appointing the proceeds of sale was proved in the supreme court of New Zealand:—Held, that the will must also be proved in England before payment out of court to the appointee could be directed. *Vallance's Trusts, In re, Limehouse Union, Ex parte*, 52 L. J., Ch. 791; 24 Ch. D. 177; 48 L. T. 941.

Absence of Personal Representative.]—Bankrupt executor petitions for leave to prove against his estate quâ executor in respect of legacies to seven individuals, upon which it was so ordered, and that the dividends should be paid into court to the credit of the matter of the bankruptcy, and to the account of the legatees. Four of the legatees, who were of age, present this petition for payment of their shares out of court, and also for their shares of any future dividends which should be paid into court. The court made the order in the absence of the executor. *Peerman, Ex parte* and *In re*, 6 Jur. 351.

Where legacies to two children had already been paid out of court, a similar legacy to a third was ordered to be paid out, without service of the petition on any representative of the testator, the executor of the testator being dead. *Compson* v. *Nicoll*, 9 Jur. 98.

The purchase-money of land which stood limited to A. for life, remainder to B. in fee, was paid into court. A. never applied for the dividends. A.'s residuary legatee bequeathed the residue of her personal estate to B., who presented a petition for payment out of court. In the absence of the legal personal representative of the tenant for life, the court refused to order payment of the dividends accrued during his life to the petitioner. *Acker, In re*, 11 W. R. 182.

A small sum standing in court to the credit of an intestate, the court ordered that sum to be paid to the intestate's husband without requiring him to take out letters of administration. *King* v. *Isaacson*, 9 W. R. 369.

A feme sole, being entitled to a pecuniary legacy on the death of A., made an absolute assignment of it, and died unmarried before it became payable. The court made an order for payment of the legacy to the assignee without requiring her personal representative to be brought before the court. *Smith* v. *Butler*, 16 W. R. 241.

But where a married woman, entitled, on the same event, to a like legacy, joined with her husband in assigning her interest therein as a security for a loan, and before the legacy became payable she died, and the legacy was exceeded in amount by the sum due on the security, the court refused to make an order for payment to the assignee in the absence of her personal representative. *Ib.*

By an order made in 1866, on a petition presented by A. to the Court for Relief of Insolvent Debtors at Bombay, it was ordered that all future personal estate which might be bequeathed to him should vest in the official assignee for the time being of such court. A. died at Bombay in 1873, in the lifetime of his father, intestate, and leaving issue. An administrator had been appointed of his estate at Bombay; but no administration in England had been obtained. His father, by will, gave him a legacy of 1,500*l*., which had been paid into court. On a petition by the official assignee:—Held, that he was entitled to have the fund in court paid to him, and that it was not necessary that administration to the intestate's estate in England should be obtained. *Lawson's Trusts, In re*,

65 L. J., Ch. 95 ; [1896] 1 Ch. 175 ; 73 L. T. 571 ; 44 W. R. 280.

Letters of Administration dispensed with.]—On what terms the court will waive letters of administration to the estate of a bankrupt who had assigned the surplus of his estate, if any, and order the surplus to be paid to the assignees of it. *Tratt, Ex parte, James and Cushion, In re*, 1 W. R. 116.

Two married women having died who were entitled to small sums of money in court, exceeding in each case 20*l.*, the money could not be paid to the husbands without letters of administration having been taken out by them. *Cabel, In re*, 3 W. R. 280.

Where there is a sum of money under 25*l.* to which a tenant for life dies entitled, the court will order payment out of court to the widow of such sum without administration being taken out. *Callendar* v. *Teasdale*, 3 Eq. Rep. 513 ; 3 W. R. 289.

Where a legatee of a share of residue less than 20*l.* has died, and has no legal personal representative, the court will distribute such sum amongst the next of kin of such residuary legatee without requiring administration to be taken out. *Hinings* v. *Hinings*, 2 Hem. & M. 32 ; 10 L. T. 294.

e. *To Some of Several Persons.*

Money paid into court by five directors of a railway company refused to be paid out to three of them without the others appeared and consented. *Staines and Richmond Ry., In re*, 9 Jur. 479.

A sum of money standing in court ordered, upon further consideration and petition of mortgagor and mortgagees, to be paid to the mortgagees "or one of them." *Bradford* v. *Nettleship*, 10 W. R. 264.

In a creditor's suit an order is made for payment to four persons named in the master's report, and the cheque is drawn payable at the accountant-general's office in favour of the four. Two of those parties being dead, the accountant-general refuses to pay to the two :—Held, that the words "survivor or survivors of them" may be inserted in the order. *Jefferys* v. *Smith*, 11 W. R. 479.

Trustees or Executors.]—Order, under circumstances, to pay dividends to trustees, or one of them. *Shortbridge's Case*, 12 Ves. 28.

The trustees of a charity being numerous, an order was made to pay the dividends of a fund in court to the trustees or any two of them. *Att.-Gen.* v. *Brickdale*, 8 Beav. 223.

Order to pay dividends to A., B., C., &c. (trustees of a charity), and the survivors and survivor of them, and the trustees for the time being. *Shrewsbury Hospital (Trustees), Ex parte*, 9 Hare (App.) xlv.

Amendment of an order for payment of money out of court for the maintenance of infants, by directing it to be paid to two out of three executors, where one executor had gone out of the jurisdiction after the order was made, and after it had been acted upon by the accountant-general. *Windsor* v. *Cross*, 9 Hare (App.) xliv.

Dividends of fund in court ordered to be paid to trustees "or either of them." *Clinton, In re*, 6 Jur. (N.S.) 601 ; 8 W. R. 492.

Payment out of court to three of four trustees directed where the fourth trustee was absent in India. *Clark* v. *Fenwick*, 42 L. J., Ch. 320 ; 21 W. R. 320.

f. *To Solicitor.*

When ordered.]—Order for payment of money to the solicitor of the party refused. *Edwards* v. *Lane*, 6 Madd. 315.

Sums below 10*l.* payable out of court to a number of persons paid to their solicitor to save the expense of powers of attorney. *Brandling* v. *Humble*, Jac. 48.

Where several small sums are payable out of court to different parties, in order to have the amount paid to the solicitor to distribute, there must be either a written authority to the solicitor, signed by the parties, or the petition praying such payment to him should be signed by them. *Kelsall* v. *Minton*, 2 Beav. 361 ; 9 L. J., Ch. 136.

In support of an application that creditors, whose dividends are less than 10*l.*, may have their shares of a fund in court paid out to their solicitor, there must be produced the written consent of the several creditors, verified by affidavit. *Downing* v. *Picken*, 1 Kay (App.) i.

The rule of the court is, not to order payment of money to the solicitor of the party where it exceeds 10*l.* ; and this rule will not be deviated from, except in very special circumstances. *Middleton* v. *Younger*, 22 L. J., Ch. 1005 ; 17 Jur. 664.

The practice is on payment out of court of sums under 10*l.* to require a letter from each creditor entitled thereto. *Anon.*, 5 Jur. (N.S.) 385.

When it is asked that small sums may be paid out of court to the solicitor of the parties entitled, the court requires the production of their written consent. *Staines* v. *Giffard*, 20 Beav. 484.

In a case where the consent was signed by eleven out of twelve of the parties, and the twelfth was in America, the court dispensed with his signature on the solicitor's undertaking to pay over the amount. *Ib.*

Where the sum to be paid out of court amounts to 11*l.*, it will not be ordered to be paid to the solicitor. *Hawkins* v. *Dodd*, 1 Hare, 146 ; 11 L. J., Ch. 97 ; 5 Jur. 1130.

Change of.]—Where, by order of court, all parties' costs are paid, and a fund transferred to the separate account of a party, that party may present a petition for payment out of court by a solicitor who had not been his solicitor in the cause, and without having obtained an order to change his solicitor. *Waddilove* v. *Taylor*, 17 L. J., Ch. 384 ; 12 Jur. 598.

On undertaking.]—A person who was entitled to 69*l.* stock and 5*l.* cash was resident out of the jurisdiction. By a letter he requested that the money might be paid to his solicitor, and the court made the order upon the solicitor and another person entering into an undertaking that the sums should be properly applied. *Armstrong* v. *Stackham*, 11 Jur. 97. See *Bear* v. *Smith*, 5 De G. & Sm. 92; 21 L. J., Ch. 176; 16 Jur. 708.

The whole of a small legacy and its accumulations were paid out of court to the solicitor of an infant who had no other property upon his undertaking to apply it in discharging a sum claimed for past maintenance and for a prospective outfit, and after deducting the costs to pay any remaining balance to the infant at majority. *Welch, In re*, 23 L. J., Ch. 344 ; 2 W. R. 310. And see *Staines* v. *Giffard*, supra.

g. *To Tenant in Tail.*

Under Settled Land Acts.]—*See* SETTLED LAND.

Under Lands Clauses Acts.]—*See* LANDS CLAUSES ACTS.

In what Cases.]—Petition by tenant in tail, on the death of the tenant for life, for payment of a fund in court arisen from the sale of timber improperly cut by the tenant for life. *Aburrow* v. *Aburrow*, 10 Sim. 602.

Although fund, of which person is tenant in tail, is subject to certain charge, court will order it to be transferred to tenant after providing for charges. *Somerville* (*Lord*), *In re*, 2 Sim. & S. 470; 4 L. J. (O.S.) Ch. 138.

Disentailing Assurance.]—Order made for payment out of court, of a sum of stock of which the petitioner was quasi tenant in tail in possession, under a settlement, on his producing the deed inrolled, or an affidavit of the inrolment of the deed, whereby, in pursuance of the provisions of the 3 & 4 Will. 4, c. 74, s. 71, he had barred the estate tail and remainders over in the stock in question. *Smythe*, *In re*, 3 Myl. & K. 249.

A share of the purchase-money of an entailed estate taken by a company paid out to the husband of a married woman upon her consent without a disentailing deed as to the particular share being required. *Tyler*, *In re*, 8 W. R. 540.

Where a fund in court representing the proceeds of an entailed estate exceeded 200*l.*, the court refused to allow it to be paid out to tenants in tail in gavelkind without the execution of a disentailing deed. *Tylden*, *In re*, 2 N. R. 413; 9 Jur. (N.S.) 942; 8 L. T. 631; 11 W. R. 869.

Where a party entitled to a fund in court, and being tenant in tail, executes a disentailing deed, the money cannot be paid out on petition without an affidavit of no incumbrances. *Thornhill* v. *Millbank*, 12 W. R. 523.

Upon the payment out of court of the proceeds of sale of settled estates to a person who was tenant in tail of the estates, he was directed to execute a disentailing deed. *Broadwood*, *In re*, 24 W. R. 108.

A fund in court exceeding 400*l.* was paid to a tenant in tail without a disentailing deed having been executed. *Row*, *In re*, 43 L. J., Ch. 347; L. R. 17 Eq. 300; 29 L. T. 824.

Enlarging Base Fee.]—A fund in court in a lunacy, the lunatic being dead, represented land in settlement. A deceased tenant in tail had created a base fee:—Held, that the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee. *Reynolds*, *In re*, 3 Ch. D. 61; 35 L. T. 293; 24 W. R. 991—C. A.

h. *To Trustees.*

Where legacy is given for permanent charitable purposes to trustees not having corporate character, court will not transfer fund to them without reference. *Wellbeloved* v. *Jones*, 1 Sim. & S. 40; 1 L. J. (O.S.) Ch. 11.

The court will never order payment out of a fund in court to a sole trustee, in the absence of any parties interested in the estate, unless such estate is substantially represented. *Roberts*, *In re*, 7 Jur. (N.S.) 818; 9 W. R. 758.

To some only.]—*See* supra.

i. *To Woman past Child-bearing.*

Generally.]—The law sees no impossibility of having issue at any number of years. *Horsley* v. *Chaloner*, 2 Ves. 84.

No jurisdiction in the court to deal with property given over in default of issue upon any probability of there being no issue. Bills in parliament on such grounds often refused. *Anon.*, 2 Ves. 113.

The court will not direct money to be paid to a party entitled in remainder, upon the improbability of an intermediate event, if such event be possible. *Kirby* v. *Clayton*, 2 Ves. 241.

Presumption as to.]—20,000*l.* stock was given to a married woman, for her separate use for life, and after her decease to her children, and in default of issue 12,000*l.* as she should by will appoint; and in case she should neglect or refuse to make an appointment, to A. B., on condition that he should pay 500*l.* each to the children of the testator's brothers and sisters. Her husband having died, and the lady being sixty-five years of age, the court, on the petition of the lady and A. B., ordered payment of the fund after providing for the legacies to the nephews. *Hamilton* v. *Brickwood*, 5 L. J., Ch. 144.

A testator gave a fund to A. absolutely, but that only the interest should be paid to her for her separate use for life, and after her death the property should go to her children, and in the event of her not intermarrying, nor having children, the property to be at her disposal by will or otherwise. A. being a widow, sixty-four years of age, and never having had any children, filed a bill for the transfer of the fund:—Held, that she was entitled to it. *Mackenzie* v. *King*, 17 L. J., Ch. 448; 12 Jur. 787.

Trust funds were bequeathed to a spinster, coupled with a direction that if she married they were to be settled on herself and her issue, and so as not to be subject to the debts or control of her husband. In 1856, when she was single, and in her forty-seventh year, she was declared absolutely entitled to the funds, but subject to that interest being divested on her marriage, as provided by the will. In 1863, and while unmarried, she presented a petition praying for the transfer and payment to herself of the trust funds:—Held, that she was entitled. *Price* v. *Boustead*, 8 L. T. 565.

A sum of 500*l.* stood settled on the trusts of a marriage settlement. The trustees were dead; there were no children; the wife was fifty-eight years old, and had assigned all her interest to her husband, who was one of the cestuis que trustent. On the petition of husband and wife, the court ordered that the right to transfer might vest in the husband, and that he might transfer to himself. *Ryan*, *In re*, 9 W. R. 137.

The court will not presume that a married woman, aged forty-nine, is past child-bearing. *Overhill's Trusts*, *In re*, 22 L. J., Ch. 485; 17 Jur. 342; 1 W. R. 208.

The court will not treat as past child-bearing a woman of less than fifty years of age, although positive medical evidence that she is past child-bearing be adduced. *Groves* v. *Groves*, *Whitehead*, *Ex parte*, 9 L. T. 533; 12 W. R. 45.

A fund in court paid out and distributed upon the assumption that a spinster, aged fifty-three years and two months, would never have issue. *Haynes* v. *Haynes*, 35 L. J., Ch. 303; 14 L. T. 47; 14 W. R. 361.

Money was ordered to be paid out of court on the presumption that a widow aged fifty-five years and four months, who had never had any children, and a spinster aged fifty-three years and nine months, would not have any children. *Widdow's Trusts, In re*, 40 L. J., Ch. 380; L. R. 11 Eq. 408; 24 L. T. 87; 19 W. R. 468.

In the administration of an estate, the court refused to act on the presumption that a married lady of fifty-two was beyond the age of bearing issue. *Conduit* v. *Soane*, 24 L. T. 656; 19 W. R. 817.

A fund in court was settled upon a married woman absolutely in default of issue. The woman gave birth to a stillborn child on the 1st June, 1871, and her husband died on the 12th of the same month. There was no other issue. On an application by the woman on the 9th December following that the fund be paid to her:—Held, that the application was premature. *Att.-Gen.* v. *Clements*, 25 L. T. 739.

Payment out of a fund in court ordered on the presumption that a woman who had been married twenty-six years to her husband without having a child, and whose age was forty-nine years and nine months, would never have a child by her husband. *Millner's Estate, In re*, 42 L. J., Ch. 44; L. R. 14 Eq. 245; 26 L. T. 825; 20 W. R. 823.

A wife, aged forty-seven, had had six children by her husband, but had not been since pregnant for seventeen years. Medical evidence was adduced to shew that she had fourteen years ago suffered from a disease which, in the opinion of the medical men, rendered it improbable, if not absolutely impossible, that she should have further issue:—Held, that there was sufficient presumption against any future issue for the court to act upon. *Summers' Trusts, In re*, 30 L. T. 377; 22 W. R. 639.

The presumption that a woman aged fifty-one years and eleven months, who had been married fifteen years and had never had any children, would not have any children, acted upon. *Allason's Trusts, In re*, 36 L. T. 653.

The court refused to treat a woman as past child-bearing whose age was fifty-four years and six months, and had never had any children, but had only been married three years. *Croxton* v. *May*, 9 Ch. D. 388; 39 L. T. 461; 27 W. R. 327—C. A.

A woman aged fifty-two, who had been a widow for twenty-four years, was absolutely entitled in default of children to a fund in the hands of trustees:—Held, on petition for advice, that the trustees were justified in paying it over to her. *Taylor's Settlement Trusts, In re*, 43 L. T. 795; 29 W. R. 350.

A testator bequeathed the dividends of a sum of 10,000*l.* consols unto and equally between his four daughters, and from and immediately after their several and respective deceases he bequeathed the 10,000*l.* to their children respectively—viz. one fourth part thereof unto and equally between the children of each daughter; and, in case any one or more of the daughters should die without leaving issue her or them surviving, he bequeathed the share or shares of the stock so bequeathed to and intended for the issue (had there been such) "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one, to that one absolutely. Three of the daughters married, and died leaving children. The fourth was the longest liver, and was a spinster of the age of fifty-four:—Held, that on her death without leaving issue she would be entitled to her own one fourth share of the 10,000*l.* absolutely; that it might be assumed that she would never have any children; and that the share might be transferred to her at once. *Maden* v. *Taylor* (45 L. J., Ch. 569) approved and followed. *Davidson* v. *Kimpton*, 18 Ch. D. 213; 45 L. T. 132; 29 W. R. 912.

Undertaking to refund or account.]—A fund paid out to persons entitled to it, subject to the contingency of a female of advanced age having children, on their recognisances to refund in case of that event happening. *Leng* v. *Hodges*, Jac. 585.

Where persons are entitled to a fund in court upon the contingency of a female of advanced age (then childless) having children, the court will order it to be paid out to them on their entering into security by recognizance to refund the money in case children should be born. *Wide Streets Commissioners, In re*, 7 Ir. Eq. R. 484.

A legacy to a woman for life, with remainder to her children, paid out of court on the petition of the mother and children, on their undertaking to account, if required, as the court should direct, the children having attained twenty-one, and the mother being sixty-six years of age. *Brown* v. *Pringle*, 4 Hare, 124; 14 L. J., Ch. 121; 8 Jur. 1113.

A female, aged fifty-six, was absolutely entitled to a fund subject to the contingency of her having children. Payment was ordered to her on her own recognisances. *Fraser* v. *Fraser* (Jacob, 586, n.) followed. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066; 2 W. R. 690.

j. *In other Cases.*

In Trust for A. until Marriage.]—Bequest of money to trustees in trust to invest in public funds, and pay dividends to A. until marriage, and then to transfer stock to her; but in case she should die unmarried, then as she should appoint by will, and in default of appointment to her executors and administrators. Semble, she is not entitled to have fund transferred while unmarried. *Wilson* v. *Mount*, 2 Sim. & S. 493.

Subsequent Marriage.]—The dividends of a fund in court were by an order made in a cause directed to be paid to one of the defendants, an unmarried lady, during her life or until further order, with liberty to apply. The lady having married, she and her husband, by petition stating the marriage and a settlement of the dividends on her to her separate use, prayed an order directing the payment of the dividends to the separate use of the lady, and that the plaintiff might be directed, under the 44th Order of April, 1852, to enter on record a statement of the marriage, and the nature and effect of the marriage settlement. The court held that an order for payment of the dividends might be made, but declined to give any such direction to the plaintiff as asked. *Langdale* v. *Gill*, 1 Sm. & G. 24; 16 Jur. 1041; 1 W. R. 51.

To Wife.]—The court will make an order for payment out of a fund in court, not exceeding 500*l.*, to a wife, with her husband's consent, on her separate receipt, without requiring her

separate examination. *Morton, In re*, 31 L. T. 82.

A wife who has been deserted by her husband for more than twenty years, and has heard nothing of him for more than five years, is entitled to receive a sum of money, paid into court, as though a feme sole. *Pope, In re*, 21 W. R. 646.

Two sisters, one married and the other unmarried, being entitled jointly to certain funds in court, presented a joint petition, praying for payment to the unmarried sister of her share, and for a settlement upon the married sister out of her share :—Held, upon the objection of the husband, that the petition touching the settlement was wrong, and that the unmarried sister ought not to have been made a co-petitioner. *Heyes* v. *Heyes*, 8 Jur. 17. *And see* HUSBAND AND WIFE.

To Lunatic.]—On a petition by a person of unsound mind not so found by inquisition, by his next friend, for payment, until further order, of the dividends on 838*l.* 15*s.* 2*d.* consols to his next friend to be applied for his maintenance, the court made an order as prayed. *Perry's Trusts, In re*, 31 L. T. 775 ; 23 W. R. 335.

In a case where a partnership had been dissolved by the court in consequence of the lunacy of one of the partners, and large sums had been paid into court to the separate account of the lunatic in respect of his share of the capital and profits of the business ; the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him. *Leaf* v. *Coles*, 1 De G. M. & G. 417. *See* LUNATIC.

To Creditors.]—It is competent to a creditor filing a bill on behalf of himself and all other the creditors of a testator, to compromise the suit and dismiss the bill ; and in such a case a fund brought into court by the executors will, with the consent of the executors, be paid to the plaintiffs. *Wood* v. *Westall*, Younge, 305.

—— **Subsequent Bankruptcy.**]—A., B. and C., having agreed for the purchase of certain mines, for 10,000*l.*, and to form a joint-stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to F., the proprietor, and the remainder divided amongst themselves and certain of their friends, whom they nominated to be directors and officers of the company ; at a meeting of the persons so nominated, at which A., B. and C. were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.*, to be paid to F. ; and a conveyance was afterwards taken from F., to the trustees of the company, and the 25,000*l.* was paid out of the funds of the company, and distributed in manner agreed upon. A suit having been instituted by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received : and one of the defendants having become bankrupt after he had paid what he had received into court, under an order upon motion :—Held, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. *Hichens* v. *Congreve*, 4 Sim. 420.

To Children.]—A fund in court was held in trust for the children of A. A. had been separated from his wife, who, during the separation, had given birth to a child. The court, considering the evidence of non-access sufficient, allowed a share in the fund to be paid to one of the legitimate children on petition, the petition having been served on the bastard, who was still an infant. *Sinclair* v. *Sinclair*, 2 W. R. 69.

Bequest of a personal fund to such of the children of I. N. as should live to attain the age of twenty-one years. I. N. had three children, two of whom having attained twenty-one applied for payment of their shares. Under the circumstances of the case, the court declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds, without prejudice to the claim of after-born children of I. N. *Brandon* v. *Aston*, 2 Y. & Coll. C. C. 30.

Semble, if an infant's legacy has been paid into court, and invested in stock, the stock will be transferred or sold out, and the proceeds paid to the party entitled, at his option. *Bromhed, Ex parte*, 13 Jur. 113.

A testator bequeathed to his wife 4,000*l.*, to be used for her own and the children's benefit, as she should think best, recommending her not to diminish the principal, but vest it in government or freehold securities. There being two children, one adult and the other a minor, the widow made an appointment of 500*l.* to the minor, and the residue to the adult ; and she and the adult child petitioned for payment out of court of the residue :—Held, that such payment could not be ordered. *Hart* v. *Tribe*, 1 De G. J. & S. 418.

Tenant for Life.]—Dividends of a fund in court ordered to be paid to a tenant for life, a professed nun, on petition, without inquiry into the circumstances under which the petition was presented, the court holding the solicitor who filed it responsible. *Holdsworth's Trusts, In re*, 2 Eq. Rep. 1090 ; 2 W. R. 692.

Where a petitioner prays that the dividends of a fund in court may be paid to several tenants for life, and that the various shares of the corpus may be carried over to the accounts of those entitled in remainder, such remaindermen, if numerous, need not be served or appear. *Hodges, In re*, 6 W. R. 487.

Repayment to Plaintiff.]—The fact that a bill has been dismissed with costs, and that those costs have not been paid, is no reason why a fund, paid into court by the plaintiff, for a purpose since satisfied in another way, should not be paid out to the plaintiff applying for it. *Flockton* v. *Peake*, 10 L. T. 369 ; 4 N. R. 135 ; 12 W. R. 789.

Legatee.]—B. died intestate in 1814, seised of two houses which were purchased in 1829 by the Charing Cross commissioners. As no title could be made to the houses, the purchase-money for them was paid into the court of exchequer, and invested in consols. In 1822 the heir-at-law of B. died, having made a will, under which the respondents to this petition claimed the fund. In 1829 the widow and J. B., his then heir-at-law, presented a petition stating that the widow had, with the consent of the immediate heir-at-law of B., been in possession of the houses from the time of his death till they were sold ; and an order was made directing the dividends on the fund to be paid to the widow for life, and then

to J. B. for his life. The widow died in 1834, and J. B. died in 1863, having bequeathed his interest in the fund in court to the party, who presented a petition for transfer of it to him absolutely. It was said that the order made by the court of exchequer in 1829 was obtained by fraud, but that was not proved :—Held, that the petitioner was entitled to the fund. *Breach, Ex parte*, 10 Jur. (N.S.) 982 ; 10 L. T. 396 ; 12 W. R. 769.

Mortgagee.]—A tenant for life having mortgaged his life interest to the full amount, a suit was instituted, and a receiver appointed, who paid certain moneys to which the tenant for life was entitled into court, and the tenant for life petitioned for payment of the money out to him, and got the order, nothing being said about the mortgage. The mortgagees afterwards petitioned for payment of the fund out of court to them, and the order was made. *Piddoc* v. *Boultbee*, 16 L. T. 837.

Person not Party.]—An order for payment to a person not before the court is not strictly regular. *Laing* v. *Harle*, 19 W. R. 1054.

Staying Proceedings pending Appeal.]—*See* APPEAL.

On Presumption of Death.]—*See* EVIDENCE.

Money paid in with or before Defence and by Accounting Parties.]—*See* supra, col. 248 et seq.

2. Proceedings to Obtain Order.

Petition or Summons.]—Money had been paid into court by executors under the Trustee Relief Act to the credit of an account entitled, "In the matter of the trusts of the sale moneys of certain real estate formerly belonging to E., deceased, and subject to the trusts of a certain royal warrant dated the 6th August, 1861." The fund had originally been about 1,500*l.* On an application by summons under Ord. LV., 600*l.*, part of the fund, was ordered to be paid out, but as to the remainder the summons stood over for further evidence as to the death of an annuitant. The further evidence having been obtained, the application was renewed, the summons asking for payment out of the balance to the applicant :—Held, that the case was not within Ord. LV. at all, and the application ought to be made by petition and not by summons. *Evans, In re*, 54 L. T. 527.

A sum of more than 1,000*l.* had been paid into court in 1883, under the Trustee Relief Act, representing the share under a will of J. R., who could not be found. The administrator of J. R. now took out a summons for payment out of this sum upon evidence that J. R. had attained twenty-one and died intestate :—Held, that the court would not make the order without a petition. *Rhodes' Will, In re*, 55 L. J., Ch. 477 ; 31 Ch. D. 499 ; 54 L. T. 294 ; 34 W. R. 270, 501.

The generality of sub-s. 1 of Ord. LV. r. 2, of Rules of Court, 1883, is not cut down by sub-s. 5 of the same rule ; and consequently an application under the Trustee Relief Acts, for the payment out of court of a fund, even though it exceeds 1,000*l.*, where the title of the applicant merely depends upon proof of his birth, should be made by summons and not by petition. *Broadwood's Trusts, In re*, 55 L. J., Ch. 646 ; 55 L. T. 312.

Where the title to a fund in court depends only upon proof of the identity of the birth, marriage or death of any person, the mere fact that the fund exceeds 1,000*l.* will not justify the making of an application for the payment or transfer of the fund out of court by petition instead of by summons in chambers. *Rhodes, In re* (31 Ch. D. 499), commented on. *Bates* v. *Moore*, 57 L. J., Ch. 789 ; 38 Ch. D. 381 ; 58 L. T. 513 ; 36 W. R. 586.

See also LANDS CLAUSES ACT.

—— **Trustee Relief Act—Fund exceeding £500.**]—Where the title to a fund in court depends only upon proof of the identity, or the birth, marriage or death of any person, the mere fact that the fund exceeds 500*l.* does not prevent an application, under the Trustee Relief Act, for the payment or transfer of the fund out of court being made by summons in chambers. *Campbell's Trusts, In re*, 31 L. R., Ir. 434. *See* TRUST AND TRUSTEE.

Former Practice—Petition, Bill or Motion.]—Under a private act of parliament, money to be paid to certain parties. Upon petition to the court, Lord Chancellor refused to make an order to pay the money to persons deriving title from the original parties, and ordered them to file a bill. *King, Ex parte*, 2 Bro. C. C. 158.

Money not paid out of court on motion. *Shipbrooke (Lord)* v. *Hinchinbrook (Lord)*, 13 Ves. 394.

Where a gross sum is required to be paid out of hands of court, it is to be done by petition ; but where interest only is sought a motion is sufficient. *Anon.*, 4 Madd. 228.

A fund carried to a separate account paid out on motion by consent, the title to it being clear. *Heathcote* v. *Edwards*, Jac. 504.

Money lodged in bank to the credit of the cause, may be ordered to be paid out at the hearing : it does not require a distinct motion. *Brophy* v. *Holmes*, 2 Moll. 1.

An incumbrancer on a fund in court is, in a contested case, only entitled, upon petition, to an order restraining the transfer of the fund and payment of the dividends, and must file a bill for any ulterior relief. *Cook* v. *Collingridge*, C. P. Coop. 255.

An application to take money out of court must be by petition. *Ponsonby, In re*, 2 Con. & L. 30 ; 3 Dr. & War. 27 ; 5 Ir. Eq. R. 268.

The proper mode of obtaining money out of court is by petition ; but the rights of the parties having been ascertained by arbitration, and no decree having been made, the court in this case ordered payment of money out of court upon motion. *Oliver* v. *Burt*, 1 Beav. 583.

An order to pay a sum of money out of court should be obtained by petition, and not on motion. *Garratt* v. *Niblock*, 5 Beav. 143.

In cases of very small sums, standing to a separate account in court, and where the title is simple, the court, to save expense, will order payment upon petition without attendance in court. *Petty* v. *Petty*, 12 Beav. 170.

The court will not make an order for payment of money out of court except upon petition, however small the sum may be. *Blind School* v. *Goren*, 21 L. J., Ch. 144.

A party having paid in money in obedience to a decree of the court below, and the decree being varied in such a way that he is entitled to have that money paid out, the same can be directed

in the order on the appeal to be so paid out without any petition being presented for that purpose. *Robinson* v. *Robinson*, 1 De G. M. & G. 247; 21 L. J., Ch. 111; 16 Jur. 255.

In 1814 W. died intestate seised of a freehold estate. On his death his widow entered into possession, and continued to receive the rents until 1829. W.'s heir-at-law died in 1829. In 1829 the property was taken under an act of parliament, and the purchase-money was paid into court. Upon a petition in 1829, by the widow and J., the heir of the heir-at-law of W., the rents were ordered to be paid to the widow for her life, and then to J. for his life. The widow died in 1834, and J. died in 1863. Upon a petition by those claiming under the will of J. for payment of the money out of court, a claim was made by the devisees of the heir-at-law of W., who alleged fraud and misrepresentation by the petitioners in 1829:—Held, that their claim was barred by lapse of time, and that they could not set up the case of fraud upon the petition; but leave was given them to file a bill, the order upon the petition not to be drawn up for ten days. *Breach*, *Ex parte*, 10 Jur. (N.S.) 982; 10 L. T. 396; 12 W. R. 769.

An application for a transfer of consols, purchased by means of a legacy paid into court, under the stat. 36 Geo. 3, c. 52, need not be by petition, but may be made by motion. *Bennett*, *Ex parte*, 19 L. J., Ch. 375; 15 Jur. 213.

When a fund the title to which is litigated in the cause has been brought into court, it is contrary to the practice of the court to determine the question of title upon interlocutory application, so far as to direct that the interest of the fund shall be paid to one of the parties claiming it until further order. *Nedby* v. *Nedby*, 4 Myl. & C. 367; 3 Jur. 18. Reversing 8 L. J., Ch. 23.

Where the master reported several persons entitled to the fund in court, Ld. Ch. Manners thought the proper practice was to set the cause down upon the report, and at the hearing order each person's share out, not to apply by a distinct motion for each person entitled. *M'Mahon* v. *Wilson*, 2 Moll. 343.

When there is a fund in court, and claims upon it reported, the common order to allocate it (to save expense to the estate) is to be obtained only on plaintiff's motion, unless default in him, not by the motion of a reported creditor. *Anon.*, 2 Moll. 335.

A sum of stock, claimed as a legacy by A., was ordered by the decree to be carried over to the account of A. "subject to the further order of the court," with a direction that it should not be sold or transferred without notice to B.:—Held, that the court might upon petition, and without rehearing the former decree, order the money to be paid to B., if his title appeared to be the better of the two. *Barksdale* v. *Abbott*, 3 Russ. 186.

—— **At Chambers.**]—Application for payment out of court to legatees of legacies paid in under the Legacy Duty Act, 36 Geo. 3, c. 52, to be made to the judge in chambers. *Batard*, *In re*, 9 Hare (App.) xliii.

The order of the 12th November, 1856, provides that application for payment of dividends or interests of any stock or funds standing to the separate account of any person may be made at chambers, but it does not provide for the payment of principal sums at chambers; and the public notice posted up in chambers states only that no order can be made in chambers for the payment of any principal sum of money or stock above 300*l.* On asking for leave to take out a summons at chambers to obtain payment of arrears of interest above 300*l.*, the court held that the application for payment could only be made by petition. *Joad* v. *Ripley*, 3 Jur. (N.S.) 432; 5 W. R. 551.

The court having ordered certain small leaseholds to be sold, and the proceeds distributed, together with a fund in court, among numerous parties, upon the certificate of the chief clerk, in order to save expense, directed the purchasers to be served with a summons to shew cause at chambers why the proceeds should not be distributed pursuant to the order, and no cause having been shewn the proceeds were distributed by the chief clerk. *Thorp* v. *Owen*, 2 Sm. & G. (App.) i.

Where a petition is presented for payment of money out of court merely, and similar successive applications will have to be made, leave will be granted to make such future applications to the judge in chambers. *Winkworth* v. *Winkworth*, 32 L. J., Ch. 40; 9 Jur. (N.S.) 61; 7 L. T. 303; 11 W. R. 15.

Petition—Form of.]—On a petition by some persons entitled to shares in a fund which has been paid into court, the petition ought to ask that the other shares should be carried to the separate accounts of the other parties entitled. *Hawke's Trust*, *In re*, 2 Eq. Rep. 3; 18 Jur. 33.

When four persons were absolutely entitled to a fund carried over to a separate account in an administration suit, and one of such persons was also entitled to a fund standing to his separate account in another suit, an order for payment out of both funds was made upon one petition instituted in both suits. *Greenwood* v. *Greenwood*, 25 W. R. 316.

—— **Service of.**]—Service on the official solicitor in cases coming within the list and regulations issued by the chancery pay office on the 1st February, 1877, may be dispensed with when the petitioner's title is clear. *Stanhope*, *In re*, 25 W. R. 601.

A petition presented after the death of a lunatic, by his executors, for payment of the balance paid into court, must be served on the committee, although he has passed his accounts, and his security has been discharged. *Wylde*, *In re*, 5 De G. M. & G. 25; 23 L. J., Ch. 464; 18 Jur. 115.

On a petition presented by a wife, who had been deserted by her husband, to draw out of court certain sums of money to which she became entitled:—Held, that notice of the petition must be served upon the husband, notwithstanding that a protection order had been obtained protecting from the husband the property of the feme covert. *Dundas's Trusts*, *In re*, *Sutcliffe*, *Ex parte*, 22 W. R. 676.

Affidavit—No Incumbrances.]—It is not the course of proceedings in the master's office in England, in cases where tenant in tail of lands to be purchased with money applies to have the money paid out to him, to direct the master to advertise for outstanding creditors. The masters merely receive affidavits that the fund is not encumbered. *St. Antonio* v. *Adderley*, Beat. 187.

Applications by persons claiming to be absolutely entitled for payment out of money in court representing real estate, should be supported by an affidavit of no incumbrances, and primâ facie, the applicant is the proper person to make the affidavit. *Williams* v. *Ware*, 57 L. J., Ch. 497; 58 L. T. 876.

As a general rule the court requires, in all petitions under acts of parliament for local improvements, &c., for payment of money out of court, that the parties applying shall, by affidavit, shortly verify their title, and state that, to their knowledge and belief, no other person has any title to, or claims any interest in, the estate. *Shears, Ex parte*, 2 Y. & J. 493.

Where funds are reported due to married women, and their husbands, to which the women are entitled, partly as personal representatives, and partly in their own rights, and the court has not the power of directing an account to ascertain how much is due in each right; it will receive affidavits to ascertain how much is due to her in her own right, and how much is required to pay debts, &c., in course of administration. *Webber* v. *Jones*, 7 Ir. Eq. R. 639.

The court has settled a form of affidavit on the model of a carefully-prepared answer to a searching interrogatory to books and papers, and which affidavit, though not obligatory, will be considered satisfactory. *Rochdale Canal Co.* v. *King*, 9 Hare (App.) vii.

A petition was presented by the trustees of a charity, praying for the investment of a fund in court, and payment of the dividends to them:—Held, that the affidavit in support of such a petition need not contain a statement of their exclusive title to the fund. *Merchant Taylors' Charity, In re*, 23 L. T. 486.

The petitioner was tenant for life of certain lands which had been taken by the company under their act. The company having paid the purchase-money into court, and it having been duly invested, the petitioner applied to have the dividends paid to her during her life. The application was supported by the affidavit of her solicitor, stating her title to the dividends. The registrar objected that this was not the proper evidence; that the application ought to be supported by the affidavit of the applicant herself, stating her belief in her title, and that no one else was interested:—Held, that the affidavit by the petitioner in the form mentioned by the registrar, verifying the petitioner's title, and negativing any claim by any other person, is only required when payment out of court of the principal money is sought, and not where the application is for payment of the dividends only; the order was made accordingly. *Braye, Ex parte*, 9 Hare (App.) vii.; 16 Jur. 1129.

Where decree for administration of testator's estate not prosecuted for sixteen years, court ordered payment of residue out of court to residuary legatees, upon the oath of the executors that testator's debts had been all paid, and that there were no outstanding claims. *Harrison* v. *Lane*, 2 Sm. & G. 249; 2 W. R. 310.

The court will order a fund in court to be paid to several petitioners on an affidavit of one of them sufficiently verifying the title of all the petitioners to such fund. *Jersey* v. *Jersey*, 14 L. T. 13.

—— **Sworn before Petition.**]—Affidavits in support of a petition for payment of money out of court, sworn before the petition is presented, but after the payment into court, will be admitted as evidence. *Varley, In re*, 14 W. R. 98.

—— **Probate Copy.**]—The dividends of a small sum of stock arising from the purchase-money of real estate taken by a railway company, were ordered to be paid to a party claiming under a will, upon production of the probate copy, with an affidavit that it had been examined and was correct. *Lowndes's Trust, In re*, 20 L. J., Ch. 422.

—— **Money in Bank.**]—Where money is, by order of court, paid into the accountant-general's hands, to be placed in the bank till it can be laid out according to the directions of a decree, if you move for an application of this money, you must have a certificate, not only that the money was paid in, but that it is actually in the bank at the time of the motion made. *Anon.*, 1 Atk. 519.

—— **Apportioned Amounts.**]—In a creditor's suit for the administration of the estate of a testator, it appeared from the master's report that there were forty-eight creditors, that many of the debts were for small amounts, and that the fund distributable among them was small, and insufficient to pay the debts in full. Upon the cause coming on on further directions, the court, on the request of the counsel for the defendants (the executors), made an order for the ratable apportionment of the fund among the creditors, on the amounts apportioned being verified by the joint affidavits of the plaintiff and one of the defendants, the executors; and that the sum apportioned under 10*l.* should be paid to the plaintiff's solicitor, on his undertaking to pay the same to the creditors respectively. Form of such order. *Bear* v. *Smith*, 5 De G. & Sm. 92; 21 L. J., Ch. 176; 16 Jur. 708.

—— **By whom made.**]—The affidavit in support of a petitioner for payment of money which has been paid into court under the Lands Clauses Act must be made by the petitioner. *L. & N. W. Ry.* v. *Bray (Lady)*, 1 W. R. 60.

When a tenant for life was too infirm to make an affidavit of title on a petition for payment to him of the dividends of purchase-money paid into court by a railway company, an affidavit made by his solicitor was held sufficient. *Halsey's Estate, In re*, 22 L. T. 11.

—— **Execution of Deed.**]—On an unopposed petition for payment out of court of purchase-money paid in by a railway company, proof of the handwriting of the attesting witnesses to a deed affecting the petitioner's title is sufficient evidence of the execution of the deed. *Mair's Estate, In re*, 42 L. J., Ch. 882; 28 L. T. 760; 21 W. R. 749.

Where a married woman, entitled to a fund in court, was resident abroad, the court accepted as evidence of no settlement, the affidavit of a solicitor, stating that he had been distinctly informed by her and her husband that there was no settlement, and also facts which rendered the existence of any settlement improbable. *Woodward* v. *Pratt*, 42 L. J., Ch. 891; L. R. 16 Eq. 127.

Delay in Application.]—Sixteen years after a decree for the administration of the testator's

estate, under which the amount in the hands of the executors had been paid into court and the decree not further prosecuted, the residuary legatees, being infants, on attaining twenty-one, petitioned to have the fund paid out to them according to the trusts of the will; and upon the affidavit of the executors that there were no outstanding demands upon the estate, the court ordered the amount to be paid to the petitioners. *Harrison* v. *Lane*, 2 Sm. & G. 249; 2 W. R. 310.

Where a fund in court has not been dealt with for a number of years, the court will not order payment of it out in the absence of the parties beneficially interested. *Edwards* v. *Harvey*, 32 L. J., Ch. 482; 9 Jur. (N.S.) 453; 7 L. T. 662; 11 W. R. 330.

When a fund has been a long time in court, the court will not pay out the fund except an equitable title be deduced, as well as the simple title of a legal personal representative, and this rule will not be relaxed. *Samson* v. *Samson*, 39 L. J., Ch. 582; 22 L. T. 457; 18 W. R. 530.

An administrator petitioned for transfer and payment to him of funds in court which belonged absolutely to the intestate, who died many years ago, and which had remained standing to his separate account and had not been dealt with for thirty-six years. The Master of the Rolls declined to order payment to the petitioner, and directed an inquiry as to the next of kin. On appeal, the court directed notice to be given to the next of kin, and this having been done, ordered transfer and payment to the petitioner. *Peacock* v. *Saggers*, 4 De G. F. & J. 406.

Undertaking to apply Fund.]—A fund paid into court ordered to be restored to a trustee, he undertaking to remit it to legatees residing in America. *Ibberson* v. *Warth*, 1 Jur. (N.S.) 440; 3 W. R. 230.

An infant plaintiff was placed at school by M., a defendant in a suit, and bills in respect of the infant's schooling were incurred. The master, by his report, found that a sum was due to M. in respect of the maintenance of the infant, and taking into account the sums due for the schooling. The sum so found to be due to M. was ordered to be paid to him, he undertaking to pay the school bills. M. subsequently, and without having paid the school bills, assigned the amount due to him to P., who obtained a stop-order on the fund and afterwards obtained an order for payment to him of the fund. The school bills remaining unpaid, and the schoolmaster having presented a petition for payment of his claim out of the fund found to be due to M.:—Held, that although the schoolmaster had no lien on the fund, yet, M. having undertaken to pay the amount due to him, the court would see that the undertaking was performed; and payment to the schoolmaster ordered of the amount due, his costs of the petition to be paid by P. *Siederfield* v. *Thacker*, 18 Beav. 588.

Before the court will order payment of small sums to a solicitor on his undertaking to apply them, the court will require the written consent of the parties themselves. But in case where eleven out of twelve had signed such written consent, and the twelfth was in America, the court dispensed with his written consent on the solicitor's undertaking properly to apply the money. *Staines* v. *Giffard*, 20 Beav. 484. And see *Armstrong* v. *Stockham*, 11 Jur. 97.

Where, in an administration suit, some legatees are dead, the fund is insufficient, and an order has been made for distribution, the court will order payment of all legacies not originally exceeding 50*l.* to the trustees, they undertaking to pay such sums to the parties entitled. *Thomas* v. *Jones*, 6 Jur. (N.S.) 391; 8 W. R. 328.

Prospective order for payment of money on reinvestment in land, on certificate of the chief clerk that the title had been approved of and conveyance executed, and payment of small balance on the undertaking of the solicitors to lay it out on lasting improvements. *Hichins's Estate*, *In re*, 1 W. R. 505.

Order—Form of.]—The 28th Order of Lord Brougham, directing that orders for payment of money out of court shall specify the amount:—Held, to apply only to cases where that can be ascertained at the time of the order being made. *Piggott* v. *Garraway*, 9 Sim. 260; 7 L. J., Ch. 243; 2 Jur. 806.

Proper form of the order for payment of money out of court, which stands in the account of a person who has been convicted of felony. *Tomkins* v. *Lane*, 2 W. R. 340.

—— **When Lost.**]—An original order directing the payment of the dividends of a sum of consols to the tenant for life was lost. The dividends had never been paid, but were represented by a sum of cash. The court directed that the record office should issue a new office copy of the lost order upon the production of a short affidavit of the loss. *Scott* v. *Heisch*, 33 L. T. 498; 24 W. R. 108.

—— **Delay in Complying with.**]—Where an order, directing money to be paid out of court, is appealed from, the accountant-general is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings in the court below. *Ferguson* v. *Tadman*, 1 Russ. & M. 331.

Upon an order being made for a transfer to a party of funds in court, the practice in the accountant-general's office is, not to make the transfer until after the lapse of a day or two, or other short period, sufficient to give any party, conceiving himself entitled, an opportunity of applying to the court for a stop-order upon the funds. *Collett* v. *Maule*, 13 Jur. 672.

—— **Use of.**]—In a creditors' suit, instituted by simple contract creditors, in which the assets, after the payment of the costs, being insufficient for the discharge of the specialty debts, are apportioned among the specialty creditors; these specialty creditors are entitled, without contributing to the extra costs of the plaintiffs, to the use of the order for the payment of the money, and of the report founded upon it, so as to enable them to get the fund out of court. *Lechmere* v. *Brazier*, 1 Russ. 72; 4 L. J. (O.S.) Ch. 95.

—— **Infant Coming of Age.**]—On a decree for payment of debts, if it appear on the pleadings that the creditor is an infant, the accountant-general will not pay such creditor, though he has come of age, on a certificate of the baptism, but an order for the payment is necessary. *Anon.*, 2 Madd. Ch. 582.

—— **After Bill Dismissed.**]—Order after the bill dismissed for payment of money out of court. *Wright* v. *Mitchell*, 18 Ves. 293.

—— **Award—Rule of Court.**]—The court will not order the payment of a fund in court, to which petitioners are declared to be entitled by an award made under an order of reference, until the award has been made a rule of court. *Salmon* v. *Osborne*, 3 Myl. & K. 429; 3 L. J., Ch. 237.

—— **Small Sums—Disability.**]—Where the sums found to be due to the wives of several plaintiffs were very small, the court, upon consent of all parties, permitted the order for payment to the husbands to be inserted in the decree, without requiring a petition and affidavit negativing any settlement up to the date of the decree. *Hedges* v. *Clarke*, 1 De G. & Sm. 354.

Where a married woman had been for many years deserted by her husband, and no settlement had been made upon her marriage, the court made an order for payment to her by way of provisional advance of a small portion of the share of a capital fund in court, to which she had been declared entitled. *Barker* v. *Vogan*, 17 L. R., Ir. 447.

Small sums of money representing shares of infants in a fund in court may be directed to be paid out by the paymaster-general into the post-office savings bank to accounts in the names of the infants. *Elliott* v. *Elliott*, 54 L. J., Ch. 1142.

Prospective Orders.]—A continuing order for payment out of court from time to time refused, no report having been obtained ascertaining the amount due. *Alexander* v. *Abernethy*, 7 Ir. Eq. R. 308.

Order made that certain sums which had been ordered to be paid into court, but had not been paid in, might, after they were paid in, be paid out to the party entitled to them. *Milne* v. *Gilbart*, 20 L. J., Ch. 213; 15 Jur. 978.

Prospective order for the sale, from time to time, of so much of the capital of a fund as would be sufficient, with the income, to pay an annuity which the income alone was insufficient to pay. *Lambie* v. *Lambie*, 9 Hare (App.) lxxxiv.

Prospective order for payment by the accountant-general to the tenant for life of the income of funds hereafter to be paid into court to the same account. *Chamberlain, In re*, 22 Beav. 286.

Prospective order for payment of money on an investment in land, on certificate of the chief clerk that the title had been approved of and conveyance executed, and payment of small balance on the undertaking of the solicitor to lay it out on lasting improvements. *Hichins's Estate, In re*, 1 W. R. 505.

The dividends of a sum of stock were ordered, upon petition, to be paid to A. for her life, and after her decease to B. for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused. *Lowndes's Trust, In re*, 20 L. J., Ch. 422.

A fund was in court, and on the petition of two persons, man and wife, who had successive life estates, an order was made for the payment of the dividends to the wife for her life, and after her death to the husband for his life. *How's Trust, In re*, 20 L. J., Ch. 422, n.; 15 Jur. 266.

Petition by an infant entitled to a moiety of a fund in court asking the costs out of the funds to save expense that a prospective order might be made as to the other moiety:—Held, that the costs must come out of the petitioner's share, and that no prospective order could be made. *Rivers* v. *Oades*, 1 W. R. 75.

Some portion of a trust fund, payable by instalments, was paid by the trustee into court, under the trustee relief act. Upon a petition seeking payment of the fund so paid in, the trustee was ordered to pay the future instalments from time to time, as he should receive them, to the cestui que trust, whose title was clear. *Wright's Settlement, In re*, 1 Sm. & G. (App.) v.

Where there is no fund in court, no order can be made prospectively to deal with purchase-moneys for estates contracted to be sold but not paid for. *Bowes, In re*, 10 L. T. 90; 12 W. R. 569.

When a fund, which has been paid into court, is settled on two successive tenants for life, an order may be made for payment of the dividends to the first tenant for life, and on proof of his death, to the second, without any further petition. *Brent, In re*, 8 W. R. 270.

Where a trustee of a residue had transferred consols into his own name, and had permitted his cestui que trust to receive the dividends for a series of years under a power of attorney, and had died without further earmarking the fund, and his next of kin refused to meddle in the matter:—Held, that there was sufficient evidence to entitle the cestui que trust to have the money paid into court, and to have an order that she should be paid the dividends till further order. *Thornton, In re*, 9 W. R. 475.

By an order made in 1827, part of the dividends of a fund in court was ordered to be paid to A. during the life of B. A. died in 1873, in the lifetime of B.:—Held, that, under the Chancery Funds Rules, 1872, r. 22, the executor of A., though not named in the order, was entitled to have the future dividends paid to him, without any fresh order being made. *Chapman* v. *Chapman*, 43 L. J., Ch. 600; L. R. 17 Eq. 350.

—— **In Case of Infants.**]—Upon a petition for the payment out of court of a sum of money, part of a fund standing to the credit of the cause, which was divisible among children upon their respectively attaining twenty-one, liberty was given to apply in chambers for the payment of the remaining shares as they respectively became payable. *Winkworth* v. *Winkworth*, 1 N. R. 6; 32 L. J., Ch. 40; 9 Jur. (N.S.) 61; 7 L. T. 303; 11 W. R. 15.

Upon an application to have the share of an infant in certain funds in court paid to her solicitor on his undertaking to pay the same to the infant on her attaining twenty-one (which would happen in about one month), the court declined to make the order, but ordered her share to be carried to her separate account, with liberty to apply in chambers on the certificate of the chief clerk that she had attained twenty-one. *Sothern, In re*, 12 W. R. 45.

When a person, entitled to a vested interest in trust funds in court, to be paid at twenty-one, would attain that age in the long vacation, a prospective order was made for the payment out of the fund to her at such date. *Penn's Trusts, In re*, 42 L. J., Ch. 880; 21 W. R. 865.

Order made pending Abatement.]—The court will order money out of court to person entitled to it by decree, notwithstanding death of some

of the parties. *Finch* v. *Winchelsea* (*Lord*), 1 Eq. Abr. 2.

Though a cause be abated, money may be ordered to be paid out of court, without reviving the cause, upon the consent of all the parties actually interested. *Beard* v. *Powis* (*Earl*), 2 Ves. 399.

After the dismission of a bill, the court is of necessity, in certain cases, justified to make orders touching money, and such an order has, it appears, also been made after abatement. *Black* v. *Creighton*, 2 Moll. 557.

Order for transfer and payment out of court, though cause abated; the right being clear. *Roundell* v. *Currer*, 6 Ves. 250.

Where the right is clear by reports and orders in the cause, and the application is to get money or title deeds out of court, upon the right clearly established by suits, reports and orders, an abatement of the suit will not prevent the court from complying with the application. *Houghton* v. *Godschall*, 2 Coop. C. C. 89.

If the party making the application does not claim under some report or order upon a clear right already established, but desires the declaration of the court upon a point that has not yet been raised and determined, the court has no power to comply with the application without the consent of all parties interested. *Ib.*

Erroneous Order — Liability of Solicitor.]—Where money was paid out of court upon a forged affidavit, the solicitor to the proceedings taking no steps in the matter himself, but allowing the matter to be attended to by a managing clerk of another firm, the solicitor was held liable to replace the money and pay all necessary costs incurred. *Slater* v. *Slater*, 58 L. T. 149.

A legacy of 500*l.* bequeathed to M., an infant, and a legacy of 7,000*l.* settled upon trust for L. and her children, were paid into court by the trustees, on separate occasions, but to one and the same account. A petition was afterwards presented on behalf of L. for the purpose of getting her legacy transferred to a separate account and of obtaining payment of the dividends to her. The petition did not state that the fund in court represented the two legacies, and in consequence of this omission, and of the amount of the fund proposed to be dealt with being stated in blank, an order was erroneously made upon the petition, under which the whole fund was transferred to the account of L.'s legacy and the dividends paid to her during her life. The solicitor who acted for the trustees on the occasion of the payment into court also acted for the petitioners, and had the carriage of the whole proceedings. After L.'s death M. attained twenty-one, and presented a petition for payment out of court of her legacy, with the accumulated dividends thereon:—Held, that the estate of L. was primarily liable for the amount of the dividends erroneously paid to her; but that, failing her estate, the solicitor was personally liable to make good to M. any deficiency there might be, and to pay all the costs occasioned by the mistake as between solicitor and client. *Dangar's Trusts, In re*, 58 L. J., Ch. 315; 41 Ch. D. 178; 60 L. T. 491; 37 W. R. 651.

—— **Extending Time for Appealing.**]—A legacy of 500*l.*, given to an infant, was paid into court under the trustee relief act, but not to the separate account of the infant. Afterwards a sum of consols, which under the same will was given in trust for a person for life, and after his death to other persons was also transferred into court under the same act and to the same account. Subsequently the 500*l.* was invested in consols. On the petition of the trustees and the tenant for life, an order was made, which by mistake directed payment of the income of the aggregate of the two sums of consols to the tenant for life. The mistake was not discovered till after the death of the tenant for life, up to which time the whole income was paid to her. The funds were still in court, and the person entitled to the consols representing the 500*l.* applied for leave to appeal from the order, notwithstanding the time for appealing therefrom had long since expired:—Held, without dismissing the application, or saying what relief could be obtained in respect of the income erroneously paid, that the proper course was to present a petition, to be served on the trustees and the legal personal representative of the tenant for life, asking that, notwithstanding the former order, the consols representing the 500*l.* might be transferred to the account of the legatee thereof. *Dangar's Trusts, In re*, 60 L. T. 402—C. A.

—— **Liability of Recipient.**]—Where money is paid out of court through the erroneous act of the court, the party who receives it and is called upon to refund is not liable to pay interest upon it. *Small* v. *Attwood*, 3 Y. & Coll. 105.

Where a fund had been paid out of court in consequence of a fraudulent representation that one of the parties beneficially interested was dead and buried, the court, on the discovery of the fraud, permitted the person to whom the fund had been paid, and who was clearly no party to the fraud, to retain the money upon his giving security that he would refund it in case it should be required, or that he would deal with it in such a manner as the court might at any time afterwards direct. *Foster* v. *M'Gregor*, 9 L. T. 473.

Jurisdiction of Court.]—A fund in court, which has, contrary to the intention of the parties, clearly proved, been included in a settlement, will only be paid out to the parties entitled under that settlement until it has been reformed; and the court has no jurisdiction, upon petition, to reform an instrument. *Malet, In re*, 30 Beav. 407.

A mortgage and further charge were executed by persons of humble position, who acted without independent advice, of a reversion of 1,500*l.* expectant on the death of a tenant for life. On death of tenant for life the 1,500*l.* was paid into court. On a petition by the reversioners to set aside the securities on the ground of fraud, and for payment out of the fund:—Held, that the mortgage and further charge could stand as security only for the sums actually advanced, with six years' arrears of interest only. *Slater's Trusts, In re*, 48 L. J., Ch. 473; 11 Ch. D. 227; 40 L. T. 184; 27 W. R. 448.

Semble, the court will, upon petition for payment out of court, hear and decide questions of this nature without directing the issue of a writ. *Ib.*

In a suit instituted to restrain proceedings on bill of exchange, alleged to have been given for moneys lost at play, an injunction until the hearing of the cause or further order was obtained upon the answer of the defendant, the plaintiff paying into court the amount of the bills and

interest; but at the hearing, the plaintiff having no evidence in support of his case, and the defendant in his answer denying all knowledge of the gambling transaction, out of which the bills were said to have originated; and having sworn that he gave valuable consideration for them, though as to the particulars of that consideration his statements were vague, and not very satisfactory; the bill was dismissed with costs. Under such circumstances, the decree ought to direct the fund in court to be paid to the defendant without putting him to the further prosecution of the action, or awaiting its result. *Wynne* v. *Jackson*, 2 Russ. 351; 5 L. J. (O.S.) Ch. 55.

Amendment of Order.]—An order directing a contract of sale to be carried out, and the costs to be paid out of a fund in court, but not indicating the parties by whom the conveyance is to be executed, may be amended by inserting a direction that the conveyance be executed by such persons as the chief clerk shall certify to be the proper parties. *Clough's Settled Estates, In re*, 32 L. T. 194.

Costs.]—Costs of motion for payment out of court refused. *Massy* v. *O'Dell*, 8 Ir. Eq. R. 509.

The costs of the petition of an assignee of tenant for life of stock, which had not been served on residuary legatees, refused. *Peart, Ex parte*, 17 L. J., Ch. 168; 12 Jur. 620.

A petition for payment out of court was served on a party who did not appear on the petition to have any claim, but had sent notice of a claim. She now disclaimed, and was not allowed her costs. *Parry's Trust, In re*, 12 Jur. 615.

Petition by an infant entitled to a moiety of a fund in court, asking the costs out of the funds, and, to save expense, that a prospective order might be made as to the other moiety:—Held, that the costs must come out of petitioner's share, and that no prospective order could be made. *Rivers* v. *Oades*, 1 W. R. 75.

Where legacies given by the same will are paid into court to distinct accounts, the court will not throw the costs consequent upon obtaining payment out of court of a share in one legacy upon the other, notwithstanding the legacy sought to be charged may have by death or lapse become residue. *Hodgson's Trusts, In re*, 2 Eq. Rep. 1083; 2 W. R. 539.

No costs given where sum of money, liable to be invested in land, was ordered to be paid out of court on the petition of the tenant for life, entitled for her separate use, and of the reversioner, a married woman. *Edmeades, In re*, 1 N. R. 43.

A purchaser under the court, after having obtained his conveyance, ought not to appear upon a petition to obtain the purchase-money out of court, and he will not be allowed his costs of so doing. *Barton* v. *Latour*, 18 Beav. 526.

A sum of 10*l.* is usually allowed, without taxation, for the costs of a petition to obtain money out of court standing to a separate account, and in which no one but the petitioners are interested. *Gover* v. *Stilwell*, 21 Beav. 182.

A fund being in court to the contingent account of an infant; she, on attaining twenty-one, petitioned for payment out, and served the defendant with the petition, with an express notice not to appear (the costs of such defendant being all paid), and made an affidavit to prove such payments. This was replied to by a short affidavit by the defendant, and on the petition he appeared by counsel:—Held, that the defendant was entitled to the costs of appearance. *Rudge* v. *Weedon*, 8 L. T. 567.

Where a person entitled to a share in a fund in court, and her incumbrancer or assignee is before the court, and one set of costs only is allowed in respect of that share, those costs are given to the incumbrancer or assignee. *Ward* v. *Yates*, 1 Dr. & Sm. 83; 8 W. R. 428.

Upon a petition in suit for payment of the income of a fund in court to the petitioner, the costs must be borne by the applicant. *Eady* v. *Watson*, 33 Beav. 481; 10 Jur. (N.S.) 982; 10 L. T. 285; 12 W. R. 682.

Upon a petition by a tenant for life for the payment to her of the income of a fund in court under an administration suit, the costs of all parties were ordered to be paid out of the corpus. *Longuet* v. *Hockley*, 22 L. T. 198.

When a testator has given a fund to trustees upon trust for investment in land, which is to be settled to the use of several persons successively for their lives, and the fund is paid into court in an administration suit, and has not been invested in land, the costs of a petition by the tenant for life for payment of the dividends to him are payable out of corpus. *Scrivener* v. *Smith*, L. R. 8 Eq. 310.

—— **When Payable by Company.**]—Where money has been paid into court under a special act providing for the costs of reinvesting the money, but not providing for the costs of any application to get the money out of court, the company must nevertheless pay the costs of an application for getting the fund out of court. *Toft's Estate, In re*, 2 Jur. (N.S.) 131.

Where lands, settled in the same manner, have been purchased by different railway companies and the purchase-moneys paid into court and invested, and the tenant for life afterwards dies, the orders directing payment of the dividends of the several funds to the person next entitled may all be obtained upon the same petition; and the railway companies will not in future be required to pay the costs of more than one petition. The point being a new one, the petitioner was not deprived of his additional costs out of pocket. *Broke's (Lord) Estate, In re*, 1 N. R. 568; 11 W. R. 505.

See also LANDS CLAUSES ACT.

—— **Out of Income.**]—When a fund has been paid into court for the benefit of all persons interested, the costs of all applications for payment of income ought to be paid out of the income. *Evans' Trusts, In re*, 41 L. J., Ch. 512; L. R. 7 Ch. 609; 26 L. T. 815; 20 W. R. 695.

—— **Trustee Relief Acts.**]—Respondents who make an unfounded claim to a fund, and so occasion the payment of it into court under the trustee relief acts, will be ordered to pay the costs of getting the fund out of court. *Benton, In re*, 43 L. J., Ch. 715.

And see TRUST AND TRUSTEE.

k. STOP-ORDER.

1. When Granted.

In a contested case, the only relief to which an incumbrancer upon a fund in court is entitled, upon petition, is a restraint on the transfer of the fund, or payment of the dividends. *Cook* v. *Collingridge*, C. P. Coop. 255.

Covenant on a dissolution of partnership between solicitors, that various debts and costs should only be received by them jointly. In a suit in which some costs, the subject of such covenant, are due, a stop-order only can be obtained, but further relief against breach of the covenant, as regards those costs, must be sought by bill. *Sangar* v. *Gardiner*, C. P. Coop. 119.

Stop-order directing that a tin box in court, containing turnpike securities, should not be parted with without notice to the petitioner. *Williams* v. *Symonds*, 9 Beav. 523.

A cheque of the accountant-general in favour of A. B., but not delivered out, is not A. B.'s property, so as to be liable to be seized by the sheriff under the provision of the 1 & 2 Vict. c. 110, s. 12. Leave to seize such a cheque refused, but a stop-order was granted. *Courtoy* v. *Vincent*, 15 Beav. 486; 21 L. J., Ch. 291.

Solicitor's Costs.]—No effective proceedings could be taken in a suit, in consequence of the contempt of two defendants:—Held, that the plaintiff's solicitor was entitled to a taxation of his costs, and to a stop-order on the funds. *Hobson* v. *Shearwood*, 8 Beav. 486.

Separate Estate.]—Since the Married Woman's Property Act, 1870, a stop-order constitutes a valid incumbrance on a married woman's separate estate in court. *Sanger* v. *Sanger*, 40 L. J., Ch. 372; L. R. 11 Eq. 470; 24 L. T. 649; 19 W. R. 792.

Retainer pending further Proceedings.]—By the decree, a sum in court was directed to be paid to the plaintiff. A person, not a party to the suit, claiming a portion of it as against the plaintiff, applied for a stop-order, and, having shewn a sufficient primâ facie case, the court ordered the fund to be retained, on the terms of his filing a bill within ten days to establish his right. *Feistel* v. *King's College (Cambridge)*, 11 Beav. 254.

A. conveyed to B. his reversionary interest in a fund in court, and B. obtained a stop-order. When the fund fell into possession, B. presented a petition for payment to him. On the hearing of the petition, A. insisted that the purchase was invalid, being a purchase of a reversionary interest at an under-value. The court would not decide the point, but proposed to retain the funds in court for a limited time if A. would undertake to file a bill to set aside the conveyance. A. not giving the undertaking, the fund was paid out to B. *Bethune* v. *Kennedy*, 3 Beav. 462. And see *S. C.*, 1 Myl. & C. 114.

No Fund in Court.]—Where there is no fund in court, and no order for bringing any fund into court, the court will not entertain a petition for a stop-order. *Wellesley* v. *Mornington*, 1 N. R. 13; 7 L. T. 590; 11 W. R. 17.

Stop-order granted upon a fund of a specified amount not actually in court, but to be paid in to the credit of an action under an order of the court. *Shaw* v. *Hudson*, 48 L. J., Ch. 689.

As to Whole or Part of Fund.]—Where several persons are interested in a fund in court, which cannot be immediately carried to their separate accounts, an order obtained by one of the parties interested, to prevent the fund being paid out without notice to him, will extend to the whole fund. *Bergman* v. *Treslove*, 5 L. J., Ch. 4.

Five of six children claiming that, under a will, a fund in court was divisible in sixths, and the sixth child claiming the whole, and becoming bankrupt, his assignees advertised the whole for sale. A stop-order granted on the five-sixths. *Hawkesley* v. *Gowan*, 11 L. T. 134; 12 W. R. 1100.

Assignment of Fund.]—When an assignment is made of an interest in a trust fund, part of which is in court and part in the hands of the trustees, the assignee, in order to complete his title, must, as regards the fund in court, obtain a stop-order, and as regards the fund in the hands of trustees, give notice to the trustees. *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A. Affirming 53 L. J., Ch. 996; 32 W. R. 792.

When the assignee of a reversionary interest in a trust fund gives notice of his assignment to the trustee, and the trustee afterwards pays the fund into court under the trustee relief act, setting out in his affidavit the notice so given to him, the assignee should also obtain a stop-order. *Miller's Trusts, In re*, 6 W. R. 238.

Where a fund in court is assigned to secure the payment of a debt, which becomes the subject of a marriage settlement, the trustees must obtain a stop-order to prevent the payment out of court without notice to them, even though the assignee had already obtained an order to prevent its payment without notice to him. And one share of the fund, belonging to the principal debtor having been paid out of court by means of an improper act of the solicitor acting for the creditor (a surety who owned another share of the fund) and the trustees of the marriage settlement, the share belonging to the surety was held to be discharged. *Wheatley* v. *Bastow*, 1 Jur. (N.S.) 222; 3 W. R. 296. And see 3 W. R. 540—L.JJ.

Property of Lunatics.]—Order, in the nature of a stop-order, granted on the application of the assignee of the interest of the sole next of kin of a lunatic. *Moore, In re*, 1 Macn. & G. 103.

An order, in the nature of a stop-order, to prevent a transfer without notice of funds in court belonging to a lunatic, granted, on the application of the mortgagee of the lunatic's next of kin. *Kent, Ex parte*, 1 H. & Tw. 214.

Order in the nature of a stop-order granted on the application of the assignees of the interest of the sole next of kin of a lunatic, but dispensing with notice to the assignees of any applications in the matter except those respecting payments to the next of kin. *Pigott, In re*, 3 Macn. & G. 268.

The court will not make an order in the nature of a stop-order on the estate of a lunatic in favour of an assignee of the next of kin. *Wilkinson, In re*, 44 L. J., Ch. 328; L. R. 10 Ch. 73; 23 W. R. 51.

Concurrent with Charging Order.]—A court of equity will make a stop-order as auxiliary to a charging order under 1 & 2 Vict. c. 110. *Hulkes* v. *Day*, 10 Sim. 41; 10 L. J., Ch. 21; 4 Jur. 1125.

By the decree, an arrear of dividends on stock was ordered to be paid to the plaintiff by her trustee; shortly afterwards such arrears were, under the 1 & 2 Vict. c. 110, s. 14, charged by a common-law judge with the payment of a sum of money to A. B. A petition was presented by A. B. that the trustee might pay the amount into court, and for a stop-order thereon. The

petition was dismissed with costs. *Newton* v. *Askew*, 11 Beav. 446; 18 L. J., Ch. 42; 12 Jur. 531, 766.

The proviso contained in s. 14 of 1 & 2 Vict. c. 110, that no proceeding shall be taken to have the benefit of the charge created under that section until after the expiration of six calendar months from the date of the charging order, does not prevent the creditor from obtaining a stop-order to restrain the debtor from receiving dividends of stock accruing within the six months. *Watts* v. *Jefferyes*, 3 Macn. & G. 372; 20 L. J., Ch. 659; 15 Jur. 783.

The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realising the security, yet that the judgment creditor may in the meantime, by force of the order, prevent the security given him by the statute from being defeated or dismissed pro tanto, by stopping payment to the debtor of part of his security. *Ib.*

It is no longer necessary, as a preliminary to obtaining a stop-order on a fund standing in court to the credit of the chancery division of the high court of justice, by a person who has a judgment in an action in another division of the high court, that he should obtain a charging order in that division. *Hopewell* v. *Barnes*, 1 Ch. D. 630.

A judgment creditor may obtain a stop-order upon a fund in court to the credit of an action in the chancery division, without any charging order obtained in the division where the judgment was recovered. *Shaw* v. *Hudson*, 48 L. J., Ch. 689.

2. Practice.

Application at Chambers.] — Stop-orders, where assignor and assignee concur, must in future be made at chambers. *Edmonson* v. *Harrison*, 1 W. R. 140.

A stop-order upon a fund in court may be obtained by summons in chambers, without the consent of the assignor or person to be affected thereby. The alleged rule, that such an order must be applied for by petition in court, is not founded on authority. *Wrench* v. *Wynne*, 38 L. J., Ch. 235; 17 W. R. 198.

An application for a stop-order should be by summons in chambers, even though the mortgagor does not concur. *Walsh* v. *Wason*, 30 L. T. 743; 22 W. R. 676.

An incumbrancer presented a petition for a stop-order on a fund in court; he had not applied to the mortgagor to consent to one being granted on summons:—Held, that he must pay the difference between the costs of obtaining a stop-order on a summons at chambers and the costs of the petition. *Wellesley* v. *Mornington*, 41 L. J., Ch. 776.

Petition—Trustee Relief Act.]—A petition is the proper means of obtaining a stop-order on a fund paid into court under the Trustee Relief Act, 1847, where the fund is over 300*l.*, and the application is the first which has been made in the matter of the fund. *Day's Trusts, In re*, 49 L. T. 499.

Where a fund in court, paid in under the Trustee Relief Act, 1847, exceeds 1,000*l.*, and there has been no prior application in the matter of the fund, a petition, and not a summons, is the proper mode of applying, under rr. 12 and 13 of Ord. XLVI. of the Rules of Court, 1883, for a stop-order on the fund so paid in. *Toogood's Trusts, In re*, 56 L. T. 703.

Service on Parties Interested.] — A party intending to apply for a stop-order must give notice of his application to all other persons having like orders on the fund. *Hulkes* v. *Day*, 10 Sim. 41; 10 L. J., Ch. 21; 4 Jur. 1125.

A petition for a stop-order was served not only on the assignor, but on the other parties to the cause. The petitioner was ordered to pay the costs of the latter. *Glazbrook* v. *Gillatt*, 9 Beav. 611.

Where a contingent interest in a fund in court has been mortgaged, and the mortgagee places a stop-order on the fund, but the mortgagor dies before his interest vests, the persons ultimately entitled to the fund, upon applying for payment out, need not serve such mortgagee. *Vernon* v. *Croft*, 58 L. T. 919; 36 W. R. 778.

The assignor, though party to the cause, must, under the General Order of April, 1841, be served with the petition for a stop-order. *Parsons* v. *Groome*, 4 Beav. 521.

Prior to the 5th Order of April, 1841, it was held that an incumbrancer on a portion of an undivided fund in court, cannot obtain a stop-order on it without serving the other parties interested with the petition for that purpose. *Trezevant* v. *Frazer*, 3 Beav. 283; 4 Jur. 982.

Principles upon which it was considered necessary, previous to the General Order of 3rd April, 1841, to serve all parties interested with an application for a stop-order. *Day* v. *Croft*, 4 Beav. 34.

When notice of stop-order must be given to all persons interested in the fund. *Lawrance* v. *Baldwin*, 2 Jur. 151.

Where a petition for a stop-order had not been served in time:—Held, that an order nisi, including a stop-order, might be made upon the petition ex parte. *Nowell, In re*, 9 Jur. (N.S.) 512; 11 W. R. 658.

Where a judgment creditor has a charging order at law upon the interest of a judgment debtor in a fund in court, a stop-order applied for in the usual way is the proper course, and an order nisi made in the court, upon a petition for a stop-order not served two clear days before the application, was discharged with costs. *S. C.*, 11 W. R. 896.

Evidence—Sufficiency.]—The stop-order can only be obtained upon admission or proof of the incumbrance, even though the party in the cause claiming the fund consents to such order being granted without prejudice. *Winchelsea* v. *Garrety*, 1 Beav. 223.

Upon an application for a stop-order, the assignor's right to the fund in court must be shewn either by the proceedings or by affidavit. *Quarman* v. *Williams*, 5 Beav. 133.

The court will not grant a stop-order, unless it is stated in the petition how the interest of the party in the fund sought to be affected arose. *Lambert* v. *Hutchinson*, 13 L. J., Ch. 336.

Requisites for obtaining the stop-order, under the General Order of April, 1841. *Wood* v. *Vincent*, 4 Beav. 419.

Consent of Parties.]—When a stop-order is made in chambers on the application of a mortgagee, with the consent of the mortgagor, such consent may be given by any person acting for

the mortgagor under a power of attorney, and it is not necessary that such person should be the mortgagor's solicitor on the record. *Lister* v. *Tidd*, 15 W. R. 917.

The court will not, on the petition of the assignor and assignee of a fund in court, grant an order that no part of the fund assigned be paid to the assignor, or any person claiming under him. *Symonds* v. *James*, 7 Jur. 11.

Order—Without Prejudice.]—A stop-order does not affect any right, and it is therefore unnecessary to specify that it is made "without prejudice." *Lucas* v. *Peacock*, 9 Beav. 177.

Where a fund is paid into court under the trustee relief act, and a creditor of a party interested in the fund applies for a stop-order and serves the trustees, who claim a lien for costs against the same party, the court will not determine the question of lien, but grant the stop-order without prejudice to that question, and give the trustees their costs of the petition as against the petitioner. *Blunt, In re*, 10 W. R. 379.

—— **Confined to specified Portion of Fund.**]—A stop-order on a fund in court, however general in its terms, is nevertheless confined in its operations to the specific portion of the fund in respect of a dealing with which the order is made. *Macleod* v. *Buchanan*, 4 De G. J. & S. 265; 3 N. R. 623; 33 L. J., Ch. 306; 10 Jur. (N.S.) 223; 10 L. T. 9; 12 W. R. 514.

——**Form.**]—Form of stop-order when husband and wife join in an assignment of the wife's reversionary choses in action. *Moreau* v. *Polley*, 1 De G. & Sm. 143.

Quære, whether in future care should not be taken in drawing up stop-orders to express on the face of them plainly whether capital or income is to be restrained, and whether, in all cases where their operation is not so limited, they ought not to be treated at the paymaster-general's office as extending to both capital and income. *Mack* v. *Postle*, 63 L. J., Ch. 593; [1894] 2 Ch. 449; 8 R. 339; 71 L. T. 153.

—— **Collateral Matter.**]—A married woman became entitled under a will to a sum of about 600*l.*, and in an administration suit she consented to the payment of this sum to her husband; she was also entitled in reversion, upon the death of an annuitant, to a share of a sum of stock, which was set apart for the payment of the annuity, which share amounted to 346*l.* 13*s.* 4*d.* During the life of the annuitant the married woman and her husband assigned this reversionary interest for 70*l.*, and the assignee obtained a stop-order upon the fund. The husband subsequently became insolvent:—Held, that upon the death of the annuitant, the married woman may have her equity to a settlement discussed and decided upon petition, although the assignee was not a party to the administration suit; held, also, that the whole fund should be settled on the married woman and her children. *Scott* v. *Spashett*, 3 Macn. & G. 599; 21 L. J., Ch. 349; 16 Jur. 157.

Semble, that the assignee, by obtaining a stop-order, brought himself before the court sufficiently to enable it to deal with the case. *Ib.*

—— **Mortgagee a Trustee.**]—A. being entitled to a fund in court, mortgaged the same to B. to secure repayment of an advance, and executed to him a bond of even date, in which he was joined by C. and D. as co-sureties. A stop-order on the application of B., and at the request of C. and D., was obtained against the fund. C. was ultimately called on to repay the money; and after the payment by her the stop-order was removed by A., with the consent of B. C. had not taken the precaution of procuring an assignment of the mortgage at the time of payment:—Held, that she was not thereby debarred from claiming the benefit of such mortgage in respect of the fund therein comprised, the mortgagee being a trustee for her of such stop-order as well as of the other securities which he held for the repayment of the debt, which she, as surety, had been compelled to discharge. *Allen* v. *De Lisle*, 5 W. R. 158.

Costs.]—Where an incumbrancer of a fund in court obtains an order for payment out of a fund in court of his principal and interest and his costs as mortgagee, the taxing master will not, unless specially directed, include the expenses of obtaining a stop-order; but if the incumbrancer is entitled to those costs, they should be expressly mentioned in the order. *Waddilove* v. *Taylor*, 6 Hare, 307; 17 L. J., Ch. 408.

A fund having become distributable, and a mortgagee, with notice that the parties entitled had presented a petition for payment out of court to the mortgagee, and to themselves, having applied for a stop-order, was refused his costs of his application. *Hoole* v. *Roberts*, 12 Jur. 108.

D. having a lien on a fund by express agreement with the parties entitled to it, they by their acts depart from that contract, and D. is obliged to get a stop-order, and appears to ask for those costs and claim his lien:—Held, that he was entitled to the costs of the stop-order, and of his appearance. *Grimsby* v. *Webster*, 8 W. R. 725.

Parties having a claim upon a fund in court are not entitled as a general rule, and under all circumstances, to the costs of getting a stop-order. *Ib.*

An incumbrancer presented a petition for a stop-order on a fund in court; he had not applied to the mortgagor to consent to one being granted on summons:—Held, that he must pay the difference between the costs of obtaining a stop-order on a summons at chambers, and the costs of the petition. *Wellesley* v. *Mornington*, 41 L. J., Ch. 776.

Solicitors who had obtained a charging order for costs due to them, and had afterwards obtained a stop-order, were not allowed the costs of appearing by counsel at the hearing on further consideration. *Mildmay* v. *Quicke*, 46 L. J., Ch. 667; 6 Ch. D. 553; 25 W. R. 788.

3. Priorities.

According to Date of Stop-orders.]—Priority obtained on a fund in court by a puisne incumbrancer who had procured the first stop-order thereon. *Swayne* v. *Swayne*, 11 Beav. 463. And see *Dearle* v. *Hall*, 3 Russ. 1; 27 R. R. 1; *Loveridge* v. *Cooper*, 3 Russ. 30; *Timson* v. *Ramsbottom*, 2 Keen, 35.

A., who was entitled to a residuary fund in the hands of his father's army agents, charged it, first, to the agents, and afterwards to M. The agents voluntarily paid the whole fund into court in an administration suit. M. obtained

the first stop-order thereon :—Held, that M. had priority over the agents. *Ib.*

A., being entitled to a reversionary interest in a fund in court, assigns it to B., and afterwards to C. C. obtains an order that the fund shall not be transferred without notice to him, and has the order entered at the accountant-general's office :—Held, that he thereby gained priority over B., who had not taken similar precautions. *Greening* v. *Beckford*, 5 Sim. 195.

By his will a testator devised and bequeathed his real and personal estate to two trustees to sell the same, and, after paying an annuity, to divide the proceeds among a certain class, of which F. P. D. was one. A suit was instituted for the administration of the testator's estate. F. P. D., by deed, dated in 1837, assigned his share to B. D. (one of the trustees), to secure advances. By deed, dated in 1844, he assigned his share to S. S., to secure advances, and notice of that deed was given by S. S. to the trustees. By an order in the cause, dated in 1845, the real estates of the testator were directed to be sold, and the produce to be paid into court and invested, and the stock representing the purchase-money stood to the credit of the cause. In 1846 C. J. obtained and registered a judgment against F. P. D., and by a judge's order, under the statutes 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, it was ordered that the stock should stand charged with the amount for which the judgment was obtained ; and the judge's order was filed in November, 1848, in the office of the accountant-general. B. D., the first assignee, took no steps beyond his deed, nor did S. S. obtain any stop-order :—Held, under these circumstances, that C. J. did not obtain any priority over S. S. *Bearcliffe* v. *Dorrington*, 19 L. J., Ch. 331 ; 14 Jur. 1101.

The priority of incumbrancers on a fund in court is determined by the dates of their stop-orders ; and in ascertaining this priority, the court will disregard all divisions of time less than a day, and allow all incumbrancers who obtain stop-orders the same day to rank pari passu. *Kent, Ex parte, Rawlins' Estate, In re*, 19 W. R. 596.

A first assignee of A.'s interest in a fund obtained a stop-order which was subsequent in date to a duly registered composition deed, by which he had assigned all his property for the benefit of his creditors. The trustee of the composition deed also obtained a stop-order subsequently to that of the first assignee :—Held, that the first stop-order, although subsequent in date to the registered composition deed, prevailed over it, and entitled the first assignee to the fund. *Birmingham Banking Co.* v. *Carter*, 20 W. R. 354.

A legatee of a reversionary interest under a will, which had been paid into court in an administration suit, presented a petition for liquidation in March, 1873, and a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop-order on the fund in court. In November, 1876, he assigned his interest to E., without notice of the liquidation, who also obtained a stop-order on the fund. Afterwards, the trustee in liquidation obtained a stop-order. The plaintiffs purchased the interest of the trustee in liquidation and of J., and contracted to sell the legacy to the defendant. The defendant required E.'s mortgage to be abstracted as an incumbrance on the estate :—Held, by Jessel, M.R., that E. having obtained a stop-order before the trustee in liquidation, his interest was prior to that of the trustees and was an incumbrance on the estate. *Bright's Settlement, In re* (13 Ch. D. 413 ; 42 L. T. 308 ; 28 W. R. 551), considered :—Held, by the court of appeal, that the question of the priority of E.'s incumbrance was too doubtful to justify the vendor in omitting it from the abstract ; and the decision of the Master of the Rolls was accordingly affirmed. *Palmer* v. *Locke*, 18 Ch. D. 381 ; 45 L. T. 229.

The assignee of a fund in court, whether in bankruptcy or otherwise, must obtain a stop-order to perfect his title ; therefore an assignee for value who obtained a stop-order, although not until after the bankruptcy of the assignor, had priority over the assignee in bankruptcy, who had omitted to obtain a stop-order. *Stuart* v. *Cockrell*, 39 L. J., Ch. 127 ; L. R. 8 Eq. 607.

"Order and Disposition."]—A person entitled to a contingent reversionary interest in stock (standing in the name of the accountant-general, to the account of himself and others) assigned the same to A., his solicitor, absolutely, who obtained a stop-order. A., acting as solicitor of B., mortgaged the share so assigned to him to B., but neither B. nor A. obtained any stop-order in respect of the mortgage, nor gave any notice of the mortgage to any person having control over the fund. A. became bankrupt, and afterwards the reversion fell into possession, and the fund became distributable, when the share of the party originally entitled was transferred to the account of himself and A., and others, his incumbrancers. The mortgagee of A. petitioned for payment of this share, but the assignees in bankruptcy claimed the funds as being in the order and disposition of A. :—Held, that as the mortgagee had not obtained a stop-order, nor given notice, he was not entitled against the assignees. *Bartlett* v. *Bartlett*, 1 De G. & J. 127 ; 26 L. J., Ch. 577 ; 3 Jur. (N.S.) 705 ; 5 W. R. 541.

Where all the interest of a residuary legatee, under a will, was mortgaged, and part of the testator's estate consisted of a fund paid into court, in a suit for the administration of his estate, and another part had been paid into court, not in that suit, but under the trustee relief act, and the mortgagee gave notice to the executor under the will, but did not obtain a stop-order on the funds in court, and the mortgagor became bankrupt :—Held, that the notice to the executor was sufficient, and affected every portion of the estate, although part of such estate might have been paid into court in a suit, or under the trustee relief act, and therefore that it was not necessary for the mortgagee to obtain a stop-order on the funds in court, in order to take those funds out of the order and disposition of the bankrupt. *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8 ; 31 L. J., Ch. 633 ; 8 Jur. (N.S.) 185 ; 6 L. T. 305 ; 10 W. R. 310.

The solicitor of the plaintiff in a suit in chancery gave the petitioners a charge upon the costs due to him in the suit, and served notice of the charge on the parties to the suit. Afterwards, the cause coming on for further directions, a certain fund was directed to be paid into court, and the solicitor's costs to be paid out of it. The petitioners obtained no stop-order on the fund. The solicitor having become bankrupt, the petitioners applied to have the fund transferred to them :—Held, that the petitioners had done all that could be reasonably done for rendering their security efficacious ; that the fund was therefore

not in the order and disposition of the bankrupt with the consent of the true owners; and the court ordered it to be transferred to the petitioners. *Day* v. *Day*, 1 De G. & J. 44; 26 L. J., Ch. 585; 3 Jur. (N.S.) 782; 5 W. R. 701.

Order charging Cash standing to Credit.]—A charging order upon cash standing to the credit of the debtor in the chancery division in the name of the paymaster-general may be made ex parte, and in order to give effect to it it is not necessary to obtain a stop-order; but notice given to the paymaster-general will be sufficient to secure priority. *Brereton* v. *Edwards*, 21 Q. B. D. 226; 60 L. T. 5; 37 W. R. 47—C. A. Affirming, on other grounds, 52 J. P. 647.

Where the fund is standing in the name of the accountant-general of the court of chancery, the practice of the office is to enter a memorandum of every charging order left at the office; but such notice is not treated as any restraint, nor as equivalent to a stop-order. No entry is made of the notice of any other assignment. The accountant-general is not a trustee of the funds committed to him, but merely the agent of the court. The trustees who have paid the fund into court are the trustees of it until the court has in some way dealt with it, and then the court becomes the trustee. Therefore, notice to the accountant-general of an assignment of funds in his hands is of no avail against a stop-order afterwards obtained by a subsequent purchaser without notice. *Warburton* v. *Hill*, 1 Kay, 470; 23 L. J., Ch. 633; 2 Eq. R. 441; 2 W. R. 365.

Fund carried to separate Account.]—A stop-order upon a person's share of a fund in court, is not affected by the carrying over of the share to the separate account of such person and his incumbrancer. *Lister* v. *Tidd*, L. R. 4 Eq. 462; 15 W. R. 975.

In an administration action under an order made in the presence of the plaintiffs, a fund was carried to the separate account of an annuitant and her issue, the dividends thereon to be paid to her for her life, and she charged her interest in favour of persons who obtained stop-orders thereon. She was afterwards found to be indebted to the estate, and the plaintiffs sought to have the dividends applied in satisfaction of her liability in priority to the charges she had created:—Held, that the effect of carrying the fund to a separate account being to release it from the general questions in the cause, the persons who had made the advances on the faith of the order were entitled to priority over the plaintiffs' claim. *Eyton, In re, Bartlett* v. *Charles*, 59 L. J., Ch. 733; 45 Ch. D. 458; 63 L. T. 336; 39 W. R. 135.

Administration Action—Creditors.]—In an administration suit all the certified debts were paid, and the residuary legatees were declared entitled to the estate of the testator subject to an annuity, to provide for which a fund was retained in court to the credit of the cause. The fund in court was assigned for value by the residuary legatees, and stop-orders were obtained. Afterwards other creditors of the testator established their claim in another suit, to which the executor of the testator and the residuary legatees were parties:—Held, that these creditors were entitled to payment out of the fund in court in priority to the assignees of the residuary legatees. *Hooper* v. *Smart*, 1 Ch. D. 90.

Undertaking to Pay.]—Where a person who is liable to pay a debt obtains an order for payment to him of that sum out of a fund in court on his undertaking to pay it to the proper party, the latter is entitled to receive the amount though it has subsequently been assigned to a person who obtains a stop-order. *Siederfield* v. *Thacker*, 18 Beav. 588.

Restraint on Capital or Income.]—A person entitled to a life interest in a fund in court having settled such interest on his marriage, subsequently, without disclosing the settlement, mortgaged his interest, and the mortgagees obtained a series of stop-orders on the fund, in none of which was the income of the fund expressly mentioned:—Held, that, upon the true construction of the stop-orders the mortgagees were entitled to the income of the fund in priority to the trustees of the settlement. *Mack* v. *Postle*, 63 L. J., Ch. 593; [1894] 2 Ch. 449; 8 R. 339; 71 L. T. 153.

Assignment of further Share of Fund.]—Assignees of shares in a fund in court obtained a stop-order, which extended over the whole fund; they afterwards became assignees of another share, but obtained no other stop-order:—Held, that a subsequent assignee of that share without notice, who had obtained a stop-order, would have priority over them. *Macleod* v. *Buchanan*, 4 De G. J. & S. 265; 3 N. R. 623; 33 L. J., Ch. 306; 10 Jur. (N.S.) 223; 10 L. T. 9; 12 W. R. 514.

Notice to Trustees.]—A first incumbrancer on a reversionary legacy gave due notice to the trustees. A fund was afterwards brought into court to provide for the legacy, and a second incumbrancer obtained the first stop-order on it:—Held, that he did not thereby obtain priority over the first incumbrancer. *Livesey* v. *Harding*, 23 Beav. 141.

As against a stop-order obtained by an incumbrancer upon a fund in court in an administration suit, and in respect of which orders have been made directing payment of interest to the parties entitled, notice to the trustees, though given by another incumbrancer before the stop-order was obtained, does not give priority. *Pinnock* v. *Bailey*, 52 L. J., Ch. 880; 23 Ch. D. 497; 48 L. T. 811; 31 W. R. 912.

A stop-order on a fund in court, in an action to administer the trusts of an original settlement, obtained by an assignee of a cestui que trust's interest in the fund under a derivative settlement, does not give the assignee priority over an earlier assignee who has given notice, though subsequently to the stop-order being obtained, to the trustee of the derivative settlement. *Stephens* v. *Green*, 64 L. J., Ch. 546; [1895] 2 Ch. 148; 12 R. 252; 72 L. T. 574; 43 W. R. 465—C. A.

Notice of Prior Incumbrance to Second Incumbrancer.]—A second incumbrancer of a fund in court, who at the time of taking his security had notice of the existence of the first incumbrance, cannot, by obtaining a stop-order, gain priority over the first incumbrancer, even although the latter never obtains a stop-order. *Holmes, In re*, 55 L. J., Ch. 33; 29 Ch. D. 786—C. A.

An incumbrancer who obtains a stop-order on a fund in court does not lose his priority over a previous incumbrancer who has obtained no stop-order, by the fact that he had notice of the

previous incumbrance at the time of obtaining the stop-order, if he had no notice of it when he took his security. *Elder* v. *Maclean* (5 W. R. 447) observed upon. *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460 ; 54 L. T. 326 —C. A. Affirming 53 L. J., Ch. 996 ; 32 W. R. 791.

A trustee who had himself made advances on a fund which was being administered by the court should have obtained a stop-order on the fund, and not having done so was postponed to another incumbrancer, who had obtained a stop-order. A. and B. made advances to C. upon his share in a fund which was being administered by the court. A.'s advance was made long prior to B.'s, but A. did not obtain a stop-order but B. did. Between the date of B.'s advance and the date of his stop-order, an order was made directing payment to A. of part of the fund in court in part satisfaction of A.'s debt. B., who was the plaintiff in the cause, had the carriage of this order. On the question whether the debt of A. or B. had priority :—Held, that as B. had notice of A.'s debt by the order directing payment to him, A. was entitled to priority over B. *Elder* v. *Maclean*, 3 Jur. (N.S.) 283 ; 5 W. R. 447.

l. PAYMASTER OR ACCOUNTANT-GENERAL.

Duties and Liabilities.]—Where money is directed, by act of parliament, to be paid to the accountant-general, he is bound by the act to receive it, and the court will not make an order for that purpose. *Anon.*, 1 Ves. J. 56.

Where a decree directed a sum to be paid into the hands of the accountant-general, he refused to receive a part of the sum without an order. *Payne* v. *Collier*, 1 Ves. J. 170.

The accountant-general of the court of chancery has no right to attend to any order inconsistent with, or varying the order of this court, without its special direction so to do. *Gore* v. *Gore*, 4 Ir. Eq. R. 164.

The accountant-general of the court of chancery is not a trustee of the funds committed to him, but merely the agent of the court. *Warburton* v. *Hill*, 1 Kay, 470 ; 23 L. J., Ch. 633 ; 2 Eq. R. 441 ; 2 W. R. 365.

Where the fund is standing in the name of the accountant-general of the court of chancery, the practice of the office is to enter a memorandum of every charging order left at the office ; but such notice is not treated as any restraint, nor as equivalent to a stop-order. No entry is made of the notice of any other assignment. The accountant-general is not a trustee of the funds committed to him, but merely the agent of the court. The trustees who have paid the fund into court are the trustees of it until the court has in some way dealt with it, and then the court becomes the trustee. Therefore, notice to the accountant-general of an assignment of funds in his hands is of no avail against a stop-order afterwards obtained by a subsequent purchaser without notice. *Ib.*

Brokerage.]—Where bank stock is transferred to the accountant-general with a direction to pay the dividends to the tenant for life only a percentage off the dividends is deducted, unless otherwise ordered by the court. *Dale* v. *Hayes*, 2 Sm. & G. (App.) vii.

Upon a petition to invest the purchase-money of lands purchased by a railway company, the whole purchase-money was ordered to be invested, without deducting the brokerage thereon, the petitioner undertaking to pay such brokerage, and the railway company was ordered to pay the petitioner the amount of the brokerage paid by him. *Kendal and Windermere Ry., In re, Braithwaite's Trust*, 1 Eq. Rep. 163 ; 1 Sm. & G. (App.) xv. ; 22 L. J., Ch. 915 ; 17 Jur. 753.

Investment of money paid into court by a railway company was ordered to be made without deduction for brokerage ; such brokerage being paid by the petitioner, and allowed him in his costs against the company. *Wilson, In re*, 1 W. R. 504.

In the usual railway purchase-money investment petition, the investment is ordered deducting brokerage, the company paying such brokerage to the tenant for life with the other costs. *Harborough, Ex parte*, 2 Eq. Rep. 320 ; 23 L. J., Ch. 260 ; 17 Jur. 1045 ; 2 W. R. 53.

Railway purchase-money invested in 1844, and asked to be paid out by trustees of a settlement to mortgagees on the property, and that the company might pay brokerage both of investment and selling out, as well as costs of tenant for life and mortgagees appearing separately :—Held, that the investment being made before the recent rule of deducting brokerage made no difference, but it would be payable by the company, except in this case there had been no taxation of costs of investment, and therefore the company were only liable to brokerage on selling out ; and that mortgagees and tenants for life had a right to appear separately and have their costs. *Legh's Settled Estate, In re*, 2 W. R. 109.

On the usual petition for investment of railway purchase-money, a reference to the brokerage as payable by the company forms part of the order. *New College (Oxford) Ex parte, Buckinghamshire Ry., In re*, 2 W. R. 2.

Cheques.]—A cheque of the accountant-general was alleged to have been accidentally destroyed. The court, though not satisfied with the evidence of its destruction, directed the issue of a new cheque, on the ground that the other cheque, being more than a year old, would not be paid if presented. *Taylor* v. *Scrivens*, 1 Beav. 571.

The accountant-general had drawn a cheque in favour of a party who was entitled to a sum of money standing in the bank to the credit of the cause. Upon the application of a judgment creditor, an order was made to prevent the cheque from being delivered, without further order, to the party entitled to the fund. *Robinson* v. *Wood*, 5 Beav. 388 ; 12 L. J., Ch. 93.

W. C., being in receipt of an annuity payable out of stock standing in the name of the accountant-general, became indebted to F. C., who brought an action against him and obtained a judgment, upon which a fieri facias was issued, but nothing was found upon which to execute it. Upon half-a-year's annuity falling due, F. C. obtained an order stopping the accountant-general from parting with the cheque, but upon a petition the court declined to make an order authorising the sheriff to seize the cheque, or to direct it to be dealt with as if it was standing in the name of a trustee, and the petition was dismissed. The court, however, continued the order stopping the accountant-general from parting with the cheque. *Courtoy* v. *Vincent*, 15 Beav. 486 ; 21 L. J., Ch. 291.

A judgment creditor, on ascertaining that a sum of money was about to be paid in a cause to his debtor, applied by petition to the court that

the sheriff might be at liberty to seize in the accountant-general's office a cheque, by means of which the sum of money was to be paid out to the debtor:—Held, that under s. 12 of 1 & 2 Vict. c. 110, the cheque was liable to seizure, and that inasmuch as the cheque was in the hands of the accountant-general the application to the court was proper. *Watts* v. *Jefferyes*, 3 Macn. & G. 422; 15 Jur. 435.

In a creditors' suit an order is made for payment to four persons named in the master's report, and the cheque is drawn payable at the accountant-general's office in favour of the four. Two of those parties being dead, the accountant-general refuses to pay to the two:—Held, that the words "survivor or survivors of them" may be inserted in the order. *Jefferys* v. *Smith*, 11 W. R. 479.

XXII. RULES OF COURT.

a. *Generally*, 789.
b. *Irregularity and Noncompliance with.*
1. General Principles, 795.
2. Waiver, 797.
3. Particular Cases, 799.
4. Costs of—*See* COSTS.

a. GENERALLY.

Effect of Judicature Acts.]—In all cases at common law which are not provided for by the judicature acts, the proceedings are to be as they were before those acts; in all cases within the judicature acts, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can be to analogous proceedings before those acts—Per Brett, L.J. *Jackson* v. *Litchfield*, 51 L. J., Q. B. 327; 8 Q. B. D. 477; 46 L. T. 518; 30 W. R. 531.

The judicature acts and rules deal with procedure only, and do not confer any new right of action. *British South Africa Co.* v. *Companhia de Moçambique*, 63 L. J., Q. B. 70; [1893] A. C. 602; 6 R. 1; 69 L. T. 604—H. L. (E.)

An action in respect of a sum of less than 10*l.* cannot be maintained in the chancery division, the judicature acts not having enlarged the jurisdiction of the high court. *Westbury-on-Severn Sanitary Authority* v. *Meredith*, 55 L. J., Ch. 744; 30 Ch. D. 387; 52 L. T. 839; 34 W. R. 217—C. A. [By Rules of Supreme Court, 1883, the Chancery Consolidated General Orders of 1860 are repealed.]

—— **Most Convenient Practice adopted when no express Provision.**]—In cases where no rule of practice is laid down by the new orders, and there is a variance in the old practice of the chancery and common law courts, that practice is to prevail which is considered by the court most convenient. *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 49 L. J., Ch. 231; 13 Ch. D. 310; 41 L. T. 637; 28 W. R. 217—C. A.

When the rules of practice at common law and in equity do not agree, the more convenient practice is to be adopted. *Thomas* v. *Palin*, 21 Ch. D. 367; 47 L. T. 208; 30 W. R. 716—C. A.

"Cause then pending."]—A judgment was delivered before the rules of 1883 came into operation, by which the action was dismissed and the plaintiff was ordered to pay the costs. The taxing-master's certificate was made after the rules of 1883 had come into operation:—Held, that the latter rules applied as the action was a "cause then pending" within the meaning of the preface of the latter rules. *Boswell* v. *Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

Cause or Proceeding pending.]—A decree was made upon motion for decree by a vice-chancellor before the judicature act came into operation. No petition of appeal had been presented:—Held, that there was no cause, matter or proceeding pending within the Judicature Act, 1873, s. 22; that the appeal must be prosecuted in accordance with the new practice, and that no direction of the court as to the form and manner of proceeding was necessary. *Bartlam* v. *Yates*, 1 Ch. D. 13; 33 L. T. 338; 24 W. R. 19.

—— **Whether New or Old Practice applicable.**]—An answer prepared previously to the 1st November, but sworn on the 3rd November, 1875, was entitled "In Chancery." The clerk of records and writs objected to file it, on the ground that it should have been entitled "In the High Court of Justice, Chancery Division":—Held, that under the provisions of the directions of the 3rd November, 1875, the heading was correct, and that the answer should be filed. *Barwick* v. *Yeadon Local Board*, 33 L. T. 322; 24 W. R. 23.

In a suit pending on the 1st November, 1875, in which notice of motion has not been given under the old practice, the plaintiff must, at the time when he would have given such notice, join issue under the new practice, without filing affidavits in support of his case, unless by consent or special leave obtained on notice for the purpose. *Att.-Gen.* v. *Willshire*, 1 Ch. D. 89.

When a defendant in a suit pending on the 1st November, 1875, had not appeared, and failed to put in an answer:—Held, that the cause should proceed under the new practice, and the bill be treated as a statement of claim, so that the plaintiff might set down the cause on motion for judgment, under the Judicature Act, Ord. XXIX. r. 10. *Provident Permanent Building Society* v. *Greenhill*, 45 L. J., Ch. 272; 1 Ch. D. 624.

In a suit to set aside a settlement on the ground of fraud and surprise on the plaintiff, evidence was filed in reply tending to shew that he, at the time of executing the settlement, was of infirm mind. Upon the hearing of a motion for leave to use this evidence (which had been objected to as not being properly evidence in reply), the plaintiff asked for leave to amend the bill and go into fresh evidence. The cause was at issue before the 1st November, 1875; and the hearing had been fixed, and only accidentally postponed. Leave was given to the plaintiff to amend the bill, and go into further evidence. *Roe* v. *Davies*, 2 Ch. D. 729; 23 W. R. 606.

The court will not, on an ex parte application, direct proceedings in a pending suit to be continued under the old practice. *Perkins* v. *Slater*, 1 Ch. D. 83; 24 W. R. 39.

An application for leave to issue a writ of attachment, for the enforcement of an order perfected before the commencement of the judicature acts, cannot be made ex parte, but only upon notice, in accordance with the Judicature Act, 1875, Ord. XLIV. r. 2. *Anon.*, 24 W. R. 103.

In a suit pending on the 2nd November, 1875, the defendant, being infirm, could not put in an answer nor be attached for contempt. Leave was given to proceed to take the bill pro confesso, under the old practice. *Culley* v. *Buttifant*, 45 L. J., Ch. 200; 1 Ch. D. 84: 24 W. R. 55.

A suit in which a decree had been made, and which had become abated before the judicature act, revived according to the old practice. *Crane* v. *Loftus*, 24 W. R. 93.

Semble, that applications for an order to carry on proceedings under the Judicature Act 1875, Ord. L. r. 4, may be made to a judge at chambers. *Ib.*

In a suit pending on the 1st November, 1875, an attachment for want of answer may issue against a defendant under the old practice. *Garling* v. *Royds*, 45 L. J., Ch. 56; 1 Ch. D. 81; 25 W. R. 123.

—— **Power to Order Transfer.**]—The court of appeal has no jurisdiction to order the transfer of a suit instituted in the court of chancery before the judicature acts came into operation from the court of one vice-chancellor to that of another. The Lord Chancellor alone has jurisdiction to make such an order. *Hutley, In re, Beards* v. *Putt*, 33 L. T. 337.

The court of appeal has no jurisdiction to make an order for the transfer of a matter commenced by petition under the statutory jurisdication of the court of chancery before the Judicature Act, 1873, came into operation, from one judge to another. *Boyd, In re*, 1 Ch. D. 12.

Power of Judges to make Rules.] — The 22 & 23 Vict. c. 21, s. 26, gave power to the barons of the exchequer to make rules as to the process, practice and mode of pleading on the revenue side of the court, and to apply the common law procedure acts to that side of the court:—Held, that this power did not authorise the barons to make a rule giving a right of appeal on motions for a new trial, for a power to regulate the practice of a court implies no power to alter the extent or nature of the jurisdiction, and it is not to be presumed, without the clearest language of the legislature, that an inferior court should be entitled at discretion to impose jurisdiction on a superior court. *Att.-Gen.* v. *Sillem*, 4 N. R. 29; 10 H. L. Cas. 704; 10 Jur. (N.S.) 446; 10 L. T. 434; 12 W. R. 641.

The creation of a new right of appeal requires legislative authority. *Ib.*

The rules of Reg. Gen., H. T., 16 Vict., change the practice only as to written rules and rules by statute; all unwritten rules remain unchanged in so far as they are not inconsistent with the new rules. *Begg* v. *Forbes*, 13 C. B. 614; 2 C. L. R. 856; 23 L. J., C. P. 222.

The Lord Chancellor cannot, under the 15 & 16 Vict. c. 86, make orders altering the practice of the court as regulated by the consolidated general orders, without the advice and assistance of three other judges in chancery. The general orders of the court of the 6th October, 1866, are therefore invalid. *Short* v. *Roberts*, L. R. 2 Ch. 13; 15 L. T. 238. Affirming 12 Jur. (N.S.) 991; 15 W. R. 91.

The general orders in bankruptcy are made by the Lord Chancellor under the act of 1869, s. 78, and no question as to their validity can be entertained by the court. *Davies, In re*, 21 L. T. 685.

By the 33rd order of the 8th of May, 1845, having, under 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, the force of parliamentary enactment, power was given to the court in all suits to order service of a subpœna upon a defendant residing abroad. The 15 & 16 Vict. c. 86, abolished the subpœna and substituted for it the service of a copy of the bill, and empowered the judges of the court to make general rules and orders for carrying the purposes of the act into effect, and for regulating the times and mode and form of procedure. By the 7th rule of the 10th of the consolidated orders, the court is authorised to order service of a copy of the bill upon a defendant residing abroad:—Held, that this, being only an adaptation of the practice to the existing course and form of procedure, was an order which it was within the power of the judges of the court to make. *Drummond* v. *Drummond*, 36 L. J., Ch. 153; L. R. 2 Ch. 32; 15 L. T. 337. Affirming 14 W. R. 828.

The consolidated orders, and all other orders of the court made since the 3 & 4 Vict. c. 94, derive a statutory force from that act. *Ib.*

The general orders of 1860 have an equal statutory force with those of 1845. *Ib.*

The order of November 11th, 1862, r. 26, allowing interest on simple contract debts from the date of a winding-up order, is invalid, as not authorised by the Companies Act of 1862. *Herefordshire Banking Co., In re*, 36 L. J., Ch. 806; L. R. 4 Eq. 250; 17 L. T. 58; 15 W. R. 1056.

The 26th rule of the general order of November, 1862, is ultra vires. *East of England Banking Co., In re*, L. R. 4 Ch. 14; 19 L. T. 299; 17 W. R. 18.

Rule 2 (7) of Ord. LV. of the Rules of the Supreme Court, 1883, though it affects the jurisdiction, and not merely the procedure of the court, is not ultra vires, being in accordance with the power conferred by 18 & 19 Vict. c. 136, s. 16, and in fact intended to be made under the powers of that act, as well as under those conferred by the judicature acts. *London Corporation, Ex parte*, 53 L. J., Ch. 6; 25 Ch. D. 384; 49 L. T. 437; 32 W. R. 87.

Inherent Powers of Court of Chancery.]—The court of chancery has an inherent power, quite independently of statutory authority, to make orders regulating its own procedure. *Beavan* v. *Mornington (Countess)*, 8 H. L. Cas. 525; 30 L. J., Ch. 663; 6 Jur. (N.S.) 1123; 8 W. R. 669.

By the 5th section of the General Order of the Court of Chancery of the 7th August, 1852, it is provided, "that no inrolment of any decree, order or dismission shall be allowed after the expiration of five years from the date thereof." B., for the purpose of appealing to the House of Lords, applied to the Lord Chancellor for leave to inrol a decree, notwithstanding the lapse of five years. The application was refused:—Held, that although the order of 1852 was practically to shorten the time of appeal allowed by the standing orders of the House of Lords, the order of 1852 was not ultra vires and void. *Ib.*

The time for inrolling decrees is matter of mere procedure, which the court of chancery, by its inherent authority, may regulate. *Ib.*

Dispensing with Compliance—By Court.]—Jurisdiction or discretionary power of the court by the effect of the statute 8 & 9 Vict. c. 105, s. 2,

to vary or relax the terms of the general orders of August, 1841. *Medhurst* v. *Allison*, 4 Hare, 479.

To prevent a supersedeas under the General Order in Bankruptcy (26th June, 1793), the strongest proof required of the purpose bonâ fide to prosecute the commission prevented by accident, illness, adjudication too late for the Gazette, &c. *Freeman, Ex parte*, 1 Ves. & B. 43.

Particular circumstances would take a case out of the general order (26th June, 1793). *Ib.*

It is no objection to the granting the certificate that the date of the signatures was attached by third person, if it be so done before the creditor signs his name. General orders may be dispensed with under circumstances in discretion of court. *Reynolds, Ex parte*, 1 Deac. & C. 459; Mont. 508; 1 Mont. & Bli. 263.

The orders of 26th August, 1841, having been made in pursuance of the provisions of 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, are obligatory upon the court with the force and effect of a statutory enactment, and the court has no discretionary power of dispensing with a literal compliance with their requisitions. *Calvert* v. *Gandy*, 14 L. J., Ch. 141; 9 Jur. 122.

Therefore, where a plaintiff had permitted the period limited by the 39th order of August, 1841. to expire before setting down the cause for argument, upon an objection taken by the answer for want of parties, the court refused to order the cause to be set down, on the ground that it had no jurisdiction. *Ib.*

Semble, that the court has power to relax the operation of its general rules of March, 1834. *Atkinson* v. *Ball*, 3 Jo. & Lat. 374.

The general orders of the court are to be regarded as part of the statute under the authority of which they were made, and not to be departed from on special considerations, but bind the court, unless there is something in the conduct of the party insisting on them which disentitles him from relying on them. *Davies* v. *Davies*, 10 Ir. Eq. R. 614.

The general orders are not so absolutely binding on the court that they cannot be in any instance relaxed. The general merits of the case and the like are no grounds for departing from them, but only the conduct of the parties or events in the course of the suit; and if in the case there appear the ordinary grounds of equitable relief, such as fraud, surprise or accident, the court may give relief against the strict construction of the orders. *Downing* v. *Hodder*, 12 Ir. Eq. R. 371.

The orders of the court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. The time allowed by the 12th order, for procuring the report as to the insufficiency of an answer extended, the drawing up of the order having been delayed by the offices being closed, and the plaintiff having through inadvertence omitted to obtain the master's certificate that further time was necessary to enable him to make his report. *Burrell* v. *Nicholson*, 6 Sim. 212.

The general orders are not imperative; but the court, on a special case being made, has the power of departing from the strict rule. *Daniel* v. *Falmouth*, 5 L. J., Ch. 69.

The affidavit of the plaintiff's solicitor cannot, in any case, be dispensed with, if expressly required by the orders of the court. *Christ's Hospital* v. *Grainger*, 10 Jur. 37.

The court has power to dispense with the general orders, if the circumstances and justice of the case require it. *Ferrand* v. *Bradford Corporation*, 21 Beav. 422; 8 De G. M. & G. 63; 25 L. J., Ch. 389; 2 Jur. (N.S.) 360; 4 W. R. 350.

The authority of the 40th order of the 7th of August, 1852, does not, by expressly reserving power to the court to enlarge the time for doing certain specified acts, abridge the inherent authority of the court to dispense with the orders in cases where that order does not apply. *Ib.*

Any judge of the court may dispense with the general orders of the court where justice requires it, and this jurisdiction is not impliedly excluded by the 40th order of August, 1852, from cases not within it. *Ib.*

—— **By Masters.**]—The masters have no power to dispense with or relax the general orders of the court. *Smith* v. *Webster*, 3 Myl. & C. 244; 1 Jur. 914.

Under the 3 & 4 Will. 4, c. 94, s. 13, and the 13th amended order of 1828, the master is put in place of the court, with respect to enlargement of publication, amendment of bill and time to plead, answer or demur, and may dispense with the order of 1828. *Miltown* v. *Stewart*, 1 Jur. 940.

Under the statute 3 & 4 Will. 4, c. 94, s. 13, the masters have the same jurisdiction to dispense with the strict letter of the general orders, in the cases mentioned in the act, as the court itself has. *Milbanke* v. *Stevens*, 8 Sim. 160; 7 L. J., Ch. 107; 2 Jur. 759. But see *Lloyd* v. *Wait*, 4 Myl. & C. 257; 3 Jur. 668.

Exceptions to the answer filed 16th March, the time for obtaining the order of reference commenced on the 24th, which was Good Friday, but the secretary's office was closed on the 23rd, and continued closed till the 3rd of April. The order was obtained, and served, and left at the master's office on the 4th, and the warrant obtained on the 6th, and appointed for the 12th:—Held, that the order might be carried into effect (relaxing the 5th order of April, 1828); but that the application should be made to the court, and not to the master. *Smith* v. *Webb*, 1 Jur. 524.

Effect of Practice upon.]—Effect of continued practice against an order of court. *Boehm* v. *De Tastet*, 1 Ves. & B. 327.

Repeated decisions, forming a series of practice, may amount to the reversal of an order. *Ib.*

Rules of practice will always yield to special circumstances verified by evidence. *Butler* v. *Bulkeley*, 2 Swanst. 374.

In equity, the rules of court, in respect of practice, are to be strictly observed only where the occasions which rendered them requisite are pressing and require their observance. *Vinter* v. *Bickley*, 12 Price, 460.

Where indulgence cannot be given without doing what is most unusual, the court will adhere to the practice intended to be established by the general order. *Wilson* v. *Parker*, 1 Coop. C. C. 346.

The general order of 1725, limiting the time of appeal to one month, cannot prevail against the practice contrary to it. *Wood* v. *Griffith*, 19 Ves. 550.

One of sworn clerks of chancery files bill against all the six clerks, praying that agree-

ment between them regulating practice might be set aside, order of Master of Rolls rescinded, and other regulations established. Demurrer allowed, that plaintiff had shewn no title for court to interfere. *Hill* v. *Sewell*, 2 Bro. P. C. 541.

An order made for the regulation of the practice of the court may be superseded by a long and uniform practice, establishing a different and more convenient rule; and, therefore, where it was certified by the clerks of records and writs, that for seventy years it had been the uniform practice to allow six calendar months for inrolment of decrees and orders:—Held, that that period had been substituted for the period limited for the same purpose by Lord Clarendon's Order of 1661. *Mann* v. *Ricketts*, 9 Jur. 543.

Form in Schedule—Sufficiency.]—When the forms given in the schedule to the orders do not in words meet the case under consideration, counsel should alter them to meet it, if it be within the spirit of the order. *Hanson* v. *Games*, 19 L. J., Ch. 571; 14 Jur. 543.

A statement of claim in a salvage action was drawn in the Form No. 6, of appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7, for a further and better statement of claim or particulars:—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in appendix C., No. 6, should generally be followed. *The Isis*, 53 L. J., P. 14; 8 P. D. 227; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. C. 155.

"The forms used in the appendix shall be followed with such variations as circumstances may require," means that those forms can only be varied for the purpose of making them to be in accordance with the terms of the order. *Boswell* v. *Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

Costs—New Orders.]—On a fair question upon new orders, upon which there has been no decision, the parties, in point of costs, are entitled to indulgence. *Watts* v. *Penny*, 11 Beav. 435; 18 L. J., Ch. 150; 13 Jur. 578.

b. Irregularity and Noncompliance with.

1. General Principles.

See R. S. C., 1883, Ord. LXX.

Amending Pleading.]—The irregular amendment of a bill is not a ground for taking it off the file, if the record can be restored to the state in which it was before the amendment was made; but if, in effecting such irregular amendment, a new ingrossment has been made, such new ingrossment may be ordered to be taken off the file. *Att.-Gen.* v. *Cooper*, 3 Myl. & C. 258; 8 L. J., Ch. 19; 2 Jur. 917.

Applicants also Irregular.]—The court will not suffer the proceedings in a cause to be impeached on the ground of irregularities, of which the persons claiming have been themselves the authors; and if all persons interested in the subject-matter of the suit have been substantially parties to all subsequent proceedings, none of them can be permitted to escape from the effect of such subsequent proceedings, by shewing prior irregularities; and no difference in this respect is caused by the circumstance that some of such parties are infant plaintiffs. *Morison* v. *Morison*, 4 Myl. & C. 215.

During the long vacation, the defendant, for the purpose of obtaining a reference to the master, procured the record and writ clerk's certificate, which was marked at the public office with the name of the master in rotation. He neglected, however, to return it to the record and writ clerk to be filed. In the next term, the plaintiff obtained a reference of exceptions, as to insufficiency, to another master, as if there had been no previous reference, and who certified the answer insufficient:—Held, that the latter proceeding was irregular, and that the defendant was not bound by the certificate; but as the defendant himself had been irregular, the court would not discharge the certificate simply so as to dissolve the injunction and make the answer sufficient, but did so without prejudice to the injunction, and referred the exceptions to the proper master on the usual terms. *Suffield (Lord)* v. *Bond*, 10 Beav. 146.

Bad Faith.]—Persons guilty of bad faith will not be allowed by the court to avail themselves of the strictness of the rules; and where an order to dismiss had been so obtained it was discharged with costs. *Talbot* v. *Keay*, L. R. 8 Eq. 610.

Effect on Jurisdiction.]—Mode in which a petition presented, under an act of parliament, by which the court derives its jurisdiction, ought to be intituled. By irregularity in the hearing of such petition, the court does not lose its jurisdiction therein. *Law, In re*, 4 Beav. 509; 11 L. J., Ch. 118; 6 Jur. 615.

Sustaining irregular Order.]—The rule is general, that the court will not, on an application to discharge an order of course, for irregularity, sustain it as an order obtained adversely on merits. *Brooks* v. *Purton*, 4 Beav. 494.

Order cannot be abandoned.]—A party who has served, and proceeded on an irregular order of course, is not at liberty to abandon it upon tender to his adversary of the costs. The order must be considered as a valid and subsisting order, until it is disposed of in some regular course, and when costs are due to a party the amount must be ascertained in a regular course. *Pearce* v. *Gray*, 4 Beav. 127; 10 L. J., Ch. 353.

Where an irregular order has been obtained, no subsequent order to the same effect can be had until the former has been discharged. *Ib.*

Order cannot be disregarded.]—A party served with an order obtained ex parte may be guilty of contempt for disobedience thereof, in a case where the order ought not to have been made. *Fennings* v. *Humphrey*, 4 Beav. 1; 10 L. J., Ch. 251; 5 Jur. 455.

A party is not at liberty to disregard an order of the court, although it is irregular, but ought to move to discharge it. *Wilkins* v. *Stevens*, 10 Sim. 617; 9 L. J., Ch. 299; 5 Jur. 403. S. P., *Chuck* v. *Cremer*, 2 Ph. 113; 1 Coop. C. C. 338; 16 L. J., Ch. 92; *Blake* v. *Blake*, 7 Beav. 514.

Chancery—Common Law.]—Court of chancery less indulgent than courts of common law to

parties neglecting to comply with rules of procedure. *Magan* v. *Magan*, 16 Jur. 587; 1 Coop. C. C. 15.

Dispensing with strictness of Rules.]—*See* supra, col. 793.

2. Waiver.

Erroneous Acts.]—The principle of waiver applies to irregularity only, and not to erroneous acts. *Levi* v. *Ward*, 1 Sim. & S. 334; 1 L. J. (o.s.) Ch. 77.

By taking Step.]—Whoever, after notice of an irregularity, takes any steps in the cause, or lies by whilst his adversary takes steps, in confidence that he is regular, precludes himself from redress when the irregularity is merely technical. *Riky* v. *Kemmis*, Beat. 322.

Mistake in title of process rectified, defendant by putting in answer having acquiesced. *Bennet* v. *Button*, Dick. 135.

Acquiescence—Delay.]—An objection of mere form, not going to the substance of the case, should be taken speedily; or if a party, being aware of such objection, allows his adversary to take consequential proceedings without noticing it, he will not be allowed afterwards to raise it. *Steele* v. *Plomer*, 2 Ph. 780. S. P., *Tarbuck* v. *Tarbuck*, 4 Beav. 149. *Bartrum*, *In re*, 10 L. T. 257; 12 W. R. 660.

See ante, WRIT OF SUMMONS, col. 144.

Where the master has taken an account, according to the old method, by charge and discharge, and not in the form of debtor and creditor, as directed by the 61st order of April, 1828, a party who has once acquiesced in the proceeding cannot afterwards object to that course. *Weale* v. *Rice*, 4 L. J., Ch. 17.

Waiver of irregularity by examining before the master without a previous state of facts. *Willan* v. *Willan*, 19 Ves. 590; G. Coop. 291. *See* 2 Dow, 274.

A defendant, whose answer had been referred on exceptions for insufficiency, attended a warrant before one of the masters, and then objected that the cause was referred to one of the other masters, but raised no other objection. He afterwards moved to discharge the order, referring the exceptions on the ground that it had not been served within the time allowed by the orders of the court:—Held, that he had waived this objection by not bringing it forward in the first instance. *Hunter* v. *Capron*, 12 L. J., Ch. 142; 7 Jur. 785.

Where a defendant who had been served out of the jurisdiction with a writ appeared and objected to the power of the court to issue it under the circumstances:—Held, that the application was too late under Ord. LXX. r. 2. *Tozier* v. *Hawkins*, 15 Q. B. D. 650.

Waiver of irregularity in an order to sue in formâ pauperis by laches. *St. Victor* v. *Devereux*, 9 Jur. 519.

Where in a proceeding before the master, the defendant, by acquiescence or omission to object, permits the other party and master to proceed as if he did acquiesce, he comes too late if he does not come at the first opportunity to complain of the irregularity. *Davis* v. *Franklin*, 2 Beav. 369; 9 L. J., Ch. 139.

Objection to Jurat.]—Objections to the form of a jurat of an answer cannot be waived by the parties to the suit. *Pilkington* v. *Himsworth*, 1 Y. & Coll. 612; 5 L. J., Ex. Eq. 47.

Plea of matter of record, with averments of matter in pais, must be filed upon oath: therefore, plea of the statute 32 Hen. 8, c. 9, against selling pretended titles, with the necessary averments of want of possession, &c., not being on oath, ordered to be taken off the file, though set down by the plaintiff for argument; this irregularity not admitting waiver. *Wall* v. *Stubbs*, 2 Ves. & B. 354; 15 R. R. 210.

An insufficient attestation not waived by answer. *Hutchinson*, *Ex parte*, *Weller*, *In re*, Mont. 130.

Taking Office Copy.]—To prevent decree pro confesso, defendant should have not only the answer on file, but also a receipt for costs. The answer being actually filed without payment or tender of costs, the defendant was remanded to give an opportunity of moving to take it off the file for irregularity, but, plaintiff having taken an office copy of answer, that course failed. *Sidgier* v. *Tyte*, 11 Ves. 202.

Taking an office copy of an answer, not knowing of an irregularity in its title, is not a waiver. *Fry* v. *Martell*, 4 Beav. 485; 5 Jur. 1194.

A defendant, being in contempt for want of an answer, filed a demurrer and answer, and the plaintiff took an office copy:—Held, that the filing the demurrer and answer being irregular they ought to be taken off the file with costs, and that the taking an office copy was no waiver of the irregularity. *Att.-Gen.* v. *Shield*, 11 Beav. 441; 18 L. J., Ch. 176; 13 Jur. 330.

Irregularity of subpœna to hear judgment waived, by appearing on a motion to advance the cause, and not then taking the objection. *Carvick* v. *Young*, Jac. 524.

Obtaining Time.]—A formal objection to a notice of motion is waived by the party appearing and requesting further time to oppose it. *Morland*, *Ex parte*, 3 Deac. & C. 248.

Under a decree in a special form directing the master to take trust accounts, the master allowed special interrogatories without requiring a previous state of facts:—Held, that there was no irregularity, and also that there had been a waiver by the accounting party obtaining time to put in his examination thereto. *Allfrey* v. *Allfrey*, 12 Beav. 292; 19 L. J., Ch. 199; 14 Jur. 427.

Appearance.]—A defendant, having filed a plea and answer, obtained at the rolls an order nisi to dissolve the common injunction:—Held, irregular; but the plaintiff having afterwards appeared before a vice-chancellor, and undertaken to shew cause on the merits, held, secondly, that this was a waiver of the irregularity; and, thirdly, that the waiver might be taken notice of on a motion to discharge the order of course at the rolls. *St. John* v. *Phelps*, 12 Beav. 606. S. P., *Wavell*, *In re*, 22 Beav. 634.

An order was made by the vacation judge, on the ex parte application of the plaintiffs, for service of the writ and notice of motion on the solicitors and at the place of business in England of a foreigner residing out of the jurisdiction. Without formally entering an appearance the defendant filed affidavits in opposition to the motion and instructed counsel, who opposed the motion on the merits:—Held, that the

defendant had thereby waived the right to raise any objection as to the irregularity of the order, and must be treated as if he had been properly served and had formally appeared; that the fact that the ex parte order had been passed and entered did not prevent the right of the defendant to move to discharge it; but that r. 12 of Ord. LXIII. did not apply to such a case, and that the proper mode of proceeding (if there had been no such order as aforesaid) would have been to apply not to the court of appeal or the vacation judge, but to the judge to whose court the action was assigned, to discharge the order of the vacation judge. *Boyle* v. *Sacker*, 58 L. J., Ch. 141; 39 Ch. D. 249; 58 L. T. 822; 37 W. R. 68—C.A.

And *see* WRIT OF SUMMONS, supra, A. 9, and APPEARANCE—MOTIONS, B. 3.

By inadvertence, an order referring an answer upon exceptions was directed to Master K. as the master in rotation, the cause being already in the possession of Master B. The exceptions were argued on both sides, before Master B., acting for Master K., who, after overruling an objection to the regularity of the order, allowed the exceptions, and gave further time to answer:—Held, upon motion to discharge the order, that the irregularity had been waived by the defendant arguing the exceptions. *Lloyd* v. *Peers*, 20 L. J., Ch. 87. S. P., *McRae, In re, Forster* v. *Davis*, 53 L. J., Ch. 1132; 26 Ch. D. 16; 49 L. T. 544; 32 W. R. 304.

Answering Affidavit.]—If a party answer an affidavit not filed until after the notice of motion, it cures the irregularity, and he cannot object to its being used on the motion. *O'Brien* v. *Peebles*, 7 Ir. Eq. R. 558.

Answering an affidavit is a waiver of any objection which might be taken to it on the ground of notice not having been given that it was to be used. *Blackmore* v. *Glamorganshire Canal Co.*, 5 Russ. 151.

Affidavits in support of petition, filed after petition day, cannot be read; but if a party knowing of the irregularity answers them, the objection is waived; but secus, if he did not know of it. *Bury, Ex parte*, Buck, 393. S. P., *Smith, Ex parte*, id. 395.

Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition that they were filed before the petition was presented. *Gilpin, Ex parte*, 1 Glyn & J. 183.

Acceptance of Costs.]—Where the plaintiff amended without requiring further answer, and omitted to call for the defendant's office copy:—Held, that the acceptance by the defendant's clerk of the 20*s.* costs of amendment was a waiver of the plaintiff's irregularity, and a motion for leave to answer, notwithstanding the replication, refused, but without costs. *Boswell* v. *Tucker*, 2 Keen, 188.

The acceptance of the 20*s.* costs, by the clerk in court of the defendant, is a waiver of the irregularity of a second order obtained as of course. *Tarleton* v. *Dyer*, 1 Russ. & M. 1. S. P., *Hair* v. *Woodbridge*, id. 5, n.

3. Particular Cases.

Judgment irregularly signed.]—A judgment irregularly signed is not a mere noncompliance with the rules which can be remedied under Ord. LXX. r. 1. *Anlaby* v. *Prætorius*, 57 L. J., Q. B. 287; 20 Q. B. D. 764; 58 L. T. 671; 36 W. R. 487.

Notice of Motion.]—A party served with an irregular notice of motion is not bound to appear and will not receive his costs of so doing. *Daubney* v. *Shuttleworth*, 45 L. J., Ex. 177; 1 Ex. D. 53; 34 L. T. 357; 24 W. R. 321.

A notice of motion that did not state that leave had been obtained to serve short notice is irregular, but such irregularity may be disregarded by the court. *Dawson* v. *Beeson*, 52 L. J., Ch. 563; 22 Ch. D. 504; 48 L. T. 407; 31 W. R. 537.

Attachment of Person.]—*See* ATTACHMENT.

Service of Affidavits.]—On motion to set aside an award, the omission to serve affidavits with the notice of motion was disregarded. *Wyggeston Hospital and Stephenson, In re*, 54 L. J., Q. B. 248; 52 L. T. 101; 33 W. R. 551.

Form and Service of Writs.]—*See ante*, WRIT OF SUMMONS, cols. 126 et seq.

Writ—Service on wrong Person.]—Where a writ has been served on a wrong person, and service is possible on the right person, leave will not be given under Judicature Act, Ord. LXX. r. 1, to amend the irregularity, but the faulty service will be discharged with costs upon the application of the person intended to be served. *Nelson* v. *Pastorino*, 49 L. T. 564.

Notice of Trial.]—*See* supra, TRIAL, col. 451.

Judgments and Orders.]—*See* supra, JUDGMENTS AND ORDERS, cols. 590 et seq.

XXIII. COURT FEES.

"Entering Cause or Matter for Trial or Hearing"—Rule to Justices.]—Under the Order as to Supreme Court Fees, 1884, schedule 52—which directs that a fee of 2*l.* shall be paid on entering or setting down, or re-entering or re-setting down an appeal to the court of appeal, or a cause or matter for trial or hearing in any court in London or Middlesex, or at any assizes—such fee is payable though the matter for hearing does not arise in an action, as in the case of a rule nisi against a justice, under 11 & 12 Vict. c. 44, s. 5. *Hasker, Ex parte*, 54 L. J., M. C. 94; 14 Q. B. D. 82.

—— **Appeals from Chambers.**]—Schedule 52 of the Order as to Supreme Court Fees, 1884, which provides for the payment of a fee of 2*l.* on entering or setting down a cause or matter for trial or hearing, does not apply to appeals from chambers. *Hasker, Ex parte*, supra, distinguished. *Dudley, Ex parte, Solicitor, In re*, 33 W. R. 750.

Percentage — Managers' Accounts.]—In the case of accounts rendered periodically in chambers by managers of a business, a percentage will be payable, under item 72 of the schedule to the order as to court fees, 1884, upon the amounts found to have been received, and not on the amounts found to be due, notwithstanding the use of the words "the amount found to be due" in the note (d) relating to item 72. If an account has been merely lodged, and no further steps are

taken with regard to it, no fee will be payable. *Crawshay, In re, Dennis* v. *Crawshay*, 57 L. J., Ch. 923; 39 Ch. D. 552; 59 L. T. 598; 37 W. R. 25.

—— **Sale of Property with Approbation of Judge.**]—By item No. 69 in the schedule to the order as to Supreme Court Fees, 1884, it is provided that: "On the sale or mortgage of any land or hereditaments pursuant to any order directing a sale or mortgage with the approbation of the judge, made in any cause or matter for the purpose of raising money to be dealt with by the court in such cause or matter, for every 100*l.* or fraction of 100*l.* of the amount raised—2*s.*" It is also provided in the same schedule that: "The amounts for or in respect of which the following fees are payable shall be limited to 200,000*l.* in the following cases: (*a*) The amount raised at any time or times in the same cause or matter in the cases to which the fee No. 69 is applicable." Upon a sale by the court of lands and hereditaments belonging to a company in liquidation the purchase-moneys of all the lands exceeded 200,000*l.*, and were paid upon a sale made under several orders of court. The question arose between the solicitors of the company and the treasury whether the limit of 200,000*l.*, applied where there were several orders of such a nature as would make the sale fall within item No. 69, or whether it only applied where there was one order:—Held, that the limit of 200,000*l.* applied to cases where the limit had been reached irrespectively of the number of orders under which the sale was effected. *Oriental Bank Corporation, In re*, 56 L. T. 731.

—— **Separate Accounts.**]—A testator made two persons his executors, and the same persons, with one other, the trustees of his real and personal estate. A decree was made for the administration of the estate, and the usual accounts ordered to be taken. The chief clerk required separate accounts to be taken of the receipts and payments of the executors, and of the receipts and payments of the trustees:—Held, that the accounts of the executors and trustees were rightly taken separately, and that the percentage for court fees was payable both on the gross receipts of the executors and on the gross receipts of the trustees: and that the receipts of the trustees properly included (1) the residue handed over to them by the executors; (2) temporary loans advanced to them by their bankers; and (3) sums transferred from the trustees' deposit account at their bankers to their drawing account. *Armitage* v. *Elworthy*, 13 Ch. D. 91; 41 L. T. 608; 28 W. R. 283.

The percentage on taking accounts imposed by the order as to court fees of October 28th, 1875, is not payable on accounts begun to be taken before commencement of the judicature acts. Where payable it is in substitution for the old certificate and other fees. *Meredith* v. *Treffry*, 45 L. J., Ch. 162; 33 L. T. 715; 24 W. R. 199.

Plaintiff suing in formâ pauperis.]—Chief clerk's certificate ordered to be delivered out without payment of court fees, the plaintiff since it was ready having obtained an order to sue in formâ pauperis. *Thomas* v. *Ellis*, 8 Ch. D. 518; 26 W. R. 839—C. A.

A plaintiff suing in formâ pauperis who has obtained a verdict, is entitled to have judgment signed without payment of fees. *Hoare* v. *Coupland*, 1 L. M. & P. 57; 19 L. J., Q. B. 150; 14 Jur. 247.

Document required by Court.]—Where the court requires for its own information the production of a document from the record office, no fee ought to be paid for the same. *Drysdale* v. *Mace*, 2 Eq. Rep. 386; 23 L. J., Ch. 518; 2 W. R. 341.

XXIV. TIME.

See R. S. C., 1883, Ord. LXIV.

a. Generally, 802.
b. Notice to Proceed, 805.
c. Vacations, 806.

a. GENERALLY.

Extension of—Notice of Motion.]—Where notice of motion has not been given in sufficient time, owing to a bonâ fide mistake, the court may, in its discretion, allow the party in default to shew the reason of the mistake by affidavit, and allow the motion to be made on a later day. *Smith* v. *Smacksmen Insurance Co.*, 32 W. R. 184.

A party ordered to take a step within a fixed time, or that the bill should be dismissed, if desirous of an extension of the time, must give notice of motion, so as to enable him to bring it on before the expiration of the time fixed. *Huntingtower* (*Lord*) v. *Sherborn*, 5 Beav. 380.

—— **Redemption Action—Order dismissing Action in Default of Payment into Court within a Specified Time—Mistake.**]—Where in a redemption action liberty is given to lodge a sum of money in court before a certain day, and in default that "the action be dismissed with costs," the action will not be treated as wholly dead and at an end if the money is not lodged before the specified day, so as to preclude an application made after that day for extension of the time for lodgment. If the failure to make the lodgment within the time limited is due to an honest mistake the court will favourably consider an application for extension of time. *Collinson* v. *Jeffery*, 65 L. J., Ch. 375; [1896] 1 Ch. 644; 74 L. T. 78; 44 W. R. 311.

—— **Motion for New Trial.**]—The court of appeal has power under Ord. LVIII. r. 5, to enlarge the time for moving for a new trial. *Purnell* v. *G. W. Ry.*, 45 L. J., Q. B. 687; 1 Q. B. D. 636; 24 W. R. 720—C. A.

Where a motion for a new trial is to be made conditionally on the result of a decision pending in the court of appeal in a similar cause, notice of motion should be given within the usual time, and application be then made to the court to postpone the hearing till the decision in the court of appeal has been obtained. The court has a full discretion over such applications, and is not limited to cases only where parties have been misled. *Peckett* v. *Short*, 32 W. R. 123. *See* supra, NEW TRIAL, ante, col. 538.

—— **For Indorsement on Writ of Date of Service.**]—Under r. 6 of Ord. LVII. of Rules of Court, 1875, the court has power to extend the time fixed by r. 13 of Ord. IX. for the making an indorsement on a writ of the date of service out of the jurisdiction. *Hastings* v. *Hurley*, 50 L. J., Ch. 577; 16 Ch. D. 734; 44 L. T. 176; 29 W. R. 440.

Where, through inadvertence, the date of the service of a writ has not been indorsed upon the writ, within the time prescribed by Ord. IX. r. 13, the court can extend the time, so as to make an indorsement made after the proper time, and all subsequent proceedings, valid. *Sproat* v. *Peckett*, 48 L. T. 755.

—— **For Pleading.**] — *See* PLEADING, post, col. 863.

—— **For Appeal.**]—*See* APPEAL.

—— **Discretion of Judge.**]—By a master's order an action was to be dismissed, unless notice of trial were delivered by a certain day. Through a mistake of the solicitor's clerk, notice of trial was not delivered within the required time. A judge at chambers refused, in the exercise of his discretion, to extend the time fixed by the master's order, and the divisional court declined to interfere with the judge's discretion. *Gilder* v. *Morrison*, 30 W. R. 815.

Power to abridge Time.]—Ord. XXXVI. r. 12, provides that, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or a judge to dismiss the action for want of prosecution. Ord. LXIV. r. 7, provides that the court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require:—Held, that the period of six weeks mentioned in Ord. XXXVI. r. 12, is not a time appointed for doing any act or taking any proceeding within Ord. LXIV. r. 7, and consequently that the court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings. *Saunders* v. *Pawley*, 54 L. J., Q. B. 199; 14 Q. B. D. 234; 51 L. T. 903; 33 W. R. 277.

Expiration of, on Sundays, &c.]—A specially indorsed writ was served on Friday, the 27th of March, consequently the eight days for entering an appearance expired on Friday, the 3rd of April. That day being Good Friday:—Held, that the defendant was not bound to enter an appearance until the following Wednesday. *Mumford* v. *Hitchcocks*, 14 C. B. (N.S.) 361; 32 L. J., C. P. 168; 9 Jur. (N.S.) 1200; 8 L. T. 282; 11 W. R. 645.

Sect. 27 of the Common Law Procedure Act, 1852, empowers a plaintiff, in case of non-appearance by the defendant, where the writ is indorsed in the special form, on filing an affidavit of personal service, at once to sign judgment, "and the plaintiff, upon such judgment, to issue execution at the expiration of eight days from the last day of appearance." In such a case, if Sunday is the last of such eight days, it is to be reckoned in the computation as one of those days. *Rowberry* v. *Morgan*, 9 Ex. 730; 23 L. J., Ex. 191; 18 Jur. 452; 2 W. R. 431.

Where a judge's order made in a cause directs that one party shall pay to the other a certain sum, by way of instalments of so much a month, judgment to be signed for the whole in case of default in payment of any one of the instalments, and the day of one of the payments falls upon a Sunday, the party has the whole of Monday following to pay in. *Morris* v. *Barrett*, 7 C. B. (N.S.) 139; 29 L. J., C. P. 102; 6 Jur. (N.S.) 609; 1 L. T. 38; 8 W. R. 45.

When the time for doing an act or taking a proceeding is expressly fixed by act of parliament, r. 12 of Ord. XXXVII., of Consolidated General Orders (providing for cases where the time for doing an act or taking a proceeding expires on a day on which the offices are closed), does not enable such act or proceeding to be done or taken after the expiration of the time so fixed. *Flower* v. *Bright*, 2 John. & H. 590; 10 W. R. 558. *See* Ord. LXIV. r. 3.

Expression of.]—An order of the court for the delivering up of a deed "forthwith" is a sufficient expression of time within the meaning of Consolidated Ord. XXIII. r. 10. *Thomas* v. *Nokes*, L. R. 6 Eq. 521; 16 W. R. 995.

Computation — Eight Days.] — Attachment returnable within eight days after the purification. The eight days mean eight days entire. *Mootham* v. *Washett*, 1 Mer. 243. *See* Ord. LXIV. r. 12, and ante, col. 714.

—— **Week.**]—The word "week," in the 79th Order of May, 1845, means any period of seven consecutive days, and not the particular seven days commencing with Sunday. Where, therefore, the last notice of motion to take a bill pro confesso under that order was inserted in the "Gazette" on a Tuesday, and the day for which the notice was given was the Thursday week following, it was held not to be a sufficient compliance with the order. *Bazalgette* v. *Lowe*, 3 Eq. R. 491; 24 L. J., Ch. 368, 416; 3 W. R. 356.

—— **Month.**]—In most orders of the courts of law and equity, "month" means a lunar month, and it so means in an order for payment of money. *Att.-Gen.* v. *Newbury Corporation*, C. P. Cooper, 383. *See now* Ord. LXIV. r. 1.

—— **Vacation, whether included.**]—*See* infra, col. 808.

Three successive Weeks.]—Interpretation put on a judge's order that advertisements be inserted in certain newspapers for three successive weeks. *Browne* v. *Pennefather*, *Monkton Farleigh Estate*, *In re*, 4 N. R. 221.

Terms.]—By 36 & 37 Vict. c. 66, s. 26, "terms" are abolished, but they may continue to be referred to in all cases in which they were used as a measure for determining the time within which an act is required to be done. An award was made on the 28th of March, 1877. An application to set it aside under 9 & 10 Will. 3, c. 15, s. 2, was made in the Easter sittings on a day after the 8th of May. Easter term in 1877, under the former procedure, would have begun on the 15th of April and ended on the 8th of May:—Held, that the application ought to have been made on a day before the 8th of May, for "terms" still exist as a measure for determining the time within which an award should be set aside under 9 & 10 Will. 3, c. 15, s. 2. *Christ's College*, *Brecknock* v. *Martin*, 46 L. J., Q. B. 591; 3 Q. B. D. 16; 36 L. T. 537; 25 W. R. 637—C. A.

When all the days included between the

Thursday before, and the Wednesday after Easter-day (both inclusive), fall within Easter term, that term must be prolonged by five business days, and Trinity term commence five days later accordingly. *Downes* v. *Bostock*, 5 Jur. 103.

Effect of Rules on Mercantile Transactions.]—The plaintiff in the action sued on a promissory note at three months, dated the 11th March, 1874; the note was therefore primâ facie due on the 14th June of the same year. The 14th of June was a Sunday. The writ in the action bore date 14th June, 1880, which was a Monday. It was contended that the right of action was barred by the Statute of Limitations:—Held, that Ord. LVII. r. 3, of the Judicature Act of 1875 did not apply to such a case as the present one, as it was not intended to extend the time fixed by the Statute of Limitations. *Morris* v. *Richards*, 45 L. T. 210; 46 J. P. 37.

See further cases, sub tit. TIME.

b. NOTICE TO PROCEED.

Month's Notice.]—*See* R. S. C., 1883, Ord. LXIV. r. 13.

In what Cases Applicable—Judgment.]—Where a defendant had failed to appear to a writ indorsed for a liquidated demand and no proceeding had been taken for more than a year after service of the writ:—Held, that the case came within Ord. LXIV. r. 13, and the plaintiff could not enter final judgment under Ord. XIII. r. 3, but was bound to give defendant a month's notice of his intention to proceed. *Webster* v. *Myer*, 54 L. J., Q. B. 101; 14 Q. B. D. 231; 51 L. T. 560; 33 W. R. 407—C. A.

Rule 176 of Hilary term, 1853, applies to the signing of judgment for not proceeding to trial under 15 & 16 Vict. c. 76, s. 101. *Metcalf* v. *Hetherington*, 3 H. & N. 755; 28 L. J., Ex. 155.

After interlocutory judgment had been entered for 25*l.* for default, the rest of the action was referred and an award made. There was no power of entering up judgment on the issues referred. After the lapse of a year the plaintiff gave the defendant notice that the court would be moved in a week. Within a month from the date of the notice, the plaintiff applied for a rule calling on the defendant to pay the 25*l.*, or why the plaintiff should not be allowed to sign final judgment. There was a proper demand of the money. The rule was discharged on the ground that there had not been a month's notice of proceeding. A subsequent notice was given by the plaintiff that he would after a month proceed in the action by applying to sign final judgment. After the month had expired, the plaintiff applied for a rule similar to the previous one. There had been no fresh personal demand of the money since the discharge of the last rule. The court made the rule absolute. *Burlington* v. *Richardson*, 22 L. J., Q. B. 385.

—— **Motion to Dismiss for Want of Prosecution.**]—A motion to dismiss for want of prosecution is not a proceeding within the Irish Ord. LXIV. r. 11 [which corresponds to the English Ord. LXIV. r. 13], so as to require a month's notice of intention to proceed "where there has been no proceeding for one year from the last proceeding had," in the action. *Warnock* v. *Mann*, [1896] 2 Ir. R. 630.

—— **Execution.**]—Execution may issue in an action in which no proceeding has taken place for more than a year without a month's notice of intention to proceed. Ord. LXIV. r. 13, does not apply to execution or proceedings after judgment. *Taylor* v. *Roe*, 62 L. J., Ch. 391; 3 R. 306; 68 L. T. 253.

Several Defendants.]—Where no proceedings have been taken against a defendant within a year, the cause is out of court as to that defendant, although proceedings have been taken within that time against other defendants. *Bartley* v. *Davis*, Fl. & K. 620.

In other Cases.]—The rule that a term's notice was necessary where no proceeding had been taken in a cause for a year, did not apply to proceedings had after verdict. *Newton* v. *Boodle*, 4 D. & L. 664; 3 C. B. 795; 16 L. J., C. P. 135; 11 Jur. 148.

Where a rule had been made absolute to set aside a verdict found for the defendant, and for a new trial on payment of costs by the plaintiff, and the plaintiff for more than a year failed to pay the costs, or to take any steps towards availing himself of the rule, the defendant could not move to discharge it without previously giving a term's notice of his intention so to do. *Lord* v. *Wardle*, 3 C. B. 295; 15 L. J., C. P. 259.

The rule did not apply to a motion to set aside proceedings for irregularity, but only to any steps taken towards judgment. *Lumley* v. *Thompson*, 3 M. & W. 632; 6 D. P. C. 558; 7 L. J., Ex. 142.

A term's notice was not necessary if the delay had taken place at the defendant's request. *Evans* v. *Davies*, 3 D. P. C. 786. S. P., *Bland* v. *Darley*, 3 Term Rep. 530.

A term's notice was not necessary in case of a trial by proviso after a lapse of four terms. *Theobald* v. *Crichmore*, 2 B. & Ald. 594.

Or before motion for costs of the day. *French* v. *Burton*, 2 C. & J. 634; 1 L. J., Ex. 257.

An order to change an attorney was not a proceeding in a cause dispensing with a term's notice of proceeding. *Deacon* v. *Fuller*, 3 Tyr. 382; 1 C. & M. 349; 1 D. P. C. 675; 2 L. J., Ex. 175.

A term's notice was not necessary to revive proceedings against a defendant who had stayed them by obtaining an injunction. *Bosworth* v. *Phillips*, 3 W. Bl. 784.

Where proceedings are stayed for a time certain above a year, proceedings might go on at the expiration of the time, without a term's notice. *Watkins* v. *Haydon*, 2 W. Bl. 762.

A motion for a commission to examine a witness resident abroad is a proceeding in the cause, and therefore prevents the necessity of the notice to proceed. *Waring* v. *Rea*, 17 W. R. 681.

Where a cause has been at issue for more than four terms and no proceedings taken, the defendant must give the plaintiff a term's notice of his intention to proceed before he rules the plaintiff to enter the issue. *Lord* v. *Hillier*, 9 B. & C. 621; 7 L. J. (O.S.) K. B. 307.

c. VACATIONS.

See R. S. C., 1883, Ords. LXIII. and LXIV.

Jurisdiction of Vacation Judge.]—The jurisdiction of the vacation judge under Ord. LXI. r. 7, extends to the adjournment of sittings by a judge of the chancery division, during the

sittings of the division. *Wilson* v. *Watson*, 38 L. T. 380.

Although the long vacation does not commence until the 10th August, the duties of the vacation judge may arise before that period in respect of business connected with any court which may have risen for the vacation. *Francis* v. *Brown*, 31 L. J., Ch. 560; 8 Jur. (N.S.) 785; 6 L. T. 799; 10 W. R. 811.

When a judge has risen for the long vacation, the jurisdiction of the vacation judge, as to that court, immediately arises. *Bank of Hindostan, India, China, and Japan, In re*, 16 L. T. 790.

Where the vice-chancellor, with whose name a cause is marked, has risen for the long vacation, an order may be made by another vice-chancellor. *Bean* v. *Griffiths*, 1 Jur. (N.S.) 1045; 3 W. R. 640. See *Price* v. *Gardner*, 1 Jur. (N.S.) 975.

—— **Absence of Judge temporarily during Term Time.**]—Whenever during the regular sittings of the high court of justice any judge is absent from any cause, as, for instance, through having risen for a few days' vacation, applications of an urgent nature in any action pending before such judge will be heard and disposed of by the Master of the Rolls or any other judge of the court of appeal, under s. 51 of the Judicature Act, 1873, upon a request being obtained from the Lord Chancellor. *Chapman* v. *Real Property Trust*, 7 Ch. D. 732; 26 W. R. 587.

What is Long Vacation Business.]—An application for payment out of a parliamentary deposit not previously payable is long vacation business. *Wigan Junction Railway Act, In re*, 44 L. J., Ch. 774; L. R. 10 Ch. 541.

Court will not issue attachment in the long vacation, unless there is fear of the party absconding. *Hunt, Ex parte, Fox, In re*, 4 Deac. & C. 503.

The Lord Chancellor can issue the writ of habeas corpus at common law in vacation. *Crowley's Case*, 2 Swanst. 1; Buck. 264.

Injunction granted in vacation. *Temple* v *Bank of England*, 6 Ves. 771.

A prohibition may issue in the vacation. *Ireson* v. *Harris*, 7 Ves. 257.

A defendant may be brought to the bar of the court by writ of habeas corpus, and remanded in vacation as well as in term time. *Needham* v. *Needham*, 10 Jur. 81.

Bill ordered to be taken pro confesso in vacation under the stat. 1 Will. 4, c. 36, s. 15, r. 2. *Simmons* v. *Wood*, 2 Hare, 644.

Vacation Masters.]—As to common matters which occur in the vacation, the vacation master acts, and is considered as acting for the several masters in rotation to whose offices such matters respectively may belong; and therefore, in the vacation, the production to the vacation master of the certificate is a sufficient compliance with the 17th Order of December, 1833, which requires its production to the master in rotation. *Suffield (Lord)* v. *Bond*, 10 Beav. 146.

A reference to the vacation master is a reference to a master excepting the case from the operation of the 15th and 25th Orders of December, 1833. *Kelsey* v. *Larken*, 4 Jur. 363.

Hearing Counsel.]—There is no rule that only one counsel on each side shall be heard in long vacation causes. *Henry* v. *G. N. Ry.*, 3 Jur. (N.S.) 1117.

Leave to serve Short Notice of Motion.]—Leave to serve short notice of motion cannot be given by the chief clerk in vacation any more than during the sitting. *Conacher* v. *Conacher*, 29 W. R. 230.

Order to take Effect in Vacation.]—When a person entitled to a vested interest in trust funds in court, to be paid at twenty-one, would attain that age in the long vacation, a prospective order was made for the payment out of the fund to her at such date. *Penn, In re*, 42 L. J., Ch. 880; 21 W. R. 865.

When included in Computation of Time.]—*See* Ord. LXIV. r. 5.

—— **Former Practice.**]—The long vacation is not to be excepted in the computation of the six days for referring exceptions for impertinence to a bill. *Sloggett* v. *Sorel*, 5 Beav. 378; 12 L. J., Ch. 16.

Where a defendant, who is in custody on contempt for not answering the bill, has been brought up and remanded under the stat. 1 Will. 4, c. 36, s. 15, the two months and six weeks given by the 13th rule is not interrupted by, but will run in, the vacation; although, if the thirty days allowed by the 5th rule for first bringing the defendant up after he is actually in custody should expire in vacation, that time is extended to include the first four days of the following term. *Simmons* v. *Wood*, 2 Hare, 644.

The exclusion of the time of vacation from the computation of time for filing replication, in the fourth article of the 14th Order of May, 1845, does not apply to the time of filing replications generally, but only to the time for filing replications under the exigency of the forty-first article of the 16th Order of May, 1845. *Stinton* v. *Taylor*, 4 Hare, 608; 15 L. J., Ch. 321; 10 Jur. 386.

The 19th Order of April, 1828, although it excludes Michaelmas and Christmas vacations from being reckoned in the time allowed for amending bills, has not, in a case where the answer must be deemed sufficient before the vacation, and the plaintiff has obtained no order to amend, the effect of excluding the vacation from being counted in the second period of two months, at the end of which, according to the 4th and 16th Orders of April, 1828, the defendant may move to dismiss for want of prosecution. The 26th Order of December, 1833, makes no difference in that respect. *Goldsworthy* v. *Crossley*, 2 Hare, 639; 13 L. J., Ch. 98; 8 Jur. 642.

A month's time to answer obtained by the service of a notice in the vacation, is considered as if obtained by an order on the usual terms. A defendant, who has obtained an order for a month's time to answer, and gained another month by the service of a notice in the vacation, will be made to pay the costs of an application for a second order for time to answer, though it should not be granted, unless he makes a special case for it. *Gregg* v. *Hutton*, 2 Hog. 32.

In counting the time within which a demurrer must be filed under the 10th Order of December, 1833, the intervention of holidays makes no difference, as a demurrer may be filed in vacation. *Boys* v. *Morgan*, 9 Sim. 262.

Under the 19th Order of 1828 (as amended in 1831), if there be no seal between the long vacation and the first day of Michaelmas term, the computation of a fortnight allowed for

obtaining the master's report upon exceptions to an answer for insufficiency, is not to begin until the first day of that term, although the vice-chancellor may have been sitting during the interval, and may have then made the order of reference. When the fortnight would expire on a Sunday, the time is extended throughout the Monday following. *Angell* v. *Westcombe*, 1 Myl. & C. 48.

The three months mentioned in the 29th Order of August 7th, 1852, as to moving to dismiss for want of prosecution, are not to be reckoned exclusively of vacation. *Bothomley* v. *Squire*, 7 De G. M. & G. 246 ; 24 L. J., Ch. 437 ; 3 W. R. 498.

The eight days within which, under the 51st Order of October 16th, 1852, made pursuant to s. 34 of the 15 & 16 Vict. c. 80, an application must be made to vary the chief clerk's certificate are to be calculated inclusive of vacations. *Ware* v. *Watson*, 7 De G. M. & G. 739 ; 25 L. J., Ch. 199 ; 2 Jur. (N.S.) 129 ; 4 W. R. 223.

Ex parte Order of Vacation Judge—Application to Discharge.]—An order was made by the vacation judge, on the ex parte application of the plaintiffs, for service of the writ and notice of motion on the solicitors and at the place of business in England of a foreigner residing out of the jurisdiction. Without formally entering an appearance the defendant filed affidavits in opposition to the motion, and instructed counsel, who opposed the motion on the merits :—Held, that the defendant had thereby waived the right to raise any objection as to the irregularity of the order, and must be treated as if he had been properly served and had formally appeared ; that the fact that the ex parte order had been passed and entered did not prevent the right of the defendant to move to discharge it ; but that r. 12 of Ord. LXIII. did not apply to such a case, and that the proper mode of proceeding (if there had been no such waiver as aforesaid) would have been to apply, not to the court of appeal or the vacation judge, but to the judge to whose court the action was assigned, to discharge the order of the vacation judge. *Boyle* v. *Sacker*, 58 L. J., Ch. 141 ; 39 Ch. D. 249 ; 58 L. T. 822 ; 37 W. R. 68—C. A.

Order made during Vacation—Time for Appeal.]—On an appeal from the decision of a judge at chambers given in vacation, two clear days' notice of motion must be given within five days, and for a day within eight days, after the decision, although no divisional court sits within the eight days. *Steadman* v. *Hakim*, 58 L. J., Q. B. 57 ; 22 Q. B. D. 16 ; 37 W. R. 208—C. A. Affirming 59 L. T. 607. S. P., *Hobbs* v. *Mead*, 53 J. P. 40.

See also APPEAL.

Before Judicature Acts—Notice of Sittings.]—The notice of sittings in vacation pursuant to 1 & 2 Vict. c. 32, must specify with accuracy and precision the nature of the business to be proceeded with. *Field* v. *Mackenzie*, 6 C. B. 384.

At the post-terminal sittings in banc, no business can be taken, except that of which notice has been given. *Sabor* v. *Edwards*, 3 C. B. (N.S.) 64.

On the last day of term, a rule was made absolute on an affidavit of service. The master, next day discovering that the affidavit was defective, refused to draw up the rule. The court considering the rule as a pending rule, allowed a motion to be made in the sittings after term to make the rule absolute on an amended affidavit of service. *Dow* v. *Bell*, 4 Ex. 259 ; 18 L. J., Ex. 391.

A writ of inquiry in a personal action may be tested in vacation under 2 Will. 4, c. 39, ss. 11, 12. *Collett* v. *Curling*, 5 D. & L. 605 ; 17 L. J., Q. B. 216.

XXV. PLEADING.

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a. General Principles and Rules.

See R. S. C., 1883, Ord. XIX.

Indorsement on Writ — Whether a "Pleading."]—The indorsement on a writ is not a "pleading" so as to entitle a plaintiff, without the consent of the defendant, to move thereon for an order on admissions in the pleadings under Rules of Court, 1875, Ord. XL. r. 11, in a case where the defendant, admitting the plaintiff's claim, has given notice that he does not require the delivery of a statement of claim. *Wallis* v. *Jackson*, 52 L. J., Ch. 384 ; 23 Ch. D. 204 ; 31 W. R. 519. *See now* Rules of Supreme Court, 1883, Ord. XX. r. 1.

Statement and Allegation of Facts.]—Semble, though by the Rules of Court, 1875, pleadings must be concise and should not contain any unnecessary accounts or evidence, a defendant is entitled to have the plaintiff's case presented in an intelligible form, so that he may know how to meet each particular charge that is made against him. *Harbord* v. *Monk*, 38 L. T. 411.

When in an action in the queen's bench division the defendant relies upon such a defence as before the Supreme Court of Judicature Acts, 1873 and 1875, was deemed equitable, he is entitled (subject to the modifications introduced by those statutes) to state the facts in his pleadings in such manner as they might have been stated in an answer to a bill in the court of chancery ; and a defence stating many distinct facts, which taken as a whole would in equity have constituted ground for relief against the action, is

not liable to be amended or struck out as embarrassing. *Heap* v. *Marris*, 46 L. J., Q. B. 761; 2 Q. B. D. 630.

Under the present system of pleading the facts must be stated, and then it is the duty of the court to decide what is the legal result of the facts stated; whereas the former system required the parties to set forth the legal result of the facts, and not the facts themselves. *Hanmer (Lord)* v. *Flight*, 35 L. T. 127; 24 W. R. 346. *S. C.* in C. A., 36 L. T. 279.

Contributory negligence may be pleaded in a general form without setting out in detail the particular facts constituting the alleged contributory negligence. *Rattray* v. *Cork and Macroom Ry.*, 4 L. R., Ir. 386.

It is not necessary, in declaring upon a written contract, to use a single word that is in the contract itself, provided its legal effect be properly stated. *Magor* v. *Wilks*, 5 L. J. (O.S.) K. B. 308.

Nor to aver any matter which happens to be part of the contract, if such matter would be implied by law. *Ib.*

A statement of claim alleged that an intestate "two days before his death made a good and valid donatio mortis causâ to the plaintiff of the whole of his moneys standing on deposit to his account at the Ellesmere Savings Bank," but did not state any facts amounting to a donatio mortis causâ. Demurrer allowed, on the ground that the facts alleged in the statement of claim did not shew a valid donatio mortis causâ. *Townsend* v. *Parton, Parton, In re*, 45 L. T. 755; 30 W. R. 287.

A party is entitled to the benefit of any point which can be suggested by the bill, though it be not expressly insisted upon by the pleadings. *Knowles* v. *Clayton*, 2 L. J. (O.S.) Ch. 181.

"Material Facts"—What are.]—With reference to L.'s claim in respect of lights, B. alleged that in another action (a new trial of which was still pending) L. had sworn that the lights in question were not ancient, and was therefore estopped from alleging in the present action that they were ancient:—Held, that the words "material facts" in Ord. XIX. r. 4, do not mean merely facts which must be proved in order to establish the existence of the cause of action, but include also any facts which the party pleading is entitled to prove at the trial, but that the above allegation did not come within this definition, and was calculated to prejudice the fair trial of the action. *Lumb* v. *Beaumont*, 49 L. T. 772.

Rules 4 and 15 of Ord. XIX. apply to such facts as are material to the cause of action or defence, and not to damages. *Wood* v. *Durham (Earl)*, 57 L. J., Q. B. 547; 21 Q. B. D. 501; 59 L. T. 142; 37 W. R. 222.

A statement of claim, after alleging a promise by the defendant to marry plaintiff, went on to allege in paragraph 4, that "the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease." It then alleged a breach of the said promise:—Held, that the facts alleged in the paragraph complained of were "material facts" within the meaning of Ord. XIX. r. 4, and as such were properly pleadable. *Millington* v. *Loring*, 50 L. J., Q. B. 214; 6 Q. B. D. 190; 43 L. T. 657; 29 W. R. 207; 45 J. P. 268—C. A.

In an action for libel published in a newspaper, the statement of claim alleged that the defendant published the libel knowing that the same would be, and it in fact was, published in editions of the same newspaper published in France and elsewhere:—Held, that evidence in support of this allegation would be admissible at the trial, and that therefore the allegation was properly made in the statement of claim. *Whitney* v. *Moignard*, 59 L. J., Q. B. 324; 24 Q. B. D. 630.

Denials and Admissions by not specifically denying Statement.]—The rules of pleading, that facts not denied are to be taken as admitted, that specific denial of facts is necessary, and that denial of facts must not be evasive, are to be strictly enforced, as having for their object the bringing of parties to definite issues. *Thorp* v. *Holdsworth*, 45 L. J., Ch. 406; 3 Ch. D. 637.

A statement of claim in an action for specific performance stated that the predecessor in title of the plaintiff, by his agent lawfully authorised, signed an agreement with H., the predecessor in title of the defendant. The defence denied this in words following the words of the statement of claim, and then proceeded to state that H., the predecessor in title of the defendant, was of unsound mind, and did not lawfully authorise any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by H., or any person by him lawfully authorised:—Held, that under the defence raised, the defendant could only enter into evidence to shew the unsoundness of mind of H., and could not enter into evidence to shew that the agent was not duly authorised. *Byrd* v. *Nunn*, 47 L. J., Ch. 1; 7 Ch. D. 284; 37 L. T. 585; 26 W. R. 110—C. A.

In action for damages for an alleged infringement of copyright in a song, the defendant, by his defence, alleged that the song had not been registered at Stationers' Hall until the 9th of December, 1876, and added, "the defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register":—Held, that under this pleading the defendant was only entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated. *Collette* v. *Goode*, 47 L. J., Ch. 370; 7 Ch. D. 842; 38 L. T. 504.

Although the plea of the general issue has been abolished by the Rules of the Supreme Court, a defence will not be struck out simply because it is not in strict accordance with the form as required by the wording of the rules, so long as it is not embarrassing and in effect specifically denies each and every material allegation in the statement of claim. *Adkins* v. *North Metropolitan Tramway Co.*, 63 L. J., Q. B. 361; 10 R. 600.

Every allegation of fact stated in a pleading not to be admitted must be so stated separately. *Harris* v. *Gamble*, 47 L. J., Ch. 344; 7 Ch. D. 877; 38 L. T. 253.

A defendant by his defence simply "put the plaintiffs to proof of the several allegations in their statement of claim." He did not appear at the trial, but service of a notice of trial upon him was proved:—Held, that the defendant had admitted the facts alleged in the statement of claim, and that the plaintiffs were entitled to judgment, without adducing any evidence in support of their case. *Ib.*

In an action against a lessee to set aside a

lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances: the defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given:—Held, that the giving the bribe was not sufficiently denied under Judicature Act, Ord. XIX. r. 22, and must, under Ord. XIX. r. 17, be taken to have been admitted; judgment for the plaintiff given; leave to amend being refused. *Tildesley* v. *Harper*, 47 L. J., Ch. 263; 7 Ch. D. 403; 38 L. T. 60; 26 W. R. 263. But leave to amend given by Court of Appeal. See *S. C.*, 48 L. J., Ch. 495; 10 Ch. D. 393; 39 L. T. 552; 27 W. R. 249.

Evidence not to be Pleaded—Admissions.]—The rule that evidence is not to be pleaded applies to admissions as well as to other evidence. *Davy* v. *Garrett*, 47 L. J., Ch. 218; 7 Ch. D. 473; 38 L. T. 77; 26 W. R. 225—C. A.

Matters of Law.]—Statements in pleading which are not demurrers, but allege only matters of law that might be raised by demurrer, are embarrassing, and may be struck out under Ord. XXVII. r. 1. *Stokes* v. *Grant*, 4 C. P. D. 25; 40 L. T. 36; 27 W. R. 397. *See now* Rules of Supreme Court, 1883, Ord. XXV.

Statement that Agreement is in Writing.]—An allegation in the plaintiff's pleadings, which simply stated that there was a promise to pay a debt barred by the Statute of Limitations, but did not aver that such promise was in writing, is sufficient. The fact that the promise was in writing is a matter to be shewn by evidence at the trial. *Pascal* or *Pascoe* v. *Richards*, 50 L. J., Ch. 337; 44 L. T. 87.

See also *Futcher* v. *Futcher*, 50 L. J., Ch. 735; 45 L. T. 306; 29 W. R. 884.

When by law an agreement in order to be valid must be in writing, it is unnecessary (whether in a declaration or in a plea) to allege that it is so, as it will be intended that by an agreement is meant an agreement valid by law and therefore in writing. *Young* v. *Austen*, 38 L. J., C. P. 233: L. R. 4 C. P. 553; 20 L. T. 396; 17 W. R. 706.

A plea alleging a contract, must aver it to be in writing, if required by a statute to be so. *Taylor* v. *Hilary*, 1 Gale, 22.

Setting out Documents.]—The court allowed documents to be set out in a bill in the French language, without appending a translation. *Cassoux* v. *Great Luxembourg Ry.*, 18 W. R. 646.

If the declaration sets out the legal operation and effect of the demise, it is sufficient. *Wilson* v. *Bramhall*, 1 Y. & J. 2.

Except in deducing title, a deed or a will may, at the option of the party pleading it, be set out either in its terms, leaving the court to construe it, or according to its legal effect. *Newborough (Lord)* v. *Schroder*, 7 C. B. 342; 18 L. J., C. P. 200; 13 Jur. 611. S. P., *Robertson* v. *Showler*, 13 M. & W. 609; 2 D. & L. 687; 14 L. J., Ex. 120.

Setting out Agreement.]—It is not necessary in declaring on a parol agreement to set out the whole of the instrument; it is sufficient to set out that part of it only to which the particular breach applies. *Ward* v. *Smith*, 11 Price, 19.

If the part omitted does not qualify that which is stated. *Tempest* v. *Rawlings*, 13 East, 18.

So, it is sufficient if a declaration shews so much of the terms beneficial to the plaintiff in a contract as comprehend the point for the failure of which the plaintiff sues. *Cotterill* v. *Cuff*, 4 Taunt. 285.

In declaring upon a contract, not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the act, and the entire act or duty which is to be done (including the time, manner, and other circumstances of its performance), in virtue of such consideration, the breach of which act or duty is complained of; but such part of the contract, which respects only the liquidation of damages, after a right to them has accrued by a breach of the contract, is not necessary to be set forth in the declaration, but is only matter of evidence, to be given to the jury in reduction of damages. *Clarke* v. *Gray*, 6 East, 564; 2 Smith, 622; 4 Esp. 177.

Consideration.]—Where the promise of the defendant is alleged to have been made in consideration of a certain service to be performed by the plaintiff, amongst other things; the omission to specify the other branches of the consideration included under the term "other things," is no ground of nonsuit, unless upon the production of the agreement in which such other branches of the consideration are specified they appear to contain matter in the nature of a condition precedent. *Clark* v. *Morrell*, 2 Scott (N.R.) 17; 1 Man. & G. 841; 9 D. P. C. 461.

Where a declaration states several matters as a condition for the defendant's promise, though all are not good, yet, if a sufficient consideration remains, it is enough to support the promise laid in the declaration. *King* v. *Sears*, 2 C., M. & R. 48; 5 Tyr. 587; 1 Gale, 241; 4 L. J., Ex. 181.

Signing by Counsel.]—It is very desirable that every statement of claim should be signed by counsel, although, under Ord. XIX., such signature is not obligatory. *Duckitt* v. *Jones*, 33 L. T. 777. *See now* Rules of Supreme Court, 1883, Ord. XIX. r. 4.

The court does not approve of filing any pleading without the sanction of counsel's signature. *Barford* v. *Barford*, 3 W. R. 41.

The omission to print counsel's name upon a claim requiring his signature will not prevent its being filed. *Coppeard* v. *Mayhew*, 22 L. J., Ch. 408; 1 W. R. 157.

—— **By whom.**]—Where draft of amended bill is signed by same counsel who signed original bill, and no new engrossment is necessary, counsel's name need not be repeated on the amendment. Otherwise if by different counsel. *Webster* v. *Threlfall*, 1 Sim. & S. 135; 1 L. J. (O.S.) Ch. 109.

The answer may be signed by the counsel who signed the bill. *Anon.*, 8 L. J., Ch. 319.

A counsel who draws and signs the bill may sign the answers, and act as counsel for the other parties to the suit, unless retained for the plaintiff. *Anon.*, 3 Jur. 603.

—— **Forging or Tampering with.**]—Solicitor fined 20*l.* for forging counsel's signature to scandalous answer. *Whitlock* v. *Marriot*, Dick. 16.

Bill dismissed, counsel's signature counterfeited. *Gristing* v. *Hore*, Cary, 82.

Where counsel's name to an answer is forged, court will not order it off file to prejudice of innocent plaintiff. *Bull* v. *Griffin*, 2 Anstr. 563.

If counsel discovers that a bill has been tampered with after being signed by him, he should apply to have it taken off the file, with costs to be paid by the plaintiff. *Troup* v. *Ricardo*, 34 L. J., Ch. 91 ; 10 Jur. (N.S.) 1161 ; 11 L. T. 399 ; 13 W. R. 137, 147.

Printing—Poverty.]—The court will not dispense with the general orders, requiring the answers to be printed, simply on account of the poverty of the parties. *Meux* v. *Watkins*, 7 Jur. (N.S.) 704 ; 9 W. R. 779.

Allegation of Fraud.]—A general allegation of fraud, however strong the words used, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice. Therefore, an account directed to be taken in this case, where such an allegation had been made, was directed to be taken without regard to this insufficient allegation of fraud. The judgment and execution were ordered to stand as security. *Wallingford* v. *Mutual Society*, 50 L. J., Q. B. 49 ; 5 App. Cas. 685 ; 43 L. T. 258 ; 29 W. R. 81—H. L. (E.)

Where, in an action of contract, the defendant in one paragraph of the defence pleaded fraud generally, an order was made, on the application of the plaintiff, for particulars of the acts of fraud relied upon in that paragraph, although the defence in subsequent paragraphs specifically set out certain alleged fraudulent representations. *Bastow* v. *Bradshaw*, 8 L. R., Ir. 30.

In an action by the collector-general of Dublin upon a guarantee for the fidelity of a rate collector, the guarantors pleaded that the contract was entered into by them on the faith of a certain statement and representation made by the plaintiff and the person employed, that there had been no balance outstanding from the latter, nor any irregularity in his accounts, and that such representation was untrue :—Held bad, on demurrer, for not alleging either that the statement was fraudulent, or circumstances from which fraud could be inferred as matter of law. In a defence founded upon an alleged false and fraudulent misrepresentation as avoiding a contract, it is not sufficient to allege matters which may be fraudulent, or from which an inference of fraud may be drawn. If the word "fraudulently" be omitted, there must be allegations of fact which necessarily and per se amount to fraud. *Byrne* v. *Muzio*, 8 L. R., Ir. 396.

—— **Particulars of Fraud, &c., must be upon the Pleadings.**]—It is not enough in a statement of claim to refer to particulars of fraud, misrepresentation, breach of trust, wilful default, or undue influence previously furnished to the defendant. Such particulars must, under Ord. XIX. r. 6, be stated on the face of the pleadings. *Kingston* v. *Corker*, 29 L. R., Ir. 364.

A statement of claim alleged that the defendants (brokers) had notice of the relations between the plaintiffs (merchants) and their agent, and that the latter had no right to pledge certain goods ; that advances of the brokers were not made bonâ fide within the Factors Acts, but were the result of an arrangement by which the brokers and the agent exchanged cheques :—Held, that this was equivalent to a charge of fraud. *Kaltenbach* v. *Lewis*, 45 L. T. 666 ; 30 W. R. 356.

Malice or Fraud alleged but not essential.]—If a declaration discloses a state of facts, upon which an action is maintainable although there is neither malice nor fraud, the plaintiff is not bound to prove either, though both are alleged, and may recover on the liability which the facts disclose, though both fraud and malice are disproved. *Swinfen* v. *Chelmsford* (*Lord*), 5 H. & N. 890 ; 29 L. J., Ex. 382 ; 6 Jur. (N.S.) 1205 ; 2 L. T. 406 ; 8 W. R. 545.

Allegation of Duty.]—Where a declaration, after stating facts, alleges that it thereupon became the duty of the defendant to do a certain act, such allegation is to be understood as a mere exposition of the legal liability supposed to result from the previously-stated facts, as an assertion that the defendant became thereby bound by law to do the act, and not as a distinct substantive allegation. *Brown* v. *Mallett*, 5 C. B. 599 ; 17 L. J., C. P. 227 ; 12 Jur. 204.

The allegation of duty is superfluous where the facts stated show a legal liability, and it is useless where they do not. *Ib.*

A declaration, which charges a breach of duty, must contain an allegation from which the duty can be inferred, otherwise the declaration is bad. *Metcalfe* v. *Hetherington*, 11 Ex. 257 ; 24 L. J., Ex. 314.

A declaration upon a charter-party between the plaintiffs, the owners of a ship, and the defendant, a merchant at Liverpool, by which it was agreed that the ship should receive on board a cargo from the defendant, and should proceed to a port of discharge, and there deliver it agreeably to the bills of lading, alleged that the defendant should deliver the cargo alongside, and should pay for the hire of the vessel a lump sum, and that the master should sign bills of lading. That the defendant put up the ship as a general ship ; that goods were shipped by him, and that eight bills of lading were made out by the shippers, and signed by the captain ; that it was usual at Liverpool for the shippers to make out and deliver to the captain a copy of each bill of lading, and that the shippers of the cargo by the ship made out copies of the eight bills of lading for the captain, and delivered them to the defendant for the captain ; that the defendant kept them, and that the plaintiffs had no copies, nor was it in their power to obtain any, except from the defendant ; that it was necessary, as the defendant well knew, for the purposes of the voyage, and to enable the plaintiffs to deliver the goods, that a consular manifest should be made out, in which an accurate account of the goods should be given ; that it was the duty of the defendant as charterer, and under the charter-party, upon request to the owners, to hand over the captain's copies of the bills of lading for the purpose of enabling a consular manifest to be made out ; that the defendant, negligently and carelessly, only handed over to the agent of the plaintiff six of the copies ; that, therefore, an incomplete manifest was made out, and consequently the ship was detained at the port of discharge, and the plaintiffs sustained injury by having to pay double dues :—Held, that a general allegation of duty was not sufficient,

and therefore the declaration was bad for not shewing that the duty of the defendant to hand over to the plaintiffs the copies of the bills of lading arose from an express contract in the charter-party, or was incorporated in it by mercantile usage, or arose from the circumstances stated. *Dutton* v. *Powles*, 2 B. & S. 174; 30 L. J., Q. B. 169; 7 Jur. (N.S.) 725. Affirmed, 2 B. & S. 191; 31 L. J., Q. B. 191; 8 Jur. (N.S.) 970; 6 L. T. 224; 10 W. R. 408—Ex. Ch.

Unprosecuted Felony disclosed.]—Where a civil action claiming damages for acts which, on the face of the pleadings, amount to a felony, was instituted and came before the court upon an interlocutory matter:—Held, that the court should not of its own motion, where no application is made by the defendant, and where no prosecution was pending, stay the action on the ground of the felony not having been prosecuted. *A.* v. *B.* or *S.* v. *S.*, 24 L. R., Ir. 235; 16 Cox, C. C. 566.

A statement of claim is not demurrable on the ground that it shews the cause of action to be a felony for which the felon has not been prosecuted. *Roope* v. *D'Avigdor*, 10 Q. B. D. 412; 48 L. T. 761; 47 J. P. 248.

Foreign Law.] — A plea held bad for not with sufficient certainty, but only inferentially, averring what the law of France was by which a bond was invalid. *Benham* v. *Mornington* (*Earl*), 4 D. & L. 213; 3 C. B. 133; 15 L. J., C. P. 221; 10 Jur. 618.

If the law of a foreign country or of a colony is stated in any pleading, the allegation may be traversed as matter of fact. *Astley* v. *Fisher*, 6 C. B. 572; 18 L. J., C. P. 59; 12 Jur. 1051.

Performance or Excuse.]—In an action on a special agreement, the plaintiff must aver performance of what is to be done on his part, or shew that he was ready to perform it. *Collins* v. *Gibbs*, 2 Burr. 899.

But where a defendant has incapacitated himself from performing his contract, it renders anything further to be done by the plaintiff unnecessary. *Knight* v. *Crockford*, 1 Esp. 190; 5 R. R. 729.

To a declaration for a debt due on a foreign contract entered into with a plaintiff abroad, a plea of a composition deed made and registered whilst the plaintiff resided abroad, by which the defendant covenanted to pay a composition in the pound to his creditors on a day passed, must shew that he paid or tendered such composition to the plaintiff, notwithstanding the plaintiff was abroad when it became payable, and the want of an averment in such plea is not cured by an averment that the defendant was always ready and willing to pay to the plaintiff the composition according to the provisions of the deed, and that all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became bound by the deed as if he had executed the same. *Fossard* v. *Mugnier*, 18 C. B. (N.S.) 286; 34 L. J., C. P. 126; 11 Jur. (N.S.) 283; 11 L. T. 635.

Readiness and Willingness.] — Where concurrent acts are to be done by the plaintiff and the defendant, a declaration against the defendant for not performing the act upon his part should allege that the plaintiff was ready and willing to do the concurrent act on his part. *Kemble* v. *Mills*, 2 Scott (N.R.) 121; 1 Man. & G. 757; 9 D. P. C. 446.

In a declaration for non-delivery of goods purchased, an averment of performance by the plaintiff of all conditions precedent, and that all things have been done and happened to entitle him to have the goods delivered, is sufficient without an averment of his readiness and willingness to pay. *Bentley* v. *Dawes*, 2 C. L. R. 1070; 9 Ex. 666; 23 L. J., Ex. 220.

In an action for not delivering bonds and other securities pursuant to an agreement, where the consideration-money was to be paid on the receipt of the securities; it is not necessary to aver an actual tender of the money, an allegation of the plaintiff being ready and willing to pay is sufficient. *Levy* v. *Herbert* (*Lord*), 1 Moore, 56; 7 Taunt. 314.

Action for not accepting and paying for goods according to contract, with an averment of the plaintiff's readiness and willingness to deliver the goods, of which the defendant had notice:—Held, that the declaration was sufficient, and that it was not necessary that it should allege a tender or offer to deliver. *Boyd* v. *Lett*, 2 D. & L. 847; 1 C. B. 222. S. P., *Jackson* v. *Allaway*, 7 Scott (N.R.) 875; 6 Man. & G. 942; 13 L. J., C. P. 84; 8 Jur. 63.

A declaration stated that the plaintiff was lawfully possessed for the residue of a term, whereof twenty-one years from the 24th June, 1841, were unexpired, of a house; and thereupon, on the 21st March, 1841, it was agreed that the plaintiff should, on or before the 24th June, 1841, let the same to the defendant by a lease to be granted to the defendant for twenty-one years, the term to commence from the 24th June, 1841. The declaration stated general performance by the plaintiff, and that he was ready and willing to let the house to the defendant, and to grant and execute a lease; yet that the defendant did not nor would become the tenant, nor accept the lease:—Held, that the averment of the plaintiff's readiness and willingness to grant the lease was equivalent to an averment of his having a title to grant it. *De Medina* v. *Norman*, 9 M. & W. 820; 2 D. (N.S.) 239; 11 L. J., Ex. 320.

In an action for a breach of contract in refusing to accept, at the time appointed by the contract, and to pay for certain shares in a water, gas and market company (such shares being by the company's act of parliament made personal estate, and a form of transfer under seal being given), it is sufficient to aver that the vendor "had always been ready and willing to do all things, and that all things had happened, &c., necessary to entitle him to the performance by the defendant of his agreement;" and notice to the defendant of the plaintiff's readiness and willingness to transfer the shares is not necessary, or a condition precedent to the plaintiff's right to recover, it being, on the contrary, the duty of the purchaser to prepare and tender a transfer for execution by the plaintiff and a plea of want of such notice is bad, and no defence to the action. *Cobbold* v. *Peto*, 27 L. T. 130.

A declaration stated a contract, whereby the plaintiff, the owner of a lighter, was to convey goods for lighterage, to be landed and delivered to the defendant at a certain dock; and the defendant was to receive the goods at the dock from the plaintiff, "in a reasonable time after he should have notice of the plaintiff being ready to land and deliver the same." It then averred

that the lighter afterwards arrived with the goods at the dock; "and that the plaintiff was ready to land and deliver them to and for the defendant, of which the defendant had notice;" alleging that the defendant, although requested to receive the goods, neglected and refused so to do for an unreasonable time after such notice:—Held, that the averment that the plaintiff was ready to land and deliver was insufficient; the declaration should have averred that the plaintiff was always ready to land and deliver for a reasonable period after notice. *Granger* v. *Dacre*, 1 D. & L. 573; 12 M. & W. 431; 13 L. J., Ex. 93.

In an action on an agreement, by "which the plaintiff agreed to sell, and the defendant to buy, all that messuage, farm and lands, as comprised in an indenture of lease for the residue of a term of fourteen years, and it was further agreed that the plaintiff, on receiving 5*s.*, and such sums as should be the reasonable value of the fixtures, would execute an assignment; and that upon the execution of such assignment and payment made as aforesaid, the defendant should be put in possession of the premises, fixtures, &c.":—Semble, that the execution of the assignment, and the putting of the defendant into possession of the premises, &c., were acts to be done by the plaintiff contemporaneously with the payment of the money by the defendant; and, therefore, performance by the plaintiff, or a readiness and willingness to perform them, should be averred in the declaration. *Nash* v. *Breese*, 2 D. (N.S.) 1015; 11 M. & W. 352; 12 L. J., Ex. 305.

To an action for breach of a contract, by which the defendant agreed with the plaintiff to purchase of him all the articles required for working a patent, the court refused to allow a traverse of the readiness and willingness of the plaintiff to supply the defendant with such articles, and that the articles which he was so ready and willing to supply were not reasonably fit for the working of the patent. *Griffith* v. *Selby*, 9 Ex. 393; 2 C. L. R. 486; 23 L. J., Ex. 226; 18 Jur. 178; 2 W. R. 221.

In an action for dismissing the plaintiff from the defendant's service before the expiration of a year, the declaration alleged that the plaintiff had always been ready and willing and offered to remain in the defendant's employ for a year. Plea, that the plaintiff did not offer to remain as alleged:—Held, that the plea raised an immaterial issue, the gist of the averment being the readiness which implied the ability and willingness of the plaintiff to continue his services. *Wallis* v. *Warren*, 7 D. & L. 58; 4 Ex. 361; 18 L. J., Ex. 449.

To a declaration on an agreement, setting out that the plaintiff had agreed to sell and that the defendant had agreed to purchase of the plaintiff one-fourth share in a mining sett for 250*l.*, and that the plaintiff and the defendant agreed forthwith to form a company, to be registered with limited liability, for working the mining sett, and that, so soon as the company should be registered with limited liability, the defendant would pay to the plaintiff the 250*l.*, assigning as a breach nonpayment of the 250*l.*; the defendant pleaded that the plaintiff never has been at any time ready and willing to convey the one-fourth share to the defendant according to the agreement:—Held, a good answer to the action. *Marsden* v. *Moore*, 4 H. & N. 500; 28 L. J., Ex. 288.

A plaintiff agreed to serve the defendant for the term of ten years, in the capacity of a brewer; in consideration of the premises, and of the due, full, and complete service of the plaintiff, "the defendant agreed to pay him 20*l.* on execution of the agreement, to furnish him with a house and coals during the whole of the term of ten years, and to pay him the weekly sum of 2*l.* 10*s.* during the term." The plaintiff entered into the service under the agreement. Some years afterwards the plaintiff fell ill, and was unable to attend personally to business; but during that time he instructed the defendant in the art of brewing. The defendant refused to pay the plaintiff his wages for the period during which he had been ill, but retained him in the service; and, after he was able to attend again personally to business, paid him as before under the agreement. To an action by the plaintiff to recover wages for the period during which he had been ill, the defendant pleaded that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing or able to render, and did not, in fact, during any part of such time render, the agreed or any service:—Held, a good plea, the readiness and willingness to perform the service being a condition precedent to the right to wages; and the gist of the plea being that the plaintiff wilfully refused or omitted to serve. *Cuckson* v. *Stones*, 1 El. & El. 248; 28 L. J., Q. B. 25; 5 Jur. (N.S.) 337; 7 W. R. 134.

Where issue is taken on an averment in a declaration, that the plaintiff was ready and willing and able to do a certain act, the defendant may show thereunder any circumstance, such as the insanity of the plaintiff, which disqualified him from doing the act in question. *Kirtley* v. *Copeland*, 1 Car. & K. 319.

Construction of.]—A pleading is to be taken most strongly against the pleader, and where a bill contains general and specific allegations as to the same matter, the general allegation must be referred to the particular and specific one. *Ellis* v. *Colman*, 25 Beav. 662.

A pleading is to be taken most strongly against the pleader, and a general allegation of the defendant being a trustee cannot support a bill, unless there are facts alleged shewing the trust. *Eran* v. *Avon Corporation*, 29 Beav. 144; 30 L. J., Ch. 165; 6 Jur. (N.S.) 1361; 3 L. T. 347; 9 W. R. 84.

The plaintiff as the widow and administratrix of a deceased person claimed damages for her husband's death caused by the defendant's negligently letting fall upon her husband from their boiler a certain "corrosive liquid or other dangerous substance." At the trial it was proved that what fell on the deceased must have been scalding water:—Held, that no amendment of the statement of claim was necessary. *Bull* v. *Baldwin*, 56 J. P. 729—C. A.

Where a declaration or other pleading is susceptible of a construction that will make it good, it is not competent to the party pleading it to insist upon a construction that will make it bad. *Moore* v. *Foster*, 5 C. B. 220; 5 D. & L. 352.

It is a general rule in pleading that an equivocal expression shall be construed against the party using it; but if the other party pleads over, it shall be construed in that sense which will support the previous pleadings. *Hobson* v. *Middleton*, 9 D. & R. 249; 6 B. & C. 295; 5 L. J. (O.S.) K. B. 160.

A plea is to receive a fair and a reasonable

construction, and if ambiguous, is to be construed most strongly against the party pleading. *Goldham* v. *Edwards*, 18 C. B. 389; 25 L. J., C. P. 223; 2 Jur. (N.S.) 493; 4 W. R. 550—Ex. Ch.

The rule that pleadings are to be taken most strongly against the party pleading, is subject, both at law and in equity, to an exception as to the pleading of matters that are peculiarly within the knowledge of the opposite party. *Murphy* v. *Glass*, 6 Moore, P. C. (N.S.) 1; L. R. 2 P. C. 408; 20 L. T. 461; 17 W. R. 592.

Recourse cannot be had to a replication for the purpose of curing a defect in a plea. *Lockwood* v. *Nash*, 18 C. B. 536.

A party may avail himself of admissions or statements of particular facts in the pleadings of the opposite party, and one pleading may be cured by admissions in another, although the latter may have been demurred to. *Hyde* v. *Watts*, 1 D. & L. 479; 12 M. & W. 254; 13 L. J., Ex. 41.

If a declaration contains allegations capable of being understood in two senses, and in one sense it will sustain the action, and in the other it will not, after verdict it must be construed in the sense which will sustain the action. *Emmens* v. *Elderton*, 4 H. L. Cas. 624; 13 C. B. 495; 18 Jur. 21.

Publication to Third Parties.]—If a statement of claim in an action contains charges injuriously affecting the defendant's character, and if the plaintiff, before the hearing of the action, sends copies of the statement to persons not parties to the action, he is guilty of a contempt of court, and will be restrained from further publishing the statement, and ordered to pay the costs of a motion to commit him. *Bowden* v. *Russell*, 46 L. J., Ch. 414; 36 L. T. 177.

Waiver of Forfeiture by Pleading.]—A landlord suing in respect of breaches of covenants agreed to be inserted in a lease contracted for, claimed an injunction and possession; his pleadings stated that he was willing to grant the lease:—Held, that forfeiture was waived by the pleadings. *Evans* v. *Davis*, 48 L. J., Ch. 223; 10 Ch. D. 747; 39 L. T. 391; 27 W. R. 285.

Taking Copies of.]—The practice of the record and writ clerk's office is to produce the bill in a suit, or furnish a copy of it, after decree to any person who desires it, but not before—except in a representative suit to members of the class represented—unless with the plaintiff's consent, or under special circumstances. *Coates* v. *Brown*, 42 L. J., Ch. 378.

When, in a suit for specific performance of a contract to sell, it was discovered that some other specific performance suit had been commenced against defendants, but compromised:—Held, that plaintiffs were entitled to a copy of the bill in the compromised suit, notwithstanding the opposition of plaintiffs in that suit to any copy being furnished. *Ib.*

The clerk of records and writs is bound to furnish certified copies of chancery pleadings on application under the 14th section of the 14 & 15 Vict. c. 99. *Reeve* v. *Hodson*, 10 Hare (App.) xix; 22 L. J., Ch. 696; 17 Jur. 344; 1 W. R. 244.

Taking an office copy of an answer is not a waiver of an irregularity in its title. *Fry* v. *Mantell*, 4 Beav. 485; 11 L. J., Ch. 68; 5 Jur. 1194.

And see ante, col. 798.

b. STATEMENT OF CLAIM.

See R. S. C., 1883, Ord. XX.

Form in Schedule—Insufficiency.]—A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7, for a further and better statement of claim or particulars:—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C., No. 6, should generally be followed. *The Isis*, 53 L. J., P. 14; 8 P. D. 227; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. C. 155.

Differing from Writ.]—By the writ in a partnership action the plaintiff claimed an account, and an injunction restraining the defendant from dealing with the partnership assets. The statement of claim alleged (i.) misrepresentations on the faith of which he paid the defendant a premium, and (ii.) a course of conduct on the part of the defendant entitling him to damages, and claimed, in addition to the relief sought by the writ, the return of the premium, and damages:—Held, that the statement of claim, inasmuch as it sought relief substantially different from that claimed by the writ, and prevented a reference to arbitration, was not "an alteration, modification, or extension" of the writ within the meaning of Ord. XX. r. 4, and that it must be struck out. *Cave* v. *Crew*, 62 L. J., Ch. 530; 3 R. 401; 68 L. T. 254; 41 W. R. 359.

In a creditors' action for administration of real estate, it is sufficient that the statement of claim should express that the plaintiff sues on behalf of all creditors. *Eyre* v. *Cox*, 24 W. R. 317.

A writ being general, and the declaration special, as assignee:—Held, no ground for setting them aside as irregular. *Knowles* v. *Johnson*, 2 D. P. C. 653.

An allottee of shares brought an action for fraudulent misrepresentation against directors of his company, and by the indorsement on the writ he claimed indemnity and rescission of his contract to take shares. The company was ordered to be wound up. The plaintiff by his claim asked for indemnity, but not rescission. An application to determine whether the plaintiff was to be a contributory stood over pending this trial:—Held, that the plaintiff could not obtain rescission on the pleadings, and leave to amend was refused. *Cargill* v. *Bower*, 47 L. J., Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.

Writ Incorporated with.]—When a plaintiff sues in a representative capacity, the statement of claim is to be read for the purposes of a demurrer, as if that fact was stated therein. *Johnson* v. *Burges*, 47 L. J., Ch. 552.

When Necessary to Deliver.]—When an action by a cestui que trust under a will against executors and devisees in trust, for administration of the real and personal estate of the testator, was to be heard as a short cause, the court considered it unnecessary for the plaintiff to deliver a statement of claim. *Green* v. *Coleby*, 45 L. J., Ch. 303; 1 Ch. D. 693; 24 W. R. 246.

When an action is brought by a legatee for the administration of the estate of his testator, and

it is desired to take judgment short in the first instance, a statement of claim should be delivered. *Breton* v. *Mockett*, 33 L. T. 684.

When an action is brought to carry into execution the trusts of a deed, or other written instrument, a statement of claim should be delivered. *Boyes* v. *Cook*, 33 L. T. 778.

A defendant not appearing and proceeded against under Ord. XIII. r. 9, is not to be taken to have dispensed with the delivery of a statement of claim. *Minton* v. *Metcalfe*, 46 L. J., Ch. 584; 36 L. T. 683.

Information—Title of Claim.]—In an action by the attorney-general at the relation of a plaintiff, the title information should no longer be used. *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 42 L. T. 79.

Notice in lieu of—Writ specially Indorsed.]—The plaintiff, a barrister, issued his writ on the 30th August, 1879, indorsed for an injunction and other relief, and for payment of a sum of 1,000*l.*, alleged to have been received by the defendant as his solicitor. On the 12th December, 1879, the plaintiff was ordered to deliver a statement of claim on or before the 12th January. On the 10th January he delivered a statement of claim in person; on the 12th his solicitor, who had been that day served with a summons to set aside the statement of claim for irregularity, delivered a notice that his claim appeared by the indorsement on the writ in the form prescribed by Ord. XXI. r. 4:—Held, that the writ was not specially indorsed within the meaning of Ord. III. r. 6, and the statement of claim delivered by the solicitor must be set aside. *Yeatman* v. *Snow*, 42 L. T. 502; 28 W. R. 574.

—— **Objection on ground of Insufficiency.**]—A writ was specially indorsed, "The plaintiff's claim is against the defendant as the acceptor of a bill of exchange. The following are particulars:—Bill of exchange for 180*l.*, dated 27th of March, 1882, drawn by C. upon and accepted by defendant, payable three months after date." The plaintiff having delivered a notice under Ord. XXI. r. 4, that his claim was that which appeared by the indorsement on the writ, the defendant demurred on the ground that the statement was insufficient, and disclosed no cause of action:—Held, that there was no ground of demurrer, and that the defendant's remedy, if any, was to apply for a further statement under the rule. *Robertson* v. *Howard* (3 C. P. D. 280) disapproved. *Fawcus* v. *Charlton*, 52 L. J., Q. B. 710; 10 Q. B. D. 516.

A specially indorsed writ, together with a notice in lieu of a statement of claim under Ord. XXI. r. 4, are equivalent to a statement of claim for all purposes, and a defendant is, therefore, entitled to demur to them, if the claim on the writ shews no cause of action. *Robertson* v. *Howard*, 47 L. J., C. P. 480; 3 C. P. D. 280; 38 L. T. 715; 26 W. R. 683.

In an action for money alleged to have been obtained from the plaintiffs by fraudulent misrepresentation, the nature of which misrepresentation and the particulars of the sums sued for being set out in the indorsement of the writ of summons, the plaintiff delivered a notice in lieu of statement of claim under Ord. XX. r. 2:—Held, sufficient, and motion by the defendant to compel a statement of claim to be delivered, refused. *Young* v. *Beattie*, 16 L. R., Ir. 192.

Joinder of Alternative and Inconsistent Claims.] — *See* JOINDER OF CAUSES OF ACTION, ante, col. 121 et seq.

Title, Allegation of—Action for Recovery of Land.]—In an action for the recovery of land, of which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the person under whom he claims; and a general statement that by assurances, wills, documents, and crown grants in the possession of the defendants, without further describing them, the plaintiff is entitled to the land, is embarrassing, and liable to be struck out under the Rules of the Supreme Court, Ord. XXVII. r. 1. *Philipps* v. *Philipps*, 48 L. J., Q. B. 135; 4 Q. B. D. 127; 39 L. T. 556; 27 W. R. 436—C. A. S. P., *Sutcliffe* v. *James*, 40 L. T. 875; 27 W. R. 750.

The statement of claim in an action for the recovery of land, after alleging facts which would shew a title in Frances Evelyn, contained a statement that "the said Frances Evelyn died intestate as to real estate and leaving Sir Hugh Evelyn her heir-at-law," and then stated facts which shewed a title in the plaintiff to Sir Hugh Evelyn's estate:—Held, on a summons to strike out the paragraph above stated, that it was not embarrassing, and was a sufficient statement of the facts on which the plaintiff relied under Ord. XIX. r. 4. *Evelyn* v. *Evelyn*, 42 L. T. 248; 28 W. R. 531.

In an action for the recovery of land, a statement of claim, simply alleging that the plaintiff was wrongfully dispossessed of the lands by the defendant, was set aside. In such an action the plaintiff must, in his pleading, state such facts as would (if true) shew that he had an interest in the land entitling him to recover. *O'Connor* v. *O'Hara*, 8 L. R., Ir. 249.

The statement of claim, in an action to recover possession of land for nonpayment of rent, alleged that, prior to 1874, defendant was tenant to the plaintiff of certain premises (being those to which the action related) in the possession of the defendant, at a yearly rent, payable on every 1st of May and 1st of November; that the defendant paid the rent for said premises up to the 1st of May, 1874, but had not paid any rent since the 1st of May, 1874; and that, at the time of action brought, eight years' rent was due and owing to the plaintiff. The arrears of rent as well as possession were claimed:—Held, that the statement of claim was embarrassing for not averring with sufficient particularity any still subsisting contract of tenancy between the plaintiff and the defendant, and for pleading evidence. *Molly* v. *Lewers*, 12 L. R., Ir. 39—C. A.

In an action to recover possession of land for nonpayment of rent, semble, an allegation in the statement of claim that the defendant paid rent is unnecessary and embarrassing, as either wholly immaterial or as pleading evidence merely; but if payment of rent be alleged, the allegation may be traversed by the defendant in his statement of defence. *Rowley* v. *Laffan*, 10 L. R., Ir. 9.

In an ejectment for nonpayment of rent, brought by the assignee of the reversion against a lessee, it is sufficient for the plaintiff in his statement of claim to aver generally that the estate of the lessor became vested in him without more particularly stating the intermediate

devolution of title. *Musgrave* v. *Walsh*, 6 L. R., Ir. 335.

In an action to recover possession of land for nonpayment of rent by a plaintiff claiming under a derivative title, the statement of claim set out a lease, and alleged that the defendant entered into possession under it, and then stated that, on the death of the lessor, all his estate and interest came to and was now vested in the plaintiff. The defendant having moved to set aside the statement of claim as embarrassing :—Held, that the statement of the devolution of the plaintiff's title was sufficient. *Beatty* v. *Leacy*, 16 L. R., Ir. 132 —C. A.

Where in an action for the recovery of land a document is relied upon in the pleadings as establishing the claimant's title, the effect only of the document need be stated. The precise words are not material. *Darbyshire* v. *Leigh*, 65 L. J., Q. B. 360 ; [1896] 1 Q. B. 554 ; 74 L. T. 241 ; 44 W. R. 452—C. A.

In an action by the tenant in possession against a wrong-doer, it is sufficient to declare generally, without disclosing any title. *Grimstead* v. *Marlow*, 4 Term Rep. 717.

But if a defendant justifies under a right, it must be formally set out in the plea. *Ib.*

—— **Easement.**]—In an action to recover damages caused to the plaintiff's reversion in a dwelling-house by interference with an easement, it is not sufficient to allege in the statement of claim that the plaintiff is entitled to such easement ; the plaintiff must shew how he is so entitled, whether by grant, or prescription, or otherwise, and must set out the facts upon which he relies as entitling him to such easement. *Farrell* v. *Coogan*, 12 L. R., Ir. 14.

—— **Right of Way.**]—A plaintiff who claims to be entitled to a right of way over a road, and seeks an injunction to restrain its obstruction, should state in his statement of claim the way in which he claims to be entitled to the right, and the route and limitations of the road over which he claims it. A general statement, therefore, that there is a road over a certain farm connecting two other farms, and that the plaintiff and his tenants are entitled to a right of way over it, is embarrassing. *Harris* v. *Jenkins*, 52 L. J., Ch. 437 ; 22 Ch. D. 481 ; 47 L. T. 570 ; 31 W. R. 137.

The plaintiff was entitled to a right of way on foot through a passage across the defendant's premises. This passage had been formerly level throughout, with the exception of a three-inch step. The defendants raised part of the passage to a height of seven inches, or thereabouts, with an ascent of four and a descent of three steps. The plaintiff brought an action for the obstruction to his right of way caused by this alteration, and in his statement of claim alleged that his servants had been in the habit of carrying bales and other heavy goods along the passage. Semble, that the allegation in the statement of claim that the plaintiff's servants, in using the passage, frequently carried bales and other heavy goods, was embarrassing. *Austin* v. *Scottish Widows' Fund*, 8 L. R., Ir. 197.

In an action for interfering with the plaintiffs' right of way to a certain quarry, the plaintiffs alleged, in the first paragraph of their statement of claim, that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, on foot and with horses, carts and carriages, at all times of the year ; and in the second paragraph they alleged that they were entitled to a right of way from the public highway through a certain gateway, along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, on foot and with horses and carts, at all times convenient and necessary for the working of the said quarry, and for removing stones, gravel and other material therefrom. On motion to set aside the first and second paragraphs of the statement of claim :—Held, that the statement of claim was sufficient. *Kenmare* (*Lord*) v. *Casey*, 12 L. R., Ir. 374.

—— **Reversion — Action on Covenants in Lease.**]—In an action upon covenants in an expired lease, the plaintiff stated the lease ; that the term had expired ; that at its expiration the defendants were the assigns of the lease, and liable to perform the lessee's covenants ; that the plaintiff became, and at the expiration of the term was, entitled to the immediate reversion in the demised property, subject only to the term ; that he was and is entitled to enforce all the lessee's covenants, and that the defendants had for eight years paid him rent :—Held, such pleading was insufficient, that the plaintiff ought also to have shewn what the reversion was which the lessor had, and how the plaintiff derived his title to that particular reversion, and that the statement of claim must be struck out under Ord. XIX. r. 27, as a pleading tending to embarrass the fair trial of the action. *Philipps* v. *Philipps* (4 Q. B. D. 127) followed. *Davis* v. *James*, 53 L. J., Ch. 523 ; 26 Ch. D. 778 ; 50 L. T. 115 ; 32 W. R. 406.

Heirship.]—Semble, that in a claim of heirship the pedigree, if relied on, should, as a rule, be set out in the statement of claim as the material fact on which the claim is grounded. *Palmer* v. *Palmer*, 61 L. J., Q. B. 236 ; [1892] 1 Q. B. 319.

Plaintiff's Name.]—A plaintiff having declared as Henry H. Lindsey, instead of setting forth his second name in full, the court refused to set aside the declaration as irregular. *Lindsey* v. *Wells*, 3 Bing. (N.C.) 777 ; 4 Scott, 471 ; Hodges, 97 ; 5 D. P. C. 618 ; 6 L. J., C. P. 237.

No advantage can be taken at the trial of a misnomer of the plaintiff, though there is a person of the name erroneously used. *Moody* v. *Aslatt*, 1 C. M. & R. 771 ; 5 Tyr. 492 ; 1 Gale, 47 ; 4 L. J., Ex. 78.

It is a question of fact who is the real plaintiff. *Ib.*

Where a single vowel immediately precedes a surname, the court will understand such vowel to be the christian name of the party. *Kinnersley* v. *Knott*, 7 D. & L. 128 ; 7 C. B. 980 ; 18 L. J., C. P. 281 ; 13 Jur. 658.

Allegations of Time.]—It is not necessary to shew on the face of a declaration, that the cause of action accrued before the writ issued. *Owen* v. *Waters*, 5 D. P. C. 324 ; 2 M. & W. 91 ; 6 L. J., Ex. 13.

The plaintiffs declared, that theretofore, to wit, on the 24th December, 1835, by an agree-

ment in writing made, it was agreed that certain bills, which had been drawn upon a company of which the defendant was a member, should be paid by the plaintiffs; that the plaintiffs should have the option of taking shares in the company; and that in the event of their declining so to do, the defendant and certain other persons should repay the sum so advanced by the plaintiffs at any time after the 1st October then next, on the company having three calendar months' previous notice requiring the same. The declaration, which was dated 16th December, 1837, averred, that after the making of the agreement, and more than three calendar months before the action, the plaintiffs gave the company notice that they declined to take the shares, and required payment, at the expiration of three calendar months, of the sum advanced by them: —Held, that, notwithstanding the date of the agreement was laid under a videlicet, it sufficiently appeared, on the face of the declaration, that the action was not prematurely brought, although it was not alleged that the 1st of October next after the making of the agreement had elapsed before the action. *Harrison* v. *Heathorn*, 6 Scott (N.R.) 121; 5 Man. & G. 322; 12 L. J., C. P. 158. Contra, *Parkinson* v. *Whitehead*, 2 Scott (N.R.) 620; 2 Man. & G. 329; 11 L. J., C. P. 241.

A declaration stated that the plaintiff, being possessed of a bill of exchange, the defendant bought of the plaintiff, and the plaintiff sold to the defendant, the bill for 200*l.*; and it was agreed, that upon E. handing over to the plaintiff the 200*l.*, the bill should be delivered to E. It then alleged that the plaintiff was ready and willing to deliver the bill; and that, although the defendant had paid 50*l.*, parcel of the 200*l.*, yet (although requested) he had not paid the residue:—Held bad, for want of an averment that a reasonable time had elapsed since the making of the agreement, notwithstanding the defendant had pleaded over. *Stavert* v. *Eastwood*, 2 D. (N.S.) 988; 11 M. & W. 179; 12 L. J., Ex. 268.

A declaration stated that the defendant shipped on board the plaintiff's barge goods to be landed and delivered at a particular dock, and in consideration thereof the defendant promised to receive the goods in a reasonable time after notice of the plaintiff being ready to deliver them. It then alleged, that afterwards the plaintiff was ready to deliver the goods, but the defendant refused to receive them for an unreasonable time:—Held, that the declaration need not shew that the lapse of such reasonable time took place before the commencement of the action. *Granger* v. *Dacre*, 1 D. & L. 573; 12 M. & W. 431; 13 L. J., Ex. 93.

Exceptions and Qualifications.]—In an action by the freighter against a shipowner for breach of a charter-party of affreightment, the declaration stated that it was agreed that the ship should sail to S. H., and there load coals, and proceed to L. and deliver the cargo; freight being payable per ton (the act of God, the Queen's enemies, fire and all and every dangers and accidents of the seas, rivers and navigation of whatsoever nature and kind during the voyage, always excepted). That the charter-party should be in force for six voyages, and that they should not be later than the last day of February, 1853. Averment, that the plaintiff did all things necessary to entitle him to have the six voyages performed, and had always been ready and willing to do all things required, yet the ship did not make the six voyages, and that the defendant did not permit the vessel for the fourth time, or for any time except three times, to proceed to S. H. and load coals:—Held, that the declaration was good, it not being necessary for the plaintiff to negative the fact of the defendant being within any of the exceptions in the charter-party, it being the duty of the defendant if he relied upon such exceptions to plead it. *Wheeler* v. *Bavidge*, 9 Ex. 668; 2 C. L. R. 1077; 23 L. J., Ex. 221.

Action against Husband—Ante-nuptial Debt—Allegation of Assets unnecessary.]—In an action against a husband and wife married since the Married Women's Property Act, 1874, for the recovery of a debt of the wife contracted before the marriage, it is not necessary that the statement of claim should allege that the husband has received assets of the wife; it is sufficient to allege that the husband is liable for the debt, leaving it to the husband to exercise his option of pleading non-liability under the provisions of the act. *Matthews* v. *Whittle*, 49 L. J., Ch. 359; 13 Ch. D. 811; 43 L. T. 114; 28 W. R. 822.

Defamation—Innuendo—Sufficiency of.]—In an action for slander the statement of claim alleged that the defendant falsely and maliciously spoke and published the following of the plaintiff: "Did he (meaning the plaintiff) have a fire twice?" (meaning thereby that the plaintiff had upon two occasions set his business premises on fire or caused them to be set on fire). "He (meaning the plaintiff) has had two fires, and is a dangerous man to have on your premises" (meaning thereby that the plaintiff had upon two occasions wilfully set on fire his business premises, or caused them to be set on fire, and was likely to do so again):—Held, that the plaintiff must be nonsuited on the ground that the innuendo was insufficiently alleged to give a good cause of action. *Jacobs* v. *Schmaltz*, 62 L. T. 121. *See also* DEFAMATION.

Assignment—Statute.]—It is sufficient for the assignee of a bail-bond to state in his declaration that the sheriff assigned the bond to him according to the form of the statute, without adding "that the assignment was under the hand and seal of the sheriff"; for under that general allegation he must prove that it was under hand and seal if traversed. *Dawes* v. *Papworth*, Willes, 408.

Defendant not concerned in whole Relief.]—When plaintiffs have a common interest in all the matters comprised in a suit, the objection of a defendant that he is not concerned in the whole subject-matter, is one the allowance of which is in the discretion of the court, which will be guided by considerations of convenience under the particular circumstances of the case. *Coates* v. *Legard*, 44 L. J., Ch. 201; L. R. 19 Eq. 56; 31 L. T. 625; 23 W. R. 40.

By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default of appointment, to the use of the trustees during the life of the wife on trust for her, for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase-money was paid to

the trustees of the settlement, and a draft conveyance was approved, in the form of an appointment by the husband and wife to the purchaser; but before the conveyance had been executed the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees for his widow for life, and after her death to sell and divide the proceeds as therein directed. The widow, who was one of the executors, brought an action against the purchaser, the other executors and the devisees in trust under the husband's will, asking the court to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase-money if the contract should be completed, and whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation out of the purchase-money in respect of her life interest:—Held, that the statement of claim was not open to demurrer by the purchaser, on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for. *Cox* v. *Barker*, 3 Ch. D. 359; 35 L. T. 635—C. A.

Wilful Default—Specific Acts.]—A plaintiff seeking relief against wilful default must allege in his pleading some specific act of wilful default, or at least make out a strong case for inquiry. *Moore* v. *M'Glynn*, [1894] 1 Ir. R. 74.

General Relief.]—The rule is that relief may be given under the general prayer if a proper case is made by the bill, different from the specific relief prayed for, but not inconsistent with it. Accordingly, where the bill prayed that the defendant might refund certain dividends, and be restrained from receiving others till the other creditor had received as much as he had by means of a security, and the bill also stated that he was endeavouring, by virtue of the adjudication of a foreign court, to procure payment to himself of certain debts due to the bankrupt, it was held that the defendant was entitled, under the circumstances, to realise his security without prejudice to his right of proof. But it was held, nevertheless, that under the prayer for general relief the plaintiffs might obtain an injunction to restrain him from receiving further dividends till he had abandoned the proceedings against the debtors. *Cockerell* v. *Dickens*, 1 Mont. D. & D. 45; 3 Moore, P. C. 98.

Under a prayer for general relief the court is at liberty to give relief consistently with the case stated, but it never gives relief inconsistent therewith; as, for instance, directing the execution of a deed different from that of which the execution was prayed. *Stewart* v. *Gloag*, Macl. & R. 721.

A plaintiff cannot obtain relief inconsistent with the case made by the bill. *Mathers* v. *Green*, 35 L. J., Ch. 1; 11 Jur. (N.S.) 845; 13 L. T. 420; 14 W. R. 17.

Relief not specifically prayed may be within the prayer for general relief. *Beaumont* v. *Boulthee*, 5 Ves. 495. See *Palk* v. *Clinton*, 12 Ves. 48; 8 R. R. 283.

Relief under the general prayer if consistent with the case made by the bill. *Hiern* v. *Mill*, 13 Ves. 114; 9 R. R. 149.

The prayer for general relief is not available for the purpose of obtaining a decree at variance with the case made by the statements of the bill. *Hill* v. *G. N. Ry.*, 5 De G. M. & G. 66; 23 L. J., Ch. 524; 18 Jur. 685; 2 W. R. 335.

The prayer for general relief contained in a bill implies that the plaintiff desires that everything may be done which is necessary for the purposes of the relief which he expressly prays. *Jervis* v. *Berridge*, L. R. 8 Ch. 351; 28 L. T. 481; 21 W. R. 395.

A bill need not contain a specific allegation of the grounds for relief, but it will be sufficient if these grounds are by a reasonable deduction deducible from the facts stated in the bill. *Knox* v. *Gye*, 16 L. T. 76; 15 W. R. 628.

Interest refused because not prayed by bill. *Weymouth* v. *Boyer*, 1 Ves. J. 417.

Executors charged with interest on balances though not prayed by the bill. *Turner* v. *Turner*, 1 Jac. & Walk. 39.

Assignment of Facts to Prayer.]—Facts stated in a pleading need not be assigned to any particular prayer, so long as they tend to shew that the party relying on them is entitled to any one of the reliefs claimed, the paragraph containing them is not demurrable. *Watson* v. *Hawkins*, 24 W. R. 884.

So long as they entitle the party pleading them to any relief at all, whether expressly prayed for or not, the paragraph is not demurrable. *Ib.*

c. Defence.

See R. S. C., 1883, Ord. XXI.

What is—Signing Judgment in Default.]—The plaintiff issued a writ for the recovery of possession of certain premises against the defendant on 2nd February, and on the 13th of that month the defendant delivered at the office of the plaintiff's solicitor a document dated and signed by the defendant, setting out the terms under which he alleged that he held the premises. The plaintiff's solicitor signed judgment on the ground that no defence had been delivered. On a summons to set aside the judgment as irregular:—Held, that the document so delivered was not a defence, and that the judgment must stand. *Marshall* v. *Jones*, 52 J. P. 423.

Plea to Damages.]—The plaintiff, a professional jockey, sought to recover damages for a libel which stated that he was in the habit of pulling horses belonging to a certain stable. The defendant pleaded a justification, but sought leave to amend his defence by stating that the plaintiff was commonly reputed to have been in the habit of so unfairly and dishonestly riding horses (generally and not of a particular stable) as to prevent their winning races:—Held, that the amendment could not be allowed, since it was a plea to damages only. *Wood* v. *Durham* (*Earl*), 57 L. J., Q. B. 547; 21 Q. B. D. 501; 59 L. T. 142; 37 W. R. 222.

Where special damage is alleged in the declaration, and is essential to the maintenance of the action, such special damage may be traversed, and if not traversed is admitted. *Perring* v. *Harris*, 2 M. & Rob. 5.

But where the special damage is not the gist of the action, but a consequence only of the right of action, a traverse of such allegation is immaterial and improper. *Smith* v. *Thomas*, 2 Bing. (N.C.) 380; 1 Hodges, 355; 4 D. P. C. 333; 5 L. J., C. P. 52.

Inconsistent Defence.]—In an action for nuisance, payment into court, together with a denial of the right of action in respect of which the payment is made cannot be allowed. *Spurr* v. *Hall*, 46 L. J., Q. B. 693; 2 Q. B. D. 615; 37 L. T. 313; 26 W. R. 78. *But see following cases.*

Where a defendant has so pleaded, the defence will be amended as embarrassing under Ord. XXVII. r. 1. *Ib.*

As a general rule, a defendant may, by his defence, deny the plaintiff's causes of action, and at the same time plead payment into court in respect of the whole or any part of them. *Berdan* v. *Greenwood*, 47 L. J., Ex. 628; 3 Ex. D. 251; 39 L. T. 223; 26 W. R. 902—C. A.

Quære, whether this general rule may under special circumstances include actions brought to try a right of or in respect of property which is denied, or to establish character which has been assailed, and actions where the plaintiff is by the defence charged with fraud. *Ib.*

Quære, whether the case of *Spurr* v. *Hall*, supra, was rightly decided. *Ib.*

The defendant, in an action for a libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of certain innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper, and payment into court of 40*s.*:—Held, that the offering of an apology and payment into court and a justification could be pleaded together. *Hawkesley* v. *Bradshaw*, 49 L. J., Q. B. 333; 5 Q. B. D. 302; 42 L. T. 285; 28 W. R. 557—C. A. *See now* Rules of Supreme Court, 1883, Ord. XXII. r. 1.

It is no objection to pleas that they are inconsistent. *Wilkinson* v. *Small*, 3 D. P. C. 564; 1 H. & W. 214.

Inconsistent pleas may be pleaded if intended bonâ fide to support different substantial grounds of defence. *Triebnerr* v. *Duerr*, 3 D. P. C. 133; 1 Scott, 102; 1 Bing. (N.C.) 266.

A defendant may, in some cases, plead several pleas, shewing different legal conclusions arising out of the same state of facts. *Currie* v. *Almond*, 5 Bing. (N.C.) 224; 7 Scott, 172; 7 D. P. C. 249; 1 Arn. 483; 8 L. J., C. P. 103; 3 Jur. 171.

A defendant will not be allowed to plead several matters where the defence is vexatious, and some of the pleas are technical, and beside the merits. *Cooling* v. *G. N. Ry.*, 15 Q. B. 486; 19 L. J., Q. B. 529; 14 Jur. 875.

Payment into Court specifying Items.]—Where a plaintiff claims for distinct pieces of work and labour, alleged in separate paragraphs of the statement of claim, a defendant who has paid money into court generally need not specify in his defence how much is paid in respect of each head of claim. *Puraire* v. *Loibl*, 49 L. J., C. P. 481; 43 L. T. 427—C. A. *See* PAYMENT INTO COURT, supra, col. 249.

The defendants in an action for libel admitted part of the innuendo and denied the other; they added a plea under Lord Campbell's Act, with a payment into court generally:—Held, that the defence ought to state to what part of the libel the payment was intended to apply. *Mackay* v. *Manchester Press Co.*, 54 J. P. 22.

Statute of Frauds—How Raised and Pleaded.]—By Ord. XIX. r. 23, a defence under the Statute of Frauds, or any other special statute, must in all cases be specially pleaded; and such a defence cannot be constructively set up by traversing various allegations in the statement of claim. *Clarke* v. *Callow*, 46 L. J., Q. B. 53—C. A. S. P., *Towle* v. *Topham*, 37 L. T. 308. *Dawkins* v. *Penrhyn (Lord)*, 48 L. J., Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173—H. L.

The defence of the Statute of Frauds cannot now be raised by demurrer. *Catling* v. *King*, 46 L. J., Ch. 384; 5 Ch. D. 660; 36 L. T. 526; 25 W. R. 550—C. A.

The rule that the objection of the Statute of Frauds must be taken upon the pleadings was sufficiently complied with if it was taken by demurrer; and if the demurrer was overruled it was not necessary for the defendant to repeat the objection by plea or answer in order to entitle him to avail himself of it at the hearing. *Johnasson* v. *Bonhote*, 45 L. J., Ch. 651; 2 Ch. D. 298; 34 L. T. 745; 24 W. R. 619—C. A.

Where a defendant relies on the Statute of Frauds as a defence to an action he must not only state in his defence that he relies on such statute, but the facts which make the statute applicable must distinctly appear on the pleadings. To an action for goods sold and delivered and for work and labour, a statement that the defendant will avail himself of the statute 29 Car. 2, c. 3, without stating facts which would bring the case within the statute, was ordered to be struck out as embarrassing. *Pullen* v. *Snelus*, 48 L. J., C. P. 394; 40 L. T. 363; 27 W. R. 534.

The Statute of Frauds must be pleaded if intended to be relied on as a defence; but it is not necessary to plead any particular section. *James* v. *Smith*, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396. Affirmed on other grounds, 65 L. T. 544—C. A.

The plaintiffs brought an action upon a written guarantee signed by the defendant. The defendant did not plead the Statute of Frauds. At the trial the plaintiffs gave notice of a verbal contract, and in answer to the case so set up the defendant sought to rely upon the Statute of Frauds:—Held, that, if the evidence was admissible at all, the defendant was not debarred from relying on the statute by the fact that he had not pleaded it in the first instance, and that the judge should have directed the necessary amendments to be made in the pleadings. *Brunning* v. *Odhams*, 75 L. T. 602—H. L. (E.)

In an action for specific performance of an agreement when the statement of claim is silent as to whether the agreement was in writing or not, a defence founded on the Statute of Frauds cannot be raised by demurrer specifically relying on the statute. *Futcher* v. *Futcher*, 50 L. J., Ch. 735; 45 L. T. 306; 29 W. R. 884.

A defence founded on the Statute of Frauds could not, since the Judicature Acts, be raised by demurrer. *Morgan* v. *Worthington*, 38 L. T. 443.

The Statute of Frauds is not available as a defence to a suit to establish a trust, where it would be fraud to deny the trust. *Haigh* v. *Kaye*, 41 L. J., Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

The defence that there was no note in writing under 29 Car. 2, c. 3, ss. 4 & 17, need not have been specially pleaded, as the plaintiff was bound, under non assumpsit, to prove, as part of his case, the existence of a contract in writing sufficient to satisfy the terms of the statute.

Buttemer v. *Hayes*, 7 D. P. C. 489. S. P., *Leaf* v. *Tuton*, 2 D. (N.S.) 300; 10 M. & W. 393; 12 L. J., Ex. 69. *Turnley* v. *Macgregor*, 1 D. & L. 510. *Eastwood* v. *Kenyon*, 3 P. & D. 276; 11 A. & E. 489; 9 L. J., Q. B. 409. *Reed* v. *Lamb*, 6 Ex. 130.

Statute of Limitations.]—D. claimed, under a will executed in 1779, a certain estate, and the mesne profits accruing from the date when his father's title under that will first arose. The statement of claim itself set forth dates which shewed his grandfather's title to have first arisen in 1840, and his father's title on the death of the grandfather in 1852. His father died in 1864, and he alleged that he himself first knew of his own title in February, 1875. He asserted the existence of an express trust under the will. The defendant put in a demurrer, alleging that "the statement of claim was bad in law," denying that there was a trust so as to defeat the estates limited over on the death of the first tenant in tail without issue male, and it concluded with these words, "and on other grounds sufficient in law to sustain this demurrer":—Held, that this last sentence was sufficient to raise the defence of the statute of limitations. *Dawkins* v. *Penrhyn (Lord)*, 48 L. J., Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173—H. L. (E.)

There is a distinction between the statute of limitations and the statute of frauds. The latter must be pleaded. The title to the estate, not the mere right to proceed for its recovery, is affected by the former. If the plaintiff's statement of claim shews, on the face of it, that the time within which a title to land must be asserted has gone by, the defence of the statute of limitations may be raised on demurrer. *Ib.*

The statute of limitations must, under the new procedure, be pleaded, and cannot be raised by demurrer. *Wakelee* v. *Davis*, 25 W. R. 60.

A defence under the statute of limitations may in all cases be raised by demurrer. *Noyes* v. *Crawley*, 48 L. J., Ch. 112; 10 Ch. D. 31; 39 L. T. 266; 27 W. R. 109.

In an action for partnership accounts brought more than six years after the termination of the partnership, the defence of the statute may be raised by demurrer. *Ib.*

At the hearing of a claim a defendant is at liberty to avail himself of the benefit of the statute of limitations without pleading it. *Sneed* v. *Sneed*, 20 L. J., Ch. 630.

Illegality.]—If a good cause of action at common law appears in the declaration, the defendant must plead any statutable illegality in the contract on which it is founded in answer. *Burnett* v. *Glossop*, 3 D. P. C. 625; 1 Bing. (N.C.) 633; 1 Scott, 621; 4 L. J., C. P. 174.

A declaration stated that the plaintiffs were the promoters of a railway company, and the defendants members of a managing committee of a provisionally-registered railway company, and that the defendants were indebted to the plaintiffs in 3,000*l.* for plans, sections and books of reference, sold and delivered by the plaintiffs to the defendants, and by them used, and for work and materials. Plea, that each of the companies was a joint stock company within the meaning of the joint stock companies registration act, and not being a banking company; that it consisted of more than twenty-five members; and that a contract was made between the plaintiffs as such promoters, on behalf of the same company, and the promoters, of whom the defendants were two, of the secondly-mentioned company, whereby the plaintiffs agreed that the plaintiffs and the first-mentioned company should perform services for the secondly-mentioned company, which services and the payment of which were not necessarily required for the establishing of the company, and the work was done by the plaintiffs in their character of promoters, and an account was stated in the same character, and that neither of the companies was completely registered, or incorporated by statute or charter, or authorised by statute or letters patent to sue and be sued in the name of any officer or person, and that the plans, sections and books of reference at the time of the making of the contract, and at the time of the sale, and using of the plans, sections and books of reference, were stores not necessarily required for the establishing of the company, of all which premises the plaintiffs had notice at the time of the making of the contract, and at the time of doing the work and providing the materials, and selling and delivering, depositing, appropriating, and using the plans, sections and books of reference, and paying the money:—Held, that as the contract for services and work was forbidden by the act, and was therefore illegal, the plea was not bad as amounting to non assumpsit; and that it was a good answer to the action. *Bull* v. *Chapman*, 8 Ex. 444; 22 L. J., Ex. 257.

Illegality of the consideration of a contract cannot be objected to unless specially pleaded. *Clutterbuck* v. *Coffin*, 4 Scott (N.R.) 509; 1 D. (N.S.) 479; Car. & M. 273; 3 Man. & G. 842; 11 L. J., C. P. 65; 6 Jur. 131. S. P., *Haigh* v. *Kaye*, 41 L. J., Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

In an action for goods sold and delivered, the witnesses for the plaintiff proved a sale and delivery of fireworks to the defendant:—Held, that the defendant, under non assumpsit only pleaded, could not object that the sale of fireworks was illegal under 9 & 10 Will. 3, c. 7. *Fenwick* v. *Laycock*, 1 G. & D. 27; 1 Q. B. 414; 10 L. J., Q. B. 177; 5 Jur. 459.

Illegality of sale or contract must, in all cases, be specially pleaded. *Ib.*

Although such illegality appears on the plaintiff's pleadings, or by the plaintiff's own evidence. *Ib.*

In an action by the plaintiff, for wages as a female servant, the defendant pleaded the general issue, and the plaintiff gave evidence of acts of service. The defendant proposed to go into evidence to shew that the plaintiff had cohabited with him:—Held, that he might do so under this plea, as this went to shew that there was no contract between the parties, and not to invalidate any contract on the ground of illegality. *Bradshaw* v. *Hayward*, Car. & M. 591.

If facts are pleaded which shew that an agreement relied on must necessarily be simoniacal, it need not be alleged that the agreement was made corruptly, in order to bring it within the 31 Eliz. c. 6, s. 8. *Goldham* v. *Edwards*, 16 C. B. 437; 24 L. J., C. P. 189; 1 Jur. (N.S.) 684; 3 W. R. 551. S. P. and *S. C.*, 17 C. B. 141.

Statute.]—To a declaration for differences of prices of railway shares, the defendant pleaded a plea that the contract declared upon was a contract by way of gaming, contrary to the form

of the statute:—Held, on special demurrer, a bad plea, for too great generality of allegation. *Grisewood* v. *Blane*, 2 L., M. & P. 638; 11 C. B. 538; 21 L. J., C. P. 46.

To an action by a seaman for wages, a defence that the Merchant Shipping Act, 1854, s. 189, prohibits any suit in a superior court for the recovery of wages under 50*l*. is not open under never indebted, but must be pleaded specially. *Johnston* v. *Hilberry*, 3 H. & C. 328.

A declaration stated that the defendants erected a bridge across a canal, part of the bed of which belonged to the plaintiff, and also erected walls adjoining, and caused the bridge and walls to be so constructed as to project over parts of the land of the plaintiff. Plea, that the several acts, matters, and things complained of were lawfully done by the defendants, under and by virtue of powers given to them by a certain act of parliament (setting out the year and title):—Held, that this general form of plea was good, and that it was not necessary to allege the particular facts upon which the defendants relied as bringing them within the statute. *Bearer* v. *Manchester Corporation*, 8 El. & Bl. 44; 26 L. J., Q. B. 311; 4 Jur. (N.S.) 23.

In an action against a railway company for the full compensation claimed because of a default by the company to summon a jury within twenty-one days, a plea that the claim was not a bonâ fide claim within the statute, but in fraud of the company, and without any reasonable cause, will not be allowed. *Hooper* v. *Bristol Port Ry. and Pier Co.*, 35 L. J., C. P. 299.

Condition in Contract.]—In an action upon a contract, the averments in the declaration and the breach being sufficient, according to the contract as stated, any defence arising out of a condition not stated in the declaration must, if not supplied in law from the contract as stated, but capable of express proof, be specially pleaded, though, if implied, it may be raised on a denial of the averment of performance, or by demurrer, for want of such averments. *Coulson* v. *Attwood*, 26 L. J., Ex. 244.

General Issue by Statute — When Person entitled to Plead.]—If a party bonâ fide, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the legislature intended for him, although he has done an illegal act. *Spooner* v. *Juddow*, 6 Moore, P. C. 257. *See* Order XXI. r. 19.

Where a statute gives the plea of the general issue for anything done in pursuance of the act, the plaintiff cannot oust the defendant of this plea by waiving the tort, and suing in contract. *Calvert* v. *Moggs*, 2 P. & D. 543; 10 A. & E. 632; 8 L. J., Q. B. 339; 3 Jur. 1171.

See NOTICE OF ACTION, ante, col. 14 et seq.

—— **When allowed.**]—The 5 & 6 Vict. c. 97, s. 3, is by its preamble confined to actions "for any matter done in pursuance of or under the authority of the said acts," and therefore does not repeal 11 Geo. 1, c. 30, s. 43, by which the Royal Exchange Assurance and the London Assurance corporations are enabled, in all actions of covenant against them upon any policy, to plead generally that they have not broken the covenants in such policy. *Carr* v. *Royal Exchange Assurance Co.*, 1 B. & S. 956; 31 L. J., Q. B. 93; 8 Jur. (N.S.) 384; 6 L. T. 105; 10 W. R. 352.

The provisions of s. 3 of 5 & 6 Vict. c. 97, do not apply to statutes passed afterwards. *Boden* v. *Smith*, 18 L. J., C. P. 121; 13 Jur. 428.

—— **Local and Personal Acts.**]—The Building Act (14 Geo. 3, c. 78) and the 7 & 8 Vict. c. 84, for regulating the construction and use of buildings in the metropolis and its neighbourhood, are acts of a local and personal nature. *Richards* v. *Easto*, 15 M. & W. 244; 3 D. & L. 515; 15 L. J., Ex. 163; 10 Jur. 695.

The Metropolitan Police Acts (2 & 3 Vict. c. 47; 2 & 3 Vict. c. 71, and 3 & 4 Vict. c. 84) are not local and personal acts within 5 & 6 Vict. c. 97, s. 5. *Barnett* v. *Cox*, 9 Q. B. 617; 2 New Sess. Cas. 487; 16 L. J., M. C. 27; 11 Jur. 118.

An act for establishing a court of requests, empowering commissioners to adjudicate on demands, not exceeding a certain amount, by any persons against defendants resident within certain limits, and having a clause making it a public act, is a public local and personal act. *Cock* v. *Gent*, 12 M. & W. 234; 1 D. & L. 413; 13 L. J., Ex. 24.

The Ramsgate Harbour Acts (32 Geo. 3, c. lxxiv. and 55 Geo. 3, c. lxxxiv.) are acts of a local and personal nature. *Shepherd* v. *Sharp*, 1 H. & N. 115; 25 L. J., Ex. 254; 2 Jur. (N.S.) 617; 4 W. R. 570—Ex. Ch. S. P., *Moore* v. *Shepherd*, 10 Ex. 424; 3 C. L. R. 54; 24 L. J., Ex. 28; 3 W. R. 57.

—— **Must be pleaded.**]—The defence, that the venue in an action against a person for an act done in pursuance of the Building Act (14 Geo. 3, c. 78), was not laid in Middlesex, pursuant to s. 100, is one which must be specially pleaded, and cannot be taken advantage of under not guilty. *Richards* v. *Easto*, 15 M. & W. 244; 3 D. & L. 515; 15 L. J., Ex. 163; 10 Jur. 195.

—— **Insertion of Statute in Margin of Plea.**]—A noncompliance with rule 21 of Trinity Term, 1853, deprives a defendant of all benefit he might otherwise be entitled to under any statute giving protection to parties for acts done in pursuance or execution thereof. *Bartholomew* v. *Carter*, 3 Scott (N.R.) 529; 3 Man. & G. 125; 9 D. P. C. 896; 10 L. J., C. P. 257; 5 Jur. 552.

Where, in an action for hunting over the plaintiff's land, the defendant pleaded not guilty by statute, the court, on an affidavit of the plaintiff, that he could not discover the statute under which the defendant meant to justify, made absolute a rule upon the defendant, to point out within three days the statute under which the plea was pleaded, or else that the words "by statute" should be struck out of the margin. *Coy* v. *Forester (Lord)*, 8 M. & W. 312; 9 D. P. C. 770; 10 L. J., Ex. 262.

If a defendant does not add the words "by statute" in the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within the act of parliament, which allows a plea of not guilty; but if at the end of the plaintiff's case it appears that the defendant was entitled to notice of action, and the venue is in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" in the margin of the plea. *Mason* v. *Newland*, 9 Car. & P. 575.

A defendant pleaded not guilty by statute, and in the margin of the plea referred to several statutes. In addition, he relied at the trial on a section of one of the statutes not referred to, but no objection was taken:—Held, that the objection, that this section was not mentioned in the margin of the plea, was not available on the

argument of a rule to enter a nonsuit in pursuance of leave reserved. *Burridge* v. *Nicholetts*, 6 H. & N. 383; 30 L. J., Ex. 145; 3 L. T. 703; 9 W. R. 345.

Under 15 & 16 Vict. c. 76, s. 222, the judge at a trial has clearly power to amend a plea of not guilty by statute by inserting in the margin additional statutes to those marked there; not supplying a totally new and different defence, but making out completely the defence relied on, and founded on the statute or statutes originally marked in the margin; and the court, even after trial, and during or after argument, can allow the plea to be further amended (on such terms as it may think fit) by inserting in the same manner additional statutes which are necessary to the defence relied on at the trial and founded on the statutes originally marked. *Edwards* v. *Hodges*, 15 C. B. 477; 3 C. L. R. 472; 24 L. J., M. C. 81; 1 Jur. (N.S.) 91; 3 W. R. 112. S. P., *Eggington* v. *Lichfield Corporation*, 1 Jur. (N.S.) 908.

—— **Effect of Plea.**]—Where a defendant is entitled to plead not guilty by statute, he may go into any defence that could be specially pleaded, whether such defence is founded entirely on the statute, or partly on the statute and partly not, or is a defence wholly independent of the statute. *Maund* v. *Monmouthshire Canal Co.*, Car. & M. 606.

Under 3 & 4 Will. 4, c. 42, s. 1, an overseer sued for taking A.'s goods may still prove, under not guilty, that he, as overseer, distrained the goods for a poor-rate due from B., and that they were B.'s and not A.'s. *Haine* v. *Davey*, 4 A. & E. 892; 6 N. & M. 356; 2 H. & W. 30; 5 L. J., K. B. 167.

In an action for breaking the outer door and entering the plaintiff's dwelling-house, and seizing his goods, the defendant may give in evidence, under not guilty by statute, that he had entered under a warrant of distress for rent, and was forcibly turned out of possession, and thereupon broke the door and entered, in order to seize the goods. *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 12 L. J., Ex. 359.

The 5 & 6 Will. 4, c. 76, s. 76, provides that constables appointed for a borough shall, not only within the borough, but also within the county in which such borough is situated, have all such powers and privileges, and be liable to all such duties, as any constable duly appointed has within his constablewick, by virtue of the common law or of any statute; and by s. 133, in all actions against any person for anything done in pursuance of the act, he may plead the general issue and give the special matter in evidence. A borough constable was sued in replevin for an act done in discharge of his duty as a constable under that act, beyond the limits of the borough, but within the county in which the borough was situate:—Held, that he was entitled, under non cepit, to give the special matter of defence in evidence. *Mellor* v. *Leather*, 1 El. & Bl. 619; 22 L. J., M. C. 77; 17 Jur. 709.

By 5 & 6 Will. 4, c. 63, s. 39, "in all actions for anything done in pursuance of the act, or in execution of the powers or authorities thereof, the defendant may plead the general issue, and give the special matter in evidence, and that the acts were done in pursuance or by the authority of this act; and if they shall appear to have been so done . . . the jury shall find for the defendant." By s. 40, no plaintiff shall recover "for any irregularity, trespass or other wrongful proceeding, made or committed in the execution of this act, if tender of sufficient amends shall have been made" before action brought; and in case of no such tender made, that the defendant shall be at liberty, by leave of the court, before issue joined, to pay money into court, as in other actions:—Held, that an inspector, who had illegally seized a weighing-machine under a bonâ fide belief that he was acting at the time under the authority of the act, was entitled to the protection afforded by s. 39; but that, considered with s. 40, such protection did not extend to entitle the inspector to a verdict in an action against him for the illegal seizure. *Thomas* v. *Stephenson*, 2 El. & Bl. 108; 22 L. J., Q. B. 258; 17 Jur. 597; 1 W. R. 325.

Nature of Defence stated in the Pleadings.]—In an action to restrain the defendants from erecting a urinal in Old Burlington Mews, the statement of claim alleged that the soil of the mews was vested in and was the absolute property of three of the plaintiffs. The defence did not admit this allegation; but alleged that the mews had long been a highway dedicated to the public, and belonged to the parish as one of the public streets thereof. At the trial of the action several witnesses were examined on both sides; and, at the close of the defendant's evidence the plaintiffs applied leave to call evidence in reply, to shew that the soil of the mews had not been dedicated to the public:—Held, that, as the plaintiffs were distinctly apprised by the pleadings before the trial of the action what the nature of the defence would be, the application must be refused. *Vernon* v. *St. James' Vestry*, 49 L. J., Ch. 130; 42 L. T. 82.

Facts must be stated or Defence shut out.]—Evidence is rightly rejected where the particular facts and circumstances sought to be proved are not stated or referred to in the defence. *Scott* v. *Sampson*, 51 L. J., Q. B. 380; 8 Q. B. D. 491; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

An objection to the jurisdiction, although not raised in the pleadings, was allowed to be taken at the hearing, the state of the law on the question of jurisdiction having been unsettled at the time of filing the bill. *Stone* v. *Thomas*, 39 L. J., Ch. 168; L. R. 5 Ch. 219; 22 L. T. 359; 18 W. R. 385.

Nonsuit in Former Action, how Pleaded.]—Where a plaintiff has been nonsuited in a former action, but brings a second action, relying upon the same causes of action, the defendant should (except when the action is one of ejectment) plead the nonsuit in bar of the second action, a nonsuit under Ord. XL. r. 6, being of the same effect as a judgment on the merits for the defendant. *Bywater* v. *Dunne*, 10 L. R., Ir. 380.

Plea of Accord and Satisfaction.]—A plea which does not in terms admit or deny the breach alleged in the declaration, but sets up a certain agreement come to between the parties, which does not appear necessarily upon the face of it to be an agreement in accord and satisfaction, and is not alleged to have been accepted by the parties in accord and satisfaction of the causes of action in the declaration mentioned:—Held, bad on demurrer. *Barclay* v. *Bank of New South Wales*, 5 App. Cas. 374; 42 L. T. 196—P. C.

Libel—Plea of Justification—Particulars.]—A general plea of justification in an action of libel, where the libel complained of consists of

a general charge against the plaintiff, is bad, unless the defendant, in his particulars, states specifically the facts upon which he relies in support of the charge. *Zierenberg* v. *Labouchere*, 63 L. J., Q. B. 89; [1893] 2 Q. B. 183; 4 R. 464; 69 L. T. 172; 41 W. R. 675; 57 J. P. 711—C. A.

General Denial—Contract.]—To a statement of claim, or a counter-claim setting out a contract, and alleging a breach or several breaches, a general denial cannot be pleaded either in the form that the party so pleading "does not admit," or that "he denies the statements" in the statement of claim or counter-claim; but the making of the contract must be traversed or performance must be pleaded as the case may require. A traverse of the alleged breach is inadmissible. Sed per Palles, C.B.:—A pleading which denies the making of an alleged contract is in all cases unobjectionable in point of form. *Dunne* v. *Clancy*, 6 L. R., Ir. 395.

—— **That Libel was Falsely and Maliciously Published.**]—In an action for libel the defendant may not in his defence deny generally that he "wrote or published the same falsely or maliciously, as alleged," but must set out the facts upon which he relies, either to shew justification or privilege. *Belt* v. *Lawes*, 51 L. J., Q. B. 359.

—— **Action for Recovery of Land.**]—In an action to recover possession of land for nonpayment of rent, the defendant denied, first, that he became, or was, or is, tenant to the plaintiffs, or any of them; and, secondly, that he paid rent to the plaintiffs, or any of them:—Held, embarrassing and defective, in not answering the substance of the claim by a denial that there was a subsisting tenancy in any person under the plaintiffs. In such an action, when the pleader wishes to traverse the alleged tenancy it is necessary for him to negative any tenancy, whether subsisting in the defendant specially named or any other person under the plaintiffs. *Rowley* v. *Laffan*, 10 L. R., Ir. 9.

In an action for the recovery of land, a statement of defence alleging that the defendant is in possession operates (by virtue of Ord. XIX. r. 15, of the Rules of Court, 1875) as a denial of the allegations in the plaintiff's statement of claim, and requires the plaintiff to prove them. *Danford* v. *McAnulty*, 52 L. J., Q. B. 652; 8 App. Cas. 456; 49 L. T. 207; 31 W. R. 817—H. L. (E.)

In an ejectment on the title by the assignee of a lease against the assignors, the statement of claim alleged an assignment by deed by the defendants to the plaintiff: and the defendants, in their defence, denied "that they assigned or made over the premises" to the plaintiff:—Held, that the defence put in issue the execution only of the instrument of assignment, and that it was not open to the defendants upon the pleading to contend that the assignment, though in fact made by deed executed, was illegal and void, as contrary to a covenant against alienation in the lease. *Hayes* v. *Corcoran*, 8 L. R., Ir. 75.

The statement of claim, in an action to recover possession of land for nonpayment of rent, alleged a lease of the lands, that it was subsisting, that the lessee entered under it, that the defendant entered under the lessee, and was, at the time of action brought, in possession. The defence stated:—"That the defendant did not, at the commencement of this action, nor does he now, nor does any other person, hold the said lands and premises, or any part thereof, as tenant or subtenant to the plaintiff":—Held, that the defence was embarrassing, and should be set aside. *Barnes* v. *Barnes*, 8 L. R., Ir. 165—C. A.

Where the statement of claim, in an ejectment for nonpayment of rent, alleged that the plaintiff let the premises to the defendant at a rent, and that one year's rent was due and unpaid, a defence, denying that "the defendant is or was tenant to the plaintiff, or any other person, for the said premises," was set aside as embarrassing. *Hildige* v. *O'Farrell*, 8 L. R., Ir. 158—C. A. *See* Rules of Supreme Court, 1883, Ord. XXI. r. 21.

—— **Traverse.**]—Under non assumpsit the consideration for the promise is not traversed. *Passenger* v. *Brooks*, 1 Scott, 560; 1 Bing. (N.C.) 587; 1 Hodges, 123; 7 Car. & P. 110; 4 L. J., C. P. 195.

Want of consideration, or any matter other than a direct denial of the contract, cannot be given in evidence under non assumpsit. *Ib.*

In an action on a contract founded on an executory consideration the plaintiff averred in his declaration that the consideration had been performed, and the defendant pleaded non assumpsit:—Held, that on this plea the question whether or not the consideration was in fact performed could not be gone into, and that to entitle the defendant to go into that question, he should have pleaded that the consideration had not been performed. *Gibson* v. *Harris*, 8 Car. & P. 378.

In an action on a guarantee the defendant may shew, under the general issue, that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument. *Raikes* v. *Todd*, 1 P. & D. 138; 8 A. & E. 846; 8 L. J., Q. B. 35.

To an action on a guarantee, the defendant pleaded non assumpsit:—Held, that under this plea he could not give in evidence, that, subsequently to the execution of the agreement, and whilst it was in the possession of the plaintiff, a seal was affixed to the defendant's signature, so as to make the instrument purport to be a deed, but that such defence ought to be pleaded specially. *Davidson* v. *Cooper*, 1 D. & L. 377; 11 M. & W. 778; 12 L. J., Ex. 467.

The 3 & 4 Will. 4, c. 52, s. 108, required that previously to the unloading of goods carried coastwise, a written notice of the ship's arrival, signed by the master, should be given to the collector or controller of customs by the master, owner, wharfinger, or agent of the ship, and that certain documents should be obtained. In an action for demurrage:—Held, that noncompliance by the plaintiff with these provisions could not be given in evidence under the general issue. *Alcock* v. *Taylor*, 6 N. & M. 296; 2 H. & W. 58; 1 Jur. 513.

In an action on an express contract, which, on production at the trial, contains an interlineation in a material part, if the plaintiff proves that the instrument was originally executed without the interlineation, and in the form declared upon, the defendant cannot, under non assumpsit, contend that it has been avoided by the subsequent alteration. *Hemming* v. *Trenery*, 1 P. & D. 661; 9 A. & E. 26; 8 L. J., Q. B. 160.

A declaration against a steamboat company, for refusing to receive the plaintiff as a passenger, stated that they were common carriers of passengers for hire from Southampton to a place

beyond the seas. Plea, that they were not common carriers of passengers for hire :—Held, that the plea put in issue only the fact of the company being common carriers of passengers from and to the places named, without reference to the question whether the custom of the realm extended to a carrying beyond the seas. *Benett* v. *Peninsular and Oriental Steamboat Co.*, 6 C. B. 775.

So, in an action for goods sold and delivered, evidence is admissible under non assumpsit to shew that the article was a machine for which nothing was to be paid unless it worked well, and the defendant is entitled to a verdict, if he shews that the machine did not work well. *Groundsell* v. *Lamb*, 2 Gale, 28 ; 1 M. & W. 352 ; 5 L. J., Ex. 154.

Where a declaration was for goods sold and delivered, and an account stated, the defendant pleaded that by a deed the plaintiff released the defendant, to which the plaintiff replied non est factum :—Held, that under this issue the plaintiff was not entitled to shew that the cause of action accrued subsequently to the date of the release; but should have made it the subject of a new assignment. *Jubb* v. *Ellis*, 3 D. & L. 346 ; 15 L. J., Q. B. 94 ; 9 Jur. 1057.

Action pending Abroad.]—In a transitory action a plea in abatement of an action pending in a foreign court is bad. *Scott* v. *Seymour* (*Lord*), 31 L. J., Ex. 457 ; 8 Jur. (N.S.) 568 ; 6 L. T. 607 ; 10 W. R. 739. Affirmed, 1 H. & C. 219 ; 32 L. J., Ex. 61 ; 9 Jur. (N.S.) 522 ; 8 L. T. 511 ; 11 W. R. 169—Ex. Ch.

To an action on an American judgment, the defendant pleaded that it was erroneous according to the law of New York, and was liable to be reversed, and that he was prosecuting proceedings in appeal, which were pending :—Held, that though the pendency of an appeal might afford ground for an equitable interposition of the court, and on proper terms to stay execution, it was no bar to the action itself. *Scott* v. *Pilkington*, 2 B. & S. 783 ; 31 L. J., Q. B. 81 ; 8 Jur. (N.S.) 557 ; 6 L. T. 21.

A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the court of admiralty in England by the owner of the English vessel against the owner of the steamer, and a warrant of arrest issued against the ship ; but before the ship could be arrested she had sailed for Scotland. A suit was then commenced by the owner of the English vessel against the owner of the steamer, in the court of session in Scotland, for the damage, and the steamer was arrested under process of that court, but subsequently released upon bail. The proceedings in the court of session were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the high court of admiralty in England, and an action for damage commenced in that court for the same cause of action as was still pending in Scotland, the proceedings in the court of session being abandoned. The owner of the steamer appeared under protest in the admiralty court, and pleaded lis alibi pendens :—Held, that the plea of lis alibi pendens was bad, as the suit in Scotland was, in the first instance, in personam, the proceedings being commenced by process against the person of the owner of the vessel, and the arrest of the steamer only collateral to secure the debt, while the proceedings in the admiralty court in England were, in the first instance, in rem, against the vessel, and therefore the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other. *Harmer* v. *Bell*, 7 Moore P. C. 267.

Another Action pending.]—In an action against one of several joint contractors, the defendant cannot plead in abatement the pendency of another action for the same cause against another of the joint contractors, and in which he was not himself a defendant. *Henry* v. *Goldney*, 15 M. & W. 494 ; 4 D. & L. 6 ; 15 L. J., Ex. 298 ; 10 Jur. 439.

Cf. Cases ante, STAYING PROCEEDINGS, col. 294.

d. SET-OFF AND COUNTER-CLAIM.

1. When Allowed—Nature and Effect of, &c.

Judicature Act, 1873, s. 24, sub-s. 3. *See* R. S. C., 1883, Ords. XIX., XXI.

Difference between Set-off and Counter-claim.]—The 2 Geo. 2, c. 22, relieved a party who owed another a debt from the obligation to pay and seek his remedy by a cross-action, by enacting that where there are mutual debts one may be set off against the other. If the debt due to the defendant exceeded that due from him to the plaintiff, that act gave him no remedy for the excess, he must have sued for that in a separate action. The judicature act alters this so far as to authorise the court to give judgment for the excess. But that is all ; the set-off is not an independent action, it is still a defence, and nothing more. If the plaintiff, before the judicature act, chose to discontinue his action, the defendant could not claim to have his set-off tried. It fell with the action, to which it was and still is an adjunct.—Per Lush, L.J. *Gatliercole* v. *Smith*, 50 L. J., Q. B. 681 ; 7 Q. B. D. 626 ; 45 L. T. 106 ; 29 W. R. 577 ; 45 J. P. 812—C. A.

To my mind, the legislature has made no distinction whatever between counter-claim and set-off. A set-off is a counter-claim, and a counter-claim is a set-off.—Per Bramwell, L.J. *Ib.*

I do not quite, as at present advised, feel satisfied that a set-off and counter-claim are intended by the rules to be the same thing ; I am disposed to think that the two things are differently regarded in those rules, but it is unnecessary to refer to the rules that have reference to it for the purpose of shewing it.—Per Baggallay, L.J. *Ib.*

Whether Counter-claim an Independent Action.]—Semble, that a counter-claim is an independent action, and not part of the original action, though for convenience the two are tried together. *Varasseur* v. *Krupp* (15 Ch. D. 474) questioned. *Beddall* v. *Maitland*, 50 L. J., Ch. 401 ; 17 Ch. D. 174 ; 44 L. T. 248 ; 29 W. R. 484.

A counter-claim is not equivalent to a separate action. Where, therefore, a defendant has delivered a defence, and counter-claimed, and the plaintiff has then discontinued his action, the defendant cannot proceed with his counter-claim. *Varasseur* v. *Krupp*, 15 Ch. D. 474 ; 28 W. R. 366.

By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action

contained in the counter-claim. *Tavasseur* v. *Krupp* (15 Ch. D. 474) overruled. *McGowan* v. *Middleton*, 52 L. J., Q. B. 355; 11 Q. B. D. 464; 31 W. R. 835—C. A.

An action commenced in the high court cannot be sent down for trial in a county court under s. 65 of the County Courts Act, 1888, where the plaintiff has discontinued and only a counter-claim by the defendant remains to be tried. *Reg.* v. *City of London Court Judge*, 60 L. J., Q. B. 575; [1891] 2 Q. B. 71; 64 L. T. 869.

—— **No Order on Counter-claim until Plaintiff's Claim disposed of.**]—In an action for an account of rents and profits, the defendant delivered a defence and a counter-claim, to set off money due to him from the plaintiff under an award. The plaintiff in his reply simply joined issue generally, and the defendant then, treating the counter-claim as admitted, moved under Judicature Act, Ord. XXXIII. and Ord. XL. rr. 10 and 11, for an account of what was due to him under it:—Held, that the case was not one for an account under Ord. XXXIII.; and that no order could be made on the counter-claim before the principal claim of the plaintiff was dealt with. *Rolfe* v. *Maclaren*, 3 Ch. D. 106; 24 W. R. 816.

An order will not be made upon a counter-claim until the original claim has been dealt with. *Aitken* v. *Dunbar*, 46 L. J., Ch. 489; 25 W. R. 366.

Therefore, when in answer to a statement of claim a defence and counter-claim had been delivered, and some months after the expiration of the period allowed to the plaintiff for applying a motion was made for a decree according to the prayer of the counter-claim, the motion was dismissed. *Ib.*

Need not equal Plaintiff's Claim.]—It is not essential to a good counter-claim that it should show a claim to an amount equalling the plaintiff's claim. *Mostyn* v. *West Mostyn Coal Co.*, 45 L. J., C. P. 401; 1 C. P. D. 145; 34 L. T. 324; 24 W. R. 401.

Separate Counter-claims against Joint Plaintiffs.]—When two or more sue for a joint claim, the defendant may set up against each individual plaintiff separate counter-claims sounding in damages. *Manchester, Sheffield and Lincolnshire Ry.* v. *Brooks*, 46 L. J., Ex. 244; 2 Ex. D. 243; 36 L. T. 103; 25 W. R. 413.

Two railway companies having, as joint lessees of a railway, sued for statutory tolls, the defendant set up against each company separate counter-claims for damages in respect of delay in the delivery of goods. The plaintiffs applied to strike out the counter-claims, but no reasons were alleged why they could not be conveniently disposed of in the action:—Held, that the counter-claims ought not to be struck out. *Ib.*

Counter-claim must be against Plaintiff.]—A counter-claim must seek some relief against the plaintiff, and is not the proper form for a defendant's claim against a co-defendant for indemnity. *Furness* v. *Booth*, 46 L. J., Ch. 112; 4 Ch. D. 586; 25 W. R. 267. *See* infra, col. 854.

Effect of Judicature Act and Rules.]—Rule 3 of Ord. XIX., Rules of Court, 1875, was not intended to give rights against third parties which did not exist before; but it is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action. *Milan Tramways Co., In re, Theys, Ex parte*, 52 L. J., Ch. 29; 22 Ch. D. 122; 48 L. T. 213; 31 W. R. 107. Affirmed, 53 L. J., Ch. 1008; 25 Ch. D. 587; 50 L. T. 545; 32 W. R. 601—C. A.

"Connected with the Original Cause or Matter"—Third Party.]—An action asking relief as in detinue was brought against a sole defendant, who had seized goods which B. had assigned to the plaintiff under a bill of sale. The sole defendant filed a defence and a counter-claim impeaching the bonâ fides of the plaintiff's bill of sale, and alleging a bill of sale by B. to himself, and by such counter-claim claimed, (1) relief against the plaintiff, and (2) as against B. the money due under the bill of sale from B. to himself, and damages for the alleged fraud. The counter-claim against the plaintiff was abandoned at the hearing:—Held, that the relief asked by the defendant against B. was not a matter sufficiently "relating to or connected with the original cause or matter" to be the subject of a claim under s. 24 of the Judicature Act, 1873. *Barber* v. *Blaiberg*, 51 L. J., Ch. 509; 19 Ch. D. 473; 46 L. T. 52; 30 W. R. 362.

Ord. XIX. r. 3, is sufficiently general to allow a counter-claim by way of defence whether or not it is connected with or of the same character as the plaintiff's claim, and whether it sounds in damages or not. *Gray* v. *Webb*, 51 L. J., Ch. 815; 21 Ch. D. 802; 46 L. T. 913; 31 W. R. 8.

The plaintiff, the trustee of a settlement, by his statement of claim pleaded that the defendant, a cestui que trust of the settlement, had, by deed, covenanted to indemnify him against an innocent breach of trust in consequence whereof he had been compelled to bring 10,000*l.* into the settlement, and had incurred costs; and he claimed 11,000*l.* The defendant delivered a defence and two counter-claims, making the plaintiff and A. defendants to the counter-claims. By the defence he denied that any claim had been made upon or loss sustained by the plaintiff, and he impeached the validity of the deed of covenant. By his first counter-claim, he stated that the plaintiff and A. were the executors of the will of his father, who had joined in the covenant, and had also given to him a covenant of counter-indemnity, and he claimed that the plaintiff must be held to have admitted assets, and to have retained the amount of his claim out of his testator's estate, or otherwise that such estate might be administered for the purpose. By the second counter-claim, he stated that his father had appointed 10,000*l.* to A. on a secret trust to satisfy the liability as to the 10,000*l.* and he claimed performance of this trust accordingly:—Held, that both counter-claims must be excluded as not being sufficiently connected with the original subject-matter of the action, and as calculated unduly to embarrass and delay the plaintiff. *Paduich* v. *Scott*, 45 L. J., Ch. 350; 2 Ch. D. 736; 24 W. R. 723.

The relief claimed by a counter-claim must relate to the specific subject-matter of the action. *Harris* v. *Gamble*, 46 L. J., Ch. 768; 6 Ch. D. 748.

—— **Foreign Government — Submission to Jurisdiction.**]—Where in an action for the appointment of new trustees of a fund the defen-

dant counter-claims for damages for libel, the court will as a rule strike out the counter-claim and leave the defendant to bring an independent action in respect of the libel. The fact that the plaintiffs are a foreign government against whom the defendant cannot bring an action for libel is not sufficient reason for allowing him to proceed by counter-claim so as to take advantage of the circumstance that the plaintiffs have, by bringing their action, submitted to the jurisdiction of the court. *South African Republic* v. *La Compagnie Franco-Belge*, 66 L. J., Ch. 747; [1897] 2 Ch. 487; 77 L. T. 241; 46 W. R. 67—C. A.

Counter-claim in respect of Matter for which Action not Maintainable.]—To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their defence sought to avail themselves, either by way of set-off or of counter-claim, of a debt due to them from the intestate as one of several makers of a promissory note for 1,000*l.* which did not become due until after the intestate's death. Reply, that before action an order was made in an administration suit in the chancery division, to take an account of the debt and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice; and that, under 23 & 24 Vict. c. 38, s. 14, equity would restrain any proceedings on the note until the account had been taken:—Held, that the claim in respect of the promissory note could not be relied on as a set-off; and that in accordance with the practice in equity, the defendants must under the circumstances be restrained from setting it up by way of counter-claim, and be left to prove for it in the administration suit. *Newell* v. *National Provincial Bank of England*, 45 L. J., C. P. 285; 1 C. P. D. 496; 34 L. T. 533; 24 W. R. 458.

Counter-claim and Set-off in Reply.]—A plaintiff may, in his reply to a counter-claim of the defendant, counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant. *Toke* v. *Andrews*, 51 L. J., Q. B. 281; 8 Q. B. D. 428; 30 W. R. 659.

Equity to set aside Deed.]—Where in an action for rent due under a lease of coal mines it was shewn in the defence that the plaintiff had no title to part with the mines, and that he knew this when he granted the lease, but that the defendant did not know and had not the means of knowing it, and that he had not entered into possession or done anything to prevent his repudiating the lease:—Held, that as equity under such circumstances would set aside the lease, although there had been no actual fraud on the part of the plaintiff, the defendant was entitled to repudiate, and the defence so shown was a good answer to the action. *Mostyn* v. *West Mostyn Coal Co.*, 45 L. J., C. P. 401; 1 C. P. D. 145; 34 L. T. 324; 24 W. R. 401.

There being a breach of the covenant for title, and the defendant being entitled to some damages for such breach:—Held, that he might claim such damages by way of counter-claim to the action for rent, though there had been no eviction, and the want of title related to only a portion of the demised property. *Ib.*

Claim against Separate Estate of Wife—Counter-claim for Debt due to Wife.]—In an action against a wife to enforce against her separate estate an alleged debt, the husband was joined as a formal defendant. By their joint defence the husband and wife denied the debt, and by way of counter-claim claimed a debt due to the wife, and also the restitution of four pictures belonging to the husband, and alleged to be retained by the plaintiff against their claim on the wife:—Held, that the husband and wife's claim was properly raised by counter-claim. *Hodson* v. *Mochi*, 47 L. J., Ch. 604; 8 Ch. D. 569; 38 L. T. 635; 26 W. R. 590.

Claim by Plaintiff in her own Right—Counter-claim against her as Executrix.]—Where a plaintiff sues in her own right, a defendant will not be allowed to set up, by way of counter-claim, a claim against the plaintiff as executrix. *Macdonald* v. *Carington*, 48 L. J., Ch. 179; 4 C. P. D. 28; 39 L. T. 426; 27 W. R. 153.

Action by Executor—Counter-claim against Testator's Estate.]—The executors of M., a holder of debentures of a company, commenced an action to have the trusts of a deed for securing payment of the debentures of the company carried into execution. The company delivered a defence and counter-claim, alleging that M. had been a director and promoter of the company, and while filling those characters had joined with other persons in selling an estate to the company at a profit, concealing the fact of his interest in the estate, and that he had received more than the claim as his share of the profit of the transaction. The plaintiffs applied to have the counter-claim excluded on the ground that it could not be conveniently disposed of in the present action. The application was refused. *Huggons* v. *Tweed*, 10 Ch. D. 359; 40 L. T. 284; 27 W. R. 495—C. A.

Leave to enforce Judgment of another Division.]—In a counter-claim a defendant may refer to statements of fact in the pleadings on which he intends to rely, without setting them out again in full. An action was commenced in the chancery division to set aside a mortgage. The defendant subsequently commenced an action in the queen's bench division for payment of his mortgage debt, and obtained judgment, which, however, by order of the judge of that division, was not to be enforced without the leave of the judge of the chancery division. The defendant counter-claimed in the action in the chancery division, for leave to enforce his judgment, or in the alternative for judgment for what was due under his mortgage deed. On motion to exclude the counter-claim:—Held, that by analogy to the old practice, in a suit where, on a primâ facie case being made out, an injunction would, under such practice, have been granted to restrain the defendant proceeding to enforce his judgment, the order made by the judge of the queen's bench division was a proper and convenient form of order to make under the present practice:—but held, secondly, that inasmuch as no action could have been brought to enforce the judgment, the counter-claim was wrong, and must be struck out, and that the proper way for the defendant to enforce his judgment was to apply for leave to do so at the trial of the action in the chancery division. *Birmingham Estates*

Co. v. *Smith*, 49 L. J., Ch. 251; 13 Ch. D. 506; 42 L. T. 111; 28 W. R. 666.

Action by Assignee of Policy—Set-off by Insurers of Claims against Assured.]—In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the statutes of set-off in an action by the insured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the Rules of the Supreme Court, Ord. XIX. r. 3. *Pellas* v. *Neptune Marine Insurance Co.*, 49 L. J., C. P. 153; 5 C. P. D. 34; 42 L. T. 35; 28 W. R. 405—C. A.

Action by Assignee of Debt—Claim against Assignor.]—As a defence to a claim by the plaintiff as assignee of the balance of a debt due from the defendant to D. for work done under a contract, the defendant counter-claimed against the plaintiff for damages for breach of the contract by D.:—Held, that the defendant was entitled to counter-claim for such damages, but only as a set-off to the plaintiff's claim. *Young* v. *Kitchin*, 47 L. J., Ex. 579; 3 Ex. D. 127; 26 W. R. 403.

In such a case the counter-claim should shew on the face of it that the defendant does not seek damages against the plaintiff, but only to set them off against the plaintiff's claim. *Ib.*

Claim for Dissolution of Partnership—Counter-claim for Services rendered.]—To an action for dissolution of partnership the defendant, after denying the partnership, set up a counter-claim stating transactions which raised an altogether different cause of action, and claiming remuneration from the plaintiff for his services. Such transactions were totally unconnected with the partnership, the subject of the plaintiff's claim:—Held, that such a claim was not convenient to be disposed of in the present action, and that the defendant could not be allowed to avail himself of it; but that it was a proper subject for a cross-action. *Naylor* v. *Farrer*, 26 W. R. 809.

Action for Calls by Liquidator—Claim for Debt from Company.]—A person who has been duly settled on the list of contributories of a company, and on whom calls have been duly made, cannot (even in the case of a voluntary liquidation), in an action for calls by the liquidators of the company, counter-claim for a debt or damages due to him from the company. The defendant, a newspaper proprietor, agreed to take fully paid-up shares in payment of advertisements inserted in his newspaper by the company, and duly performed his part of the contract, but the company omitted to register the contract. The company went into voluntary liquidation, and the defendant was settled on the list of contributories as the holder of shares not paid for in cash. Calls were duly made, and the defendant sought, in answer to an action by the liquidator for money due on calls, to counter-claim for the price of the advertisements or damages for neglect to register the agreement to give him fully paid-up shares:—Held, that no such set-off or counter-claim could be pleaded. *Mumford's Case* (14 Ch. D. 643) followed. *Government Security Investment Co.* v. *Dempsey*, 50 L. J., Q. B. 199.

Rights of one Surety sued alone—Joint Debt of Defendants — Debt due from Plaintiff to Co-Surety.]—Action on a covenant to pay all liabilities which the plaintiff might incur under a deed of assignment made between the plaintiff and other parties. The defendant pleaded that the covenant was the joint and several covenant of himself and one Wilson, and that before action the plaintiff was indebted to Wilson in an amount exceeding the plaintiff's claim against the defendant; and that Wilson had assigned the plaintiff's debt to himself and the defendant in equal shares as tenants in common. As to one-half of the plaintiff's claim the defendant claimed to set off one-half of the debt so assigned, and as to the other half, the defendant said that he was entitled to be exonerated by his co-surety Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and was entitled to set off the share remaining vested in Wilson against this part of the plaintiff's claim:—Held, that the defence was no answer to the plaintiff's claim. *Bowyear* v. *Pawson*, 50 L. J., Q. B. 495; 6 Q. B. D. 540; 29 W. R. 664.

Action delayed—Breach of Trust—Bill of Exchange.]—An action was brought by a tenant for life and other cestuis que trusts against the trustees of a settlement for breaches of trust. One of the trustees alleged as a defence that the breaches of trust had been sanctioned by the tenant for life; and also set up a counter-claim upon a bill of exchange for 45*l.*, claiming payment of that amount, and that the income of the tenant for life, arising from the property subject to the settlement, might be applied towards payment of the 45*l.*, and any other sums which the trustee might be ordered to pay:—Held, that the counter-claim must be struck out under Ord. XXI. r. 15. *Fendall* v. *O'Connell*, 52 L. T. 538.

Set-off—Defendant against Principal—Action by Agent.]—In an action of trover and for goods sold and delivered a defendant cannot set off a claim for unliquidated damages which he has against a third party on another transaction, although the third party happens to be the plaintiff's principal. *Tagart* v. *Marcus*, 36 W. R. 469.

Action for Rent—Counter-claim for Damages for Libel.]—In an action for rent, the court refused to allow the defendant to set up a counter-claim for damages for a libel not connected with the subject-matter of the action. *Rotherham* v. *Priest*, 28 W. R. 277.

In Action for Recovery of Land.]—In an action to recover possession of land for nonpayment of rent, a counter-claim cannot be made. And where such a counter-claim was delivered, the court, upon motion, set it aside; and there being no other defence or demurrer, gave liberty to sign judgment. *FitzGerald* v. *Day*, 6 L. R., Ir. 326.

In an action to recover the possession of land for nonpayment of rent, a counter-claim, in the absence of special circumstances, will not be allowed. *Hildige* v. *O'Farrell*, 8 L. R., Ir. 158—C. A.

In an action by the assignee of the lessor to recover possession of demised land for nonpayment of rent, the defendant, the assignee of the lease, delivered a counter-claim for a sum exceeding the rent in arrear, and consisting partly of arrears of annuities claimed by the defendant, and partly the sums which the defendant alleged she had been compelled to pay for head rent of the premises. The annuities were, under the will of the original lessor (according to the construction of the will for which the defendant contended), chargeable on the lessor's interest in the premises. The court refused a motion by the plaintiff to set aside the counter-claim, but directed the counter-claim to be amended by setting out the material portions of the will in extenso, with liberty to the plaintiff to reply and demur to the amended pleading. *Whitton* v. *Hanlon*, 16 L. R., Ir. 137.

In an ejectment for nonpayment of rent, brought by the devisee of a deceased lessor against a person claiming the interest in the lease, the defendant made a counter-claim, in substance alleging that through a mutual mistake of the lessor and lessee a bulk instead of an acreable rent was reserved, that such acreable rent at the stipulated rent per acre would have been less by 45*l*. yearly than the rent reserved in the lease, and that by taking credit for the excess paid in respect of the rent actually reserved, all rent properly due and claimable under the lease had been paid, up to the time of action brought, and the defendant counter-claimed to have the lease rectified by reducing the rent thereon from the bulk rent of 119*l*. 15*s*. 3*d*. to the sum of 74*l*. yearly, being the alleged acreable rent:—Held, that the counter-claim should be set aside. *Carew* v. *Christopher*, 10 L. R., Ir. 38—C. A.

Where, in an action to recover possession of land for nonpayment of rent, the defendant traversed the contract of tenancy, and counter-claimed for damages for breach of that contract, and it appeared that there was no defence to the claim for possession, the court, upon the defendant's refusal to withdraw his defence, ordered the counter-claim to be struck out. *Loughrey* v. *Maguire*, [1897] 2 Ir. R. 140.

In respect of Matters arising after Action brought.]—A counter-claim founded on facts which have arisen since the action was brought must be pleaded as so arising, so that the plaintiff may be able to confess the plea; and if it is not so pleaded the plaintiff should take out a summons to strike it out, unless it is amended. *Ellis* v. *Munson*, 35 L. T. 585—C. A. S. P., *Bourke* v. *Nichol*, infra.

When a defendant delivers a counter-claim any damages thereby claimed must be limited to the date when the writ of summons was issued. *Original Hartlepool Collieries Co.* v. *Gibb*, 46 L. J., Ch. 311; 5 Ch. D. 713; 36 L. T. 433.

Relief can be given on a counter-claim in respect of a cause of action accrued to the defendant subsequently to the issue of the writ in the original action. *Original Hartlepool Collieries Co.* v. *Gibb* (5 Ch. D. 713) not followed. *Beddall* v. *Maitland*, 50 L. J., Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484. See also *Toke* v. *Andrews*, 51 L. J., Q. B. 281; 8 Q. B. D. 428; 30 W. R. 659.

Leave to set up refused on Ground of Delay.]—When a defendant in a foreclosure suit obtained an order for leave to file a counter-claim by way of set-off, and through the negligence of his solicitor no counter-claim was delivered, and a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counter-claim was refused on the ground of delay. *Wilkins* v. *Bedford*, 35 L. T. 622.

Refusal to Allow—Discretion.]—It is in the discretion of the judge under Ord. XIX. r. 3, to refuse permission to a defendant to avail himself of a counter-claim, which cannot be conveniently disposed of in the action. *Naylor* v. *Farrer*, 26 W. R. 809. See *Huggons* v. *Tweed*, 10 Ch. D. 359; 40 L. T. 284; 27 W. R. 495—C. A.

The court has a discretion to exclude a counter-claim which may unduly delay the action. *Gray* v. *Webb*, 51 L. J., Ch. 815; 21 Ch. D. 802; 46 L. T. 913; 31 W. R. 8.

Order made to exclude a counter-claim, on the ground that in it such a joinder of causes of action had been made, without the leave of the court, that the fair trial of the action would be embarrassed. *Compton* v. *Preston*, 51 L. J., Ch. 680; 21 Ch. D. 138; 47 L. T. 122; 30 W. R. 563.

Setting Aside.]—In an action to recover possession of land for nonpayment of rent, and for a year's rent, amounting to 346*l*. 2*s*. 6*d*., due the 29th September, 1883, the defendant, inter alia, pleaded, as to 21*l*., part of the rent claimed, eviction by the plaintiff from a portion of the lands, in 1877, the value of which the defendant alleged was 21*l*.; as to 10*l*. 18*s*. 10*d*., other part of the rent claimed, a set-off for poor rate, to which the plaintiff, as landlord, was liable, and he brought the residue of the rent claimed into court. The defendant also delivered a counter-claim, as to so much of the plaintiff's claim as claimed payment of the said sum of 346*l*. 2*s*. 6*d*., for 84*l*. for the plaintiff's use and occupation of the seven acres for four years; and, secondly, for 100*l*. damages for breach of an alleged contract by the plaintiff, in consideration of the surrender of the said seven acres, to grant a reasonable abatement of the rent of the residue of the lands during the defendant's unexpired term. The poor rate was paid after action brought. On motion by the plaintiff to strike out so much of the defence as relied on the set-off and payment into court as embarrassing, on the grounds that the payment relied on by way of set-off was made after the commencement of the action, and the payment into court was irregular and not in compliance with the statute and Ord. XXX. r. 5, and that the counter-claim could not be conveniently tried in the action, the court granted the motion, and set aside these portions of the defence and counter-claim. *Bourke* v. *Nichol*, 12 L. R., Ir. 415.

A motion to set aside a counter-claim and a motion for judgment upon admissions of fact in the defence cannot be entertained simultaneously. *Church Temporalities Commissioners* v. *M'Ivor*, 3 L. R., Ir. 433.

Application for Separate Trial.]—Where a defendant counter-claims instead of bringing a

new action he is not entitled, under rules of court, 1875, Ord. XXXVI. r. 6, to have the issue in his counter-claim tried before the other issues in the action. *Piercy* v. *Young*, 15 Ch. D. 475; 42 L. T. 292.

Whether the issues raised by a claim and counter-claim shall be tried together or separately is a matter of convenience. *Woodfine, In re, Thompson* v. *Woodfine*, 47 L. J., Ch. 832; 38 L. T. 753; 26 W. R. 678.

Proceedings at Trial.]—When the court was of opinion that it would be more convenient that the claim and counter-claim should be tried separately, on the ground that the questions raised by the counter-claim were distinct from and independent of those raised by the claim:—Held, that on the trial of the claim the defendant's counsel should confine his cross-examination of the plaintiff's witness to the questions raised by the claim, and that upon the trial of the counter-claim he might call the plaintiff's witness, but must examine such witness in chief as his own witness. *Woodfine, In re, Thompson* v. *Woodfine*, supra.

—— **Evidence in reply to Counter-claim.**]—The issues of fact on the claim and the counter-claim being identical:—Held, that the plaintiff was not entitled to adduce fresh evidence in reply on the counter-claim. *Green* v. *Sevin*, 13 Ch. D. 589; 41 L. T. 724.

—— **"Balance."**]—The balance in favour of the defendant mentioned in Ord. XXI. r. 17 (1883), in case a set-off or counter-claim is established against the claim, is the balance upon the hearing of the action. *Rolfe* v. *Maclaren*, 3 Ch. D. 106; 24 W. R. 816.

—— **Findings, how entered.**]—Where, in an action, certain questions on the facts are left to the jury, the answers to which amount to a finding for the plaintiff on his claim, and for the defendant on his counter-claim, and the judge directs a verdict to be entered for the plaintiff for the balance, upon a summons to vary the entry of the verdict by stating what the plaintiff and the defendant respectively recovered in order to enable the defendant to recover the costs of his counter-claim, the court will not interfere. *Potter* v. *Chambers*, 48 L. J., C. P. 274; 4 C. P. D. 69; 39 L. T. 350; 27 W. R. 414.

See also COSTS.

Inferior Court—Excess of Jurisdiction.]—Under the Judicature Act, 1873, ss. 89 & 90, an inferior court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction; but the power to grant relief in respect of such counter-claim is limited to the same amount which the plaintiff has claimed in the action. *Davis* v. *Flagstaff Silver Mining Co.*, 47 L. J., C. P. 503; 3 C. P. D. 228; 38 L. T. 769; 26 W. R. 431—C. A.

2. Form of.

See R. S. C., 1883, Ord. XIX. r. 3, &c.

Statement of Facts.]—The same rules apply to a counter-claim as to a statement of claim; therefore the facts on which the defendant relies must be stated in the body of his counter-claim, and cannot be inferred from the plaintiff's statement, and if the defendant wants alternative or general relief, the counter-claim must ask it. *Holloway* v. *York*, 25 W. R. 627.

A counter-claim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed. *Crowe* v. *Barnicot*, 46 L. J., Ch. 855; 6 Ch. D. 753; 37 L. T. 68; 25 W. R. 789.

It is not sufficient that the facts relied upon appear in the defence, even though that and the counter-claim form one continuous document. *Ib.*

A counter-claim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused. *Ib.*

When a defendant in his defence claims a right to set off, he need not separate the set-off from the defence by a marked line, nor need he state the facts relied upon as giving the right to set off in paragraphs differently numbered. It is only necessary that such facts should be specifically stated. *Lees* v. *Patterson*, 47 L. J., Ch. 616; 7 Ch. D. 866; 38 L. T. 451; 26 W. R. 399.

A counter-claim may refer to statements of fact in the pleadings on which the defendant relies without setting them out in extenso. *Birmingham Estates Co.* v. *Smith*, 49 L. J., Ch. 251; 13 Ch. D. 506; 42 L. T. 111; 28 W. R. 666.

3. Against Persons not previously Parties to Action.

See Judicature Act, 1873, s. 24, sub.-s. 3; Rules of Supreme Court, 1883, Ord. XXI. r. 11, et seq.

A counter-claim cannot be set up which does not seek relief against the plaintiff. *Warner* v. *Twining*, 24 W. R. 536. S. P. *Furness* v. *Booth*, 46 L. J., Ch. 112; 4 Ch. D. 586; 25 W. R. 267.

A defendant must not bring a third party before the court as defendant to a counter-claim against the plaintiff unless the relief to be obtained against him relates specifically to or is connected with the subject-matter of the action. *Padwick* v. *Scott*, 45 L. J., Ch. 350; 2 Ch. D. 736; 24 W. R. 723.

A second mortgagee brought an action against the first mortgagee for accounts and the application of the proceeds of sale of the security. The first mortgagee filed a counter-claim for specific performance against the purchaser and the concurrence of the second mortgagee in the sale on the ground that they had consented to the sale:—Held, a good counter-claim. *Dear* v. *Sworder*, 46 L. J., Ch. 100; 4 Ch. D. 476; 25 W. R. 124.

A person cannot be joined as a defendant to a counter-claim against whom there is only a claim for relief in one of two inconsistent alternatives. *Evans* v. *Buck*, 46 L. J., Ch. 157; 4 Ch. D. 432; 25 W. R. 392.

Where an action was brought by trustees of a settlement to inforce payment of a sum of money against the representative of a covenanting party, and the representative, by her defence and counter-claim, averred that according to the true construction of the settlement, the sum was not payable, and claimed that if the sum was payable according to the true construction, the settlement might be rectified, making the surviving tenant for life under the settlement a defendant to the counter-claim for that purpose

only :—Held, on demurrer by the tenant for life, that she was improperly made a party. *Ib.*

A defendant may bring in as defendants to his counter-claim, in addition to the plaintiff, all such persons as he could if he had sued the plaintiff in a cross action have joined with the plaintiff as defendants to such action, that is to say, all persons against whom he could claim relief along with the plaintiff, whether jointly, severally or in the alternative. *Turner* v. *Hednesford Gas Co.*, 47 L. J., Ex. 296 ; 3 Ex. D. 145 ; 38 L. T. 8 ; 26 W. R. 308—C. A.

To an action for breach of contract the defendants alleged that, as the plaintiff had not executed the contract as specified by the agreement, they had thereby become entitled to put an end to the contract, and they sought by way of counter-claim, to recover damages from the plaintiff for the expenses caused by his default. They also made R., who, as surety for the due execution of the contract by the plaintiff, had entered into a bond with the defendants, a defendant to the counter-claim, and they sought to recover the amount of his bond as damages. R. applied to have so much of the counter-claim as related to him struck out :—Held, that the whole of the counter-claim must be allowed, as it raised a question between the defendants and the plaintiff, along with R. the surety, and that R. was properly served with the counter-claim. *Ib.*

A counter-claim must claim relief against the plaintiff, and he must be made a party to it. The relief claimed by a counter-claim must relate to the specific subject-matter of the action. *Harris* v. *Gamble*, 46 L. J., Ch. 768 ; 6 Ch. D. 748. S. P., *Furness* v. *Booth*, 46 L. J., Ch. 112 ; 4 Ch. D. 586 ; 25 W. R. 267.

Relief will not be given in a counter-claim against a third party which does not relate to the subject-matter of the original action. *Barber* v. *Blaiberg*, 51 L. J., Ch. 509 ; 19 Ch. D. 473 ; 46 L. T. 52 ; 30 W. R. 362.

In an action for money lent the defendant set up a counter-claim, in which he joined one T. as defendant to the counter-claim under Ord. XXII. r. 5, and alleged a contract between himself and T., and a breach thereof by T. ; that the contract had been transferred from T. to the plaintiffs ; and that the plaintiffs had broken it. He then claimed damages against the plaintiffs, and, in the alternative, against T. :—Held, that T. was not properly joined as co-defendant to the counter-claim under Ord. XXII. r. 5, but that the defendant should have applied to have the question determined as against T., under Ord. XVI. r. 17. *Central African Trading Co.* v. *Grove*, 48 L. J., Ex. 510 ; 40 L. T. 540 ; 27 W. R. 933—C. A.

Third Party cannot Counter-claim against Plaintiff.]—When in an action a counter-claim is made by a defendant against a plaintiff and a third party, such third party has only a right of reply and cannot himself set up a counter-claim. *Street* v. *Gover*, 46 L. J., Q. B. 582 ; 2 Q. B. D. 498 ; 36 L. T. 766 ; 25 W. R. 750.

A person not a party to an action, who is brought in by the original defendant as a defendant to a counter-claim, cannot counter-claim against the original plaintiff and defendant. *Street* v. *Gover* (2 Q. B. D. 498) followed. *Take* v. *Andrews* (8 Q. B. D. 428) distinguished. *Alcoy and Gandia Ry.* v. *Greenhill*, 65 L. J., Ch. 99 ; [1896] 1 Ch. 19 ; 73 L. T. 452 ; 44 W. R. 117—C. A. S. P., *Eden* v. *Weardale Coal and Iron Co.*, 54 L. J., Ch. 384 ; 28 Ch. D. 333 ; 51 L. T. 726 ; 33 W. R. 241—C. A.

Appearance before Service.]—A defendant set up a counter-claim in which he asked for relief against a third party, as well as the original plaintiffs, but on delivery of the statement of defence and counter-claim to the plaintiff's solicitors, who were also the solicitors of the third party, the defendant's solicitor told them that they must not take it as a service upon them as representing the third party, as the defendant was not sure whether he would proceed with his counter-claim against the third party, though, owing to the time for delivering the statement of defence and counter-claim to the plaintiffs having nearly expired, he was obliged to deliver it as it was. The third party entered an appearance to the counter-claim, and delivered a statement of defence. The defendant having made up his mind not to proceed with his counter-claim against the third party, moved to discharge his appearance :—Held, that, until service of the counter-claim, no one can consider himself as a defendant to it ; that the third party was therefore wrong in appearing without being served ; and that on the defendant amending his counter-claim by omitting all mention of the third party, the third party's appearance should be discharged. *Fraser* v. *Cooper*, 52 L. J., Ch. 684 ; 23 Ch. D. 685 ; 48 L. T. 754 ; 31 W. R. 714.

4. Claims and Questions between Co-Defendants.

Between Co-Defendants.]—Questions between co-defendants may be raised by a pleading which states both a defence as against the plaintiff and a claim against a co-defendant ; but such pleading is not a counter-claim under Ord. XXII. r. 5, and should not be so intitled. *Furness* v. *Booth*, 46 L. J., Ch. 112 ; 4 Ch. D. 586 ; 25 W. R. 267.

Delivery of such pleading to the co-defendant is sufficient notice under Ord. XVI. r. 17. *Ib.*

A counter-claim must seek some relief against the plaintiff, and is not the proper form for a defendant's claim against a co-defendant for indemnity. *Ib.*

Plaintiff, jointly with defendant B., entered into a contract with defendant E. to work a trading adventure on lands belonging to E. Plaintiff by his claim alleged that E. had obtained the contract from him and defendant B. by misrepresentation, and asked for rescission, and in the alternative for dissolution. Defendant B. delivered a pleading, which was at the same time his defence in the action, a reply to a counter-claim by E., and a new claim as in an action against E. :—Held, that he was entitled to prosecute in this action his claim against E. ; and that delivery to the defendant E. of the said pleading should be notice, under the statute, of the claim of defendant B. against him. *Bagot* v. *Easton*, 11 Ch. D. 392 ; 27 W. R. 404.

Counter-claims raised by a defendant against a co-defendant are to be delivered to the plaintiff and co-defendant, and formal notice need not be given to the co-defendant. *Shephard* v. *Beane*, 45 L. J., Ch. 429 ; 2 Ch. D. 223 ; 24 W. R. 363. *See now, however, preceding Cases.*

Cf. Cases, THIRD PARTIES, supra, col. 239.

e. REPLY AND SUBSEQUENT PLEADINGS.

See R. S. C., 1883, Ord. XXIII.

Counter-claim and Set-off in Reply.]—A plaintiff may, in his reply to a counter-claim of the defendant, counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant. *Toke* v. *Andrews*, 51 L. J., Q. B. 281; 8 Q. B. D. 428; 30 W. R. 659.

Confession and Avoidance.]—Where a plaintiff desires to state facts by way of confession and avoidance of the defence, he should do so in his reply, and not by amendment of the statement of claim. *Hall* v. *Eve*, 46 L. J., Ch. 145; 4 Ch. D. 341; 35 L. T. 926; 25 W. R. 177—C. A.

A plaintiff may by his reply traverse, confess and avoid, or combine both. *Ib.*

To an action for specific performance of an agreement to grant a lease, the defendants pleaded that the plaintiff had committed breaches of the agreement, giving the defendants power to determine the same, and that they had determined. The plaintiff by his reply denied the alleged breaches, and further said that even if the lessee did break the provisions of the agreement as alleged, yet the defendants were not nor was any of them entitled, by reason of the alleged breaches, to determine the agreement for certain reasons which the reply proceeded to state at length. On an application by the defendants to strike out the reply as irregular and erroneous in form and point of pleading:—Held, that there was nothing in the rules of court to limit the plaintiff's right to state what facts he pleased in his reply to meet a defence by confession and avoidance, so that they were not irrelevant or scandalous. *Ib.*

A reply, which begins by joining issue with the defendant in his defence, and then goes on to confess and avoid, is erroneous in form. *Earp* v. *Henderson*, 45 L. J., Ch. 738; 3 Ch. D. 254; 34 L. T. 844.

When, after statement of claim and defence, the plaintiff replied, joining issue on the defence, and then pleading in confession and avoidance, and the defendant took no further step till long after notice of trial had been served; leave was, under the powers of the court for extending time, given to the defendant to join issue on the second pleading in the reply. *Ib.* But see *Hall* v. *Eve*, supra.

A declaration stated, that the defendant agreed to hire the plaintiff for a year, as a teacher of French and drawing, and not to discharge him without reasonable notice, and then averred that the defendant did discharge him without reasonable notice. Plea, that when the plaintiff was retained by the defendant, the plaintiff promised to serve the defendant as teacher, and not to absent himself without just cause; that the plaintiff wrongfully absented himself, whereby the defendant was much hindered and delayed in divers matters of business, and compelled to endeavour to get the assistance of some other person:—Held, first, that this plea sufficiently confessed and avoided the contract stated in the declaration; secondly, that the plea was bad in arrest of judgment, as it did not shew either that the contract was put an end to or that the defendant had a right to dissolve it. *Fillieul* v. *Armstrong*, W. W. & D. 616; 7 A. & E. 557; 2 N. & P. 406; 7 L. J., Q. B. 7; 1 Jur. 921.

Introducing fresh Matter into.]—A railway company was defendant to an action which raised the question whether or not a piece of land was included in an agreement, the plaintiffs asserting that it was not included, and that the agreement conferred no title on the defendant to take it, and that the defendant had given no statutory notice of an intention to take it. The defendant pleaded that the piece of land was comprised in and shewn on the plans deposited with the railway bill, of which the plaintiffs had full knowledge; that the company was empowered to take compulsorily the piece of land and to enter upon it for the purposes of the agreement, and denied that the agreement conferred no title on the company to take it. The plaintiffs by their reply joined issue generally on the statement of defence, and then pleaded fresh matter:—Held, that the plaintiffs had no right to introduce fresh matter into their reply, and that the same was irrelevant to the issue, and must be struck out. *London and St. Katharine Docks Co.* v. *Metropolitan Ry.*, 35 L. T. 733. *But see preceding Cases.*

In an action for rent in respect of a tenancy described in the statement of claim as still subsisting, the defendant made a counter-claim for money had and received, to which the plaintiff replied that by reason of the defendant overholding part of the premises after the expiration of his tenancy therein, the plaintiff, whose interest as a middleman had also determined, was compelled to pay to the head landlord damages and costs, which he sought to set off against the counter-claim:—Held, that the reply was a departure from, and inconsistent with, the statement of claim, and should be set aside as irregular: and that the reply introduced a new ground of claim, which the plaintiff could only be allowed to raise by amendment of the statement of claim. *Duckworth* v. *M'Clelland*, 2 Ir. L. R. 527.

If a plaintiff in his declaration avers the performance of a condition precedent, and the defendant denies this, and the plaintiff replies matter of excuse for not performing the conditions, this is a departure. *Perry* v. *Smith*, Car. & M. 554.

To an action on a charterparty, the defendant pleaded that at the time it was made the plaintiff represented to him that the ship was then at W., and that he entered into the charterparty, confiding in that representation, and that the ship was not at that time at W. Replication, that the plaintiff, when he made the representation, believed it to be true, and that the ship at the time was in fact on her homeward voyage from W. Rejoinder, that the representation was contained in the charterparty, and was part of the contract:—Held, a departure from the plea. *Elliott* v. *Von Glehn*, 18 L. J., Q. B. 221.

A declaration alleged that a railway company wrongfully raised, made and formed, and caused to be raised, made and formed, an embankment of earth near a house, and wrongfully continued the same, by reason whereof quantities of water ran and flowed to and into the house, whereby the same became greatly injured, wetted and damaged. Plea, that the embankment was raised, made and formed and continued by the company, under and by virtue of acts of parliament. Replication, that the running and

flowing of the water to and into the house were occasioned by the wrongful construction, negligent and improper raising, making and forming of the embankment, and the want of proper and sufficient drains to the same :—Held, that the replication was no departure. *Brine* v. *G. W. Ry.*, 2 B. & S. 402 ; 31 L. J., Q. B. 101 ; 8 Jur. (N.S.) 410 ; 6 L. T. 50 ; 10 W. R. 341.

A replication, on equitable grounds, to a plea of infancy, that the defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of age, is bad, on the ground of departure, and disclosing no answer in equity. *De Roo* v. *Foster*, 12 C. B. (N.S.) 272. S. P., *Bartlett* v. *Wells*, 1 B. & S. 836 ; 31 L. J., Q. B. 57 ; 8 Jur. (N.S.) 762 ; 5 L. T. 607 ; 10 W. R. 229.

For other instances of departure, see *Meyer* v. *Haworth*, 3 N. & P. 462 ; 8 A. & E. 467 ; 7 L. J., Q. B. 211. *Wilders* v. *Stevens*, 15 M. & W. 208 ; 15 L. J., Ex. 108.

Claim against Separate Estate to Defence of Coverture.]—In an action against a married woman she pleaded coverture. The reply set out that, until after action brought, the plaintiff was not aware of the coverture ; that the defendant obtained credit by representing herself to be entitled to an annuity ; and that the plaintiff had since discovered that under a separation deed she was entitled to an annuity :—Held, that the reply did not raise a new ground of claim or contain an allegation of fact inconsistent with the previous pleading within Ord. XIX. r. 19. *Collett* v. *Dickinson*, 26 W. R. 403.

Reply of Married Woman to Plea of Coverture that Action in respect of Separate Estate.]—In an action for breach of contract by a married woman against her bankers, the first count was for not presenting for payment a bill of exchange deposited with them for that purpose : the second count was for not giving her notice of the dishonour of a bill of exchange entrusted to them for collection, and the third count was for dishonouring a cheque drawn by her upon them, they having at the time funds to meet it. Plea, that the plaintiff was a married woman. Replication, that the causes of action arose exclusively from earnings, money, chattels and property within the meaning of the Married Women's Property Act, 1870, and that the bankers knew when they accepted her banking account that she was a married woman carrying on her business separately from her husband :—Held, that the replication was good as shewing that she was seeking a remedy for the protection of her earnings and property within the meaning of the Married Women's Property Act, 1870, s. 11. *Summers* v. *City Bank*, 43 L. J., C. P. 261 ; L. R. 9 C. P. 580 ; 31 L. T. 268.

Explaining Mistake in Document set up in Claim.]—Whenever the pleadings show that a contract was erroneously reduced into writing by the mutual mistake of both parties, the court will at once treat the writing as reformed, although the plaintiff has never asked that it should be so reformed. Thus, where the statement of claim set up a charter-party made between the plaintiff and the defendant, and the replication stated that the charter-party on the face of it appeared to be made between the defendant and a stranger, but that the stranger's name was inserted by mistake of both parties, who treated it as representing the plaintiff's name :—Held, that this was no variance ; and that there was no need for the plaintiff to ask to have the instrument actually altered to correspond with his statement of claim. *Breslauer* v. *Barwick*, 36 L. T. 52 ; 24 W. R. 901.

Action of Trespass—Justification—Excess—New Assignment.]—In an action for trespass to the plaintiff's dwelling-house, and conversion of his goods, the statement of claim containing allegations that the defendant put bailiffs in the house, stayed therein a long time, and on two different days brought in a concourse of people ; the defendant justified the acts complained of as done in execution of a fieri facias, and the plaintiff replied that in continuing in the house for a long time, posting auction bills, and introducing a concourse of people as in the statement of claim mentioned, the defendant stayed more than a reasonable time, and brought in more people, and made a greater noise and disturbance upon the plaintiff's premises than was reasonable in order to levy under the fi. fa. :—Held, that the reply was either a new assignment, and therefore inadmissible under Ord. XVIII. r. 7, or was embarrassing ; and that in either view it should be set aside, with leave to amend the statement of claim. *Byrne* v. *Duckett*, 10 L. R., Ir. 24.

Facts by Reference to Independent Document.]—A reply must not refer to an independent document, such as plaintiff's answer to interrogatories, as containing facts on which the pleader relies, without setting out such document itself as part of the reply. *Williamson* v. *L. & N. W. Ry.*, 48 L. J., Ch. 559 ; 12 Ch. D. 787 ; 27 W. R. 724.

Reply to Counter-claim.]—When a defendant in his defence and counter-claim does not comply with Ord. XIX. r. 10, it is sufficient for the plaintiff, who wishes to put in issue the facts alleged by the defendant, to join issue under r. 21 of Ord. XIX., as in such case r. 20 of the same order will not apply to the reply of the plaintiff. *Hill* v. *Mayhew*, 24 W. R. 485.

A reply joining issue generally will not, upon the application of the defendant, be ordered to be struck out or amended either under Ord. XXVII. r. 1, or Ord. LIX., because it does not deal specifically with the allegations of a counter-claim. *Rolfe* v. *Maclaren*, 3 Ch. D. 106 ; 24 W. R. 816.

The defendants having repeated, by way of counter-claim, paragraphs 1 to 13 of their defence, the plaintiffs by their reply (paragraph 1) joined issue upon the defence, and (paragraph 2) pleaded as follows :—"With respect to the statements contained in the defendants' counter-claim, the plaintiffs join issue upon paragraphs 1 to 13 inclusive of the defence therein repeated and relied on, as if the same were repeated verbatim." Upon a motion by the defendants to strike out paragraph 2 of the reply :—Held, that the plaintiffs were not at liberty merely to join issue upon the counter-claim, but must deal specifically with the statements contained in it. *Rolfe* v. *Maclaren* (3 Ch. D. 106) not followed upon that point. *Benbow* v. *Low*, 49 L. J., Ch. 259 ; 13 Ch. D. 553 ; 42 L. T. 14 ; 28 W. R. 384. *See* Rules of Supreme Court, 1883, Ord. XXIII. r. 4.

—— **General Denial.**]—The defendant to an action delivered a statement of defence and counter-claim. The defence contained various admissions and allegations of fact, and then, by way of counter-claim, the defendant repeated "the several matters hereinbefore stated and admitted," and claimed certain relief. The plaintiff, by his reply, after making certain admissions and joining issue on the rest of the statement of defence, "in reply to the statements alleged by way of counter-claim" repeated "the several matters stated in the statement of claim and the admissions hereinbefore made," and said that "save as stated in the statement of claim or hereinbefore admitted, each of such allegations is untrue":—Held, that this amounted to an admission of all the statements alleged by way of counter-claim. But leave to amend was given. *Green* v. *Sevin*, 13 Ch. D. 589; 41 L. T. 724. See also *Dunne* v. *Clancy*, 6 L. R., Ir. 395.

Leave to plead Special Rejoinder.]—Application for leave to rejoin specially, when the court in the exercise of its discretion considered a rejoinder unnecessary, refused. *Norris* v. *Beazley*, 35 L. T. 845.

An application for leave to plead a special rejoinder under Ord. XXIII. r. 2, should be made on notice. *Monck* v. *Smythe*, [1895] 1 Ir. R. 200.

f. Pleading Matters arising after Action brought.

See R. S. C., 1883, Ord. XXIV.

Bankruptcy.]—On the 1st of February, 1877, the plaintiff brought an action for the recovery of property against a debtor and the trustee of his estate under a composition. On the 2nd of July, 1877, the defendant delivered a defence stating an adjudication in bankruptcy made against him on the 1st of June, 1877, on an act of bankruptcy committed on the 11th of November, 1876, and that the property was then in the order and disposition of the bankrupt with the consent of the plaintiff. Thereupon the plaintiff delivered a confession of the defence and signed judgment for his costs under Ord. XX. r. 3. On a summons by the trustee to set aside the judgment:—Held, that the adjudication in bankruptcy was a ground of defence which had arisen since action brought, notwithstanding that it related back to an act of bankruptcy committed before action brought, and the summons was dismissed with costs. *Champion* v. *Formby*, 47 L. J., Ch. 395; 7 Ch. D. 373; 26 W. R. 391.

A defendant was adjudged bankrupt on the 3rd of September; an action was commenced against him on the 11th of November; and on the 27th of November he obtained his order of discharge, and then pleaded, under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 161, in the general form, that he became bankrupt before action brought, and that the cause of action accrued before the bankruptcy. Issue having been joined:—Held, that the plea was not proved: for that it was the order of discharge, and not the adjudication, which was the bar; and that, therefore, the defence arose after action brought, and ought to have been pleaded according to the fact, as required by the Common Law Procedure Act, 1852, s. 68. *Jones* v. *Hill*, 39 L. J., Q. B. 74; L. R. 5 Q. B. 30; 21 L. T. 784; 18 W. R. 453.

Counter-claim.]—A counter-claim founded on facts which have arisen since the action was brought must be pleaded as so arising, so that the plaintiff may be able to confess the plea; and if it is not so pleaded the plaintiff should take out a summons to strike it out, unless it is amended. *Ellis* v. *Munson*, 35 L. T. 585—C. A. S. P., *Bourke* v. *Nichol*, 12 L. R., Ir. 415.

When a defendant delivers a counter-claim any damages thereby claimed must be limited to the date when the writ of summons was issued. *Original Hartlepool Collieries Co.* v. *Gibb*, 46 L. J., Ch. 311; 5 Ch. D. 713; 36 L. T. 433.

Relief can be given on a counter-claim in respect of a cause of action accrued to the defendant subsequently to the issue of the writ in the original action. *Original Hartlepool Collieries Co.* v. *Gibb* (supra) not followed. *Beddall* v. *Maitland*, 50 L. J., Ch. 401; 17 Ch. D. 174; 44 L. T. 248; 29 W. R. 484.

A plaintiff may, in his reply to a counter-claim of the defendant, counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant. *Toke* v. *Andrews*, 51 L. J., Q. B. 281; 8 Q. B. D. 428; 30 W. R. 659.

Deed Registered.]—By 6 Anne, c. 2, s. 4 (Ir.), a registered deed is to be taken as good and effectual according to the time of the registration of the memorial thereof. By s. 5, all deeds paid on date, but unregistered, are to be absolutely void as against the registered deed:—Held, that under a plea which was in form in bar of the action, and which alleged the time of registration under a videlicet, proof of the registration of a deed which really defeated the action might be given, though the deed was not in fact registered till after the commencement of the action, but before plea pleaded. *Carlisle* v. *Whaley*, L. R. 2 H. L. 391; 16 W. R. 229.

Defence of Statute.]—A plea in bar, justifying under a statute which affords a defence arising subsequently to the commencement of the action, is good after verdict. *Cobbett* v. *Grey*, 4 Ex. 729; 19 L. J., Ex. 137.

Decree or Judgment.]—Liberty given to file a supplemental answer putting in issue a decree pronounced subsequently to the filing of the original answer. *Blake* v. *O'Kelly*, Ir. R. 8 Eq. 67.

An executor may plead puis darrein continuance unreversed judgments on simple contract of the testator, recovered against the executor in suits commenced since he pleaded the general issue in bar in the principal case; and though he might have demurred to such actions, he is not bound so to do. *Prince* v. *Nicholson*, 5 Taunt. 665; 1 Marsh. 280; 15 R. R. 612.

Material Facts.]—When facts material for the defendants to put in issue have occurred since the filing of their answer, the court will give leave to file a supplemental answer. *Southall* v. *British Mutual Life Assurance Society*, 38 L. J., Ch. 711.

A defendant may state in his answer, and take issue upon, matters which happened after the bill was filed; but the court will not deal with the subject of the suit by interlocutory order founded upon matters which occur after the answer has been filed, and are not brought forward by amendment, by supplemental bill, or

by supplemental answer. *Stamps* v. *Birmingham, Wolverhampton & Stour Valley Ry.*, 7 Hare, 258; 12 Jur. 720. Affirmed, 2 Ph. 673; 6 Railw. Cas. 123; 17 L. J., Ch. 431.

Time for Pleading.]—A defendant may plead puis darrein continuance where an issue remains to be tried, notwithstanding there are other issues upon which the plaintiff has already obtained judgment. *Wagner* v. *Imbrie*, 2 L. M. & P. 333; 6 Ex. 380; 20 L. J., Ex. 235; 15 Jur. 405.

Amendment of Plea.]—A plea of the bankruptcy of the plaintiff, pleaded puis darrein continuance, is amendable. *Holroyd* v. *Reed*, D. & M. 483; 5 Q. B. 594; 13 L. J., Q. B. 130; 8 Jur. 81.

Effect of Confession of Defence.]—When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, and the plaintiff has confessed such plea, and has signed judgment for the costs of the cause up to the time of pleading such plea, such confession is not equivalent to the entry of a nolle prosequi, but puts an end to the litigation altogether as it stands at the time of the confession, so that the plaintiff is estopped from afterwards asserting in a fresh action any claim which he might have set up in the action, the plea in which he has confessed. *Newington* v. *Levy*, 39 L. J., C. P. 334; L. R. 5 C. P. 607; 23 L. T. 70; 18 W. R. 1198. Affirmed, 40 L. J., C. P. 29; L. R. 6 C. P. 180; 23 L. T. 595; 19 W. R. 473—Ex. Ch.

—— **One Defendant.**]—If one of two defendants pleads bankruptcy puis darrein continuance, the plaintiff cannot at nisi prius confess this plea to be true, and go on as to the other defendant. *Pascall* v. *Horsley*, 3 Car. & P. 372.

Costs on Confessing Defence.]—In an action for rent and for damages for breach of covenant in not building a wall, and also claiming an injunction, the defendant paid money into court to satisfy the claim for rent, and pleaded performance of the covenant by building the wall after action, and paid money into court in respect of the breach before action. The plaintiff took the money out of court, confessed the defence as to the wall, and claimed costs under Ord. XX. r. 3:—Held, that he was not entitled to such cost, for the statement did not amount to a defence within the meaning of that rule; but that he was entitled to the costs of the action under Ord. LV., or under the County Courts Act, 15 & 16 Vict. c. 54, s. 4. *Callendar* v. *Hawkins*, 2 C. P. D. 592; 26 W. R. 212.

A defendant pleaded pleas in bar of the action, and afterwards by leave of a judge, under the Common Law Procedure Act, 1852, s. 142, pleaded in addition the bankruptcy of the plaintiff since action, and the plaintiff confessed the plea:—Held, that under rr. 22 and 23 of T. T., 1853, the plaintiff was entitled to judgment for his costs up to the time of such pleading. *Foster* v. *Gamgee*, 45 L. J., Q. B. 576; 1 Q. B. D. 666; 34 L. T. 248; 24 W. R. 319.

Semble, that the effect of Ord. XX. rr. 1—3, is the same. *Ib.*

An action was brought by a member of a club "on behalf of himself and all other members" of such club, "except the defendant," against the committee of the club, charging them with breaches of trust in making profits out of contracts entered into by them on behalf of the club. The defence, in addition to other matters, stated that since action brought a meeting of the club had been held at which the contracts had been ratified by every member except the plaintiff, and that resolutions expressing confidence in the committee had been passed. The plaintiff delivered a confession of defence, and signed judgment for his costs of the action. The defendants moved to set aside the judgment and dismiss the action:—Held, that the plaintiff could not avail himself of Ord. XXIV. r. 3, as the above grounds of defence did not amount to a waiver of the other pleas. *Foster* v. *Gamgee* (1 Q. B. D. 666) distinguished. *Harrison* v. *Abergavenny* (*Marquis*), 57 L. T. 360.

A plaintiff became insolvent after issue joined, and the defendant, by leave of a judge, under 15 & 16 Vict. c. 76, s. 142 (the plaintiff's assignees not giving security for costs), pleaded a plea of the plaintiff's insolvency, withdrawing his former pleas. The plaintiff confessing the plea and giving notice to tax his costs, the court held that the plaintiff was entitled to costs under the above rule if the plea of insolvency stood, but allowed the defendant to withdraw that plea, and to substitute his former pleas, and go on with the action. *Plummer* v. *Hedge*, 24 L. J., Q. B. 24.

When a plea that the plaintiff since the last pleading had been convicted of felony is pleaded puis darrein continuance, he may confess the plea and sign judgment for his costs. *Barnett* v. *L. & N. W. Ry.*, 5 H. & N. 604; 29 L. J., Ex. 334; 6 Jur. (N.S.) 559; 8 W. R. 500.

So when a defendant pleads a matter of defence which, in fact, arose after the last pleading, the plaintiff may confess the plea, and sign judgment for his costs, although it contains no allegation that the matter of defence arose after the last pleading. *Howarth* v. *Brown*, 1 H. & C. 694; 32 L. J., Ex. 99; 7 L. T. 638; 11 W. R. 270.

A defendant, after pleading his bankruptcy and certificate puis darrein continuance, cannot force the plaintiff to reply, and the latter may discontinue the action without payment of costs. *Wollen* v. *Smith*, 1 P. & D. 374; 9 A. & E. 505; 2 W. W. & H. 79; 8 L. J., Q. B. 122.

—— **Setting aside Order.**]—Defendants delivered a further defence of matter arising since the delivery of the defence. The plaintiffs delivered a confession of the amended defence, and signed judgment for costs against the defendants. The judgment for costs was set aside on terms of the defendants withdrawing their amended defence. *Bridgetown Waterworks Co.* v. *Barbados Water Supply Co.*, 57 L. J., Ch. 1051; 38 Ch. D. 378; 59 L. T. 314; 36 W. R. 852.

—— **Appeal from Order.**]—By Ord. XX. r. 3 [Ord. XXIV. (1883) r. 3], the plaintiff may, after delivering a confession of defence, "sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge shall, either before or after the delivery of such confession, otherwise order":—Held, that there is no appeal, without leave, to a divisional court from the refusal of a judge at chambers to deprive the plaintiff of his costs under the above rule. It is an appeal as to costs only, left to the discretion of the judge within the meaning of s. 49 of the Judicature Act, 1873. *Perkins* v. *Beresford*, 47 L. T. 515.

g. TIME FOR DELIVERY—PROCEEDINGS ON DEFAULT.

Defence—Specially-indorsed Writ.]—The service of a writ specially indorsed under Ord. III. r. 6, is delivery of a statement of claim to the defendant within the meaning of Ord. XXI. r. 6; so that the defendant has ten days from the time limited for appearance within which to deliver his defence. *Anlaby* v. *Praetorius*, 57 L. J., Q. B. 287; 20 Q. B. D. 764; 58 L. T. 671; 36 W. R. 487—C. A.

The time for appearing to a specially-indorsed writ expired on March 23, on which, being Good Friday, the offices of the court were closed, and they did not re-open until the 28th, on which day an appearance was entered:—Held, that the time for delivering a defence did not begin to run until the 28th. *M'Kibbin* v. *M'Clelland*, [1894] 2 Ir. R. 654.

—— **Ord. XIV.**]—A defendant having entered an appearance requiring a statement of claim, the plaintiff moved, in vacation, for final judgment under Ord. XIII., and the judge made "no rule" on the motion, no special time being limited for the delivery of the defence:—Held, that, after the lapse of eight days from the termination of the vacation, the plaintiff might sign judgment by default without delivering a statement of claim, or notice in lieu thereof. *Rae* v. *Langford*, 10 L. R., Ir. 108.

Reply—Counter-claim.]—Where a counter-claim is pleaded with a defence, the plaintiff has twenty-one days within which to deliver his reply to the defence and counter-claim. *Rumley* v. *Winn*, 58 L. J., Q. B. 128; 22 Q. B. D. 265; 60 L. T. 32; 37 W. R. 285. S. P., *Page* v. *Gilmore*, 30 L. R., Ir. 47.

Several Defendants — Time for Pleading Enlarged as to Some by Consent.]—Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being closed within the meaning of Ord. XXIX. r. 12, and Ord. XXXVI. rr. 4, 4a, of the Rules of Court, 1875. A defendant's proper course under such circumstances is to write to the plaintiff's solicitor, and inquire how the action stands as regards the other defendants. *Ambroise* v. *Evelyn*, 48 L. J., Ch. 686; 10 Ch. D. 759; 27 W. R. 639.

"Defence"—What is.]—In an action for recovery of land, a document, dated and signed by the defendant, setting out the terms under which he alleged that he held the premises, and delivered by him at the office of the plaintiff's solicitor, is not a "defence." *Marshall* v. *Jones*, 52 J. P. 423.

Non-delivery of Defence—Practice on.]—When a defendant has made default in delivering a defence, the action may be set down on motion for judgment without previous notice of motion. *Gillatt* v. *Ker*, 24 W. R. 428.

If a defendant makes default in delivering a defence, and the plaintiff has set down the action on motion for judgment, the motion for judgment may, by consent of all parties, be taken as an ordinary motion, and the order taken at once. *Bowen* v. *Bowen*, 24 W. R. 246.

When a defendant was in default the court ordered two clear days' notice of the intention to set down the action on motion for judgment to be given him. *Roupell* v. *Parsons*, 34 L. T. 56; 24 W. R. 269.

When an action is set down on motion for judgment in default of pleading, the court will fix an early day for the hearing. *Meakin* v. *Sykes*, 24 W. R. 293.

When three defendants had made default in delivering defence and another defendant had, by his defence, practically admitted the correctness of the statement of claim, and it was important to have the action tried against all at the same time, an order was made to set down the action on motion for judgment against the defendants in default, with liberty to give notice of motion, under Ord. XL. r. 11, for the same time against the defendant who had pleaded. *Smith, In re, Bridson* v. *Smith*, 24 W. R. 392.

If, in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under Ord. XXIX. r. 2, and not interlocutory judgment under r. 4 of that order. *Dix* v. *Groom*, 49 L. J., Ex. 430; 5 Ex. D. 91; 28 W. R. 370.

—— **Failure by Infant Defendant.**]—Where several defendants to an action, one of whom was an infant, failed to put in any defence, the court ordered that the action should be set down on notice of trial as against the infant defendant, and on notice of motion for judgment on the statement of claim as against the adult defendants. *National Provincial Bank* v. *Evans*, 51 L. J., Ch. 97; 30 W. R. 177.

In an action for sale in lieu of partition, the sole defendant was an infant. The facts were simple, and no defence was put in. The plaintiffs moved for judgment, and supported their motion by affidavits which verified the statement of claim. The guardian ad litem did not object to the proposed minutes of judgment:—Held, that under the circumstances the plaintiffs had taken the proper course, and that notice of trial need not be given. There is nothing in the Rules of Court, or in *Ellis* v. *Robbins* (50 L. J., Ch. 512), or *National Provincial Bank* v. *Evans* (51 L. J., Ch. 97), to the contrary. *Fitzwater, In re, Fitzwater* v. *Waterhouse*, 52 L. J., Ch. 83.

Semble, the court will not make an order for judgment for want of defence in the case of infant defendants making default in filing a statement of defence. *Byrne* v. *Byrne*, 5 L. R., Ir. 134.

Where there are minor defendants who do not file any defence, the proper course is to move for judgment against such defendants under Judicature Act, Ord. XXXIX. r. 1, grounding the motion upon affidavits verifying the statement of claim. *Wallis* v. *Wallis*, 13 L. R., Ir. 258.

Motion for Judgment—Proof of Case.]—An action was brought by a vendor for specific performance of an agreement against a purchaser who was in possession. The statement of claim set out the agreement. The defendant had not put in any defence. A motion was made on behalf of the plaintiff for judgment in

default of defence, the action being set down as a short cause. The agreement had not been proved; but it was contended that the defendant, by making default in defence, had admitted the agreement as alleged, and that evidence of it was consequently unnecessary:—Held, that the agreement must be duly verified by affidavit, and the action was ordered to stand over for that purpose. *Holmes* v. *Shaw*, 52 L. T. 797.

In a creditor's suit for administration, the giving of judgment for administration upon default of pleading, under Ord. XXVIII. r. 10, and directing the usual account, does not relieve the plaintiff from the onus of proving his claim in chambers. *Boak* v. *Moore*, 7 L. R., Ir. 322—C. A.

On a motion for judgment in default of pleading, under Ord. XXVIII. r. 10, the plaintiff, where his title depends on documents, must produce and prove them. *Crisford* v. *Dodd*, 15 L. R., Ir. 83.

On an application to sign final judgment in default of defence in an action for cancelling an allotment of shares, where there has been no appearance under Ord. XXVII. r. 11, no evidence need be filed. *Webster* v. *Vincent*, 77 L. T. 167.

Where in a partition action some of the plaintiffs and some of the defendants were infants, and the plaintiffs moved for judgment in default of defence:—Held, that no affidavit verifying the statement of claim was necessary. *Ripley* v. *Sawyer*, 55 L. J., Ch. 407; 31 Ch. D. 494; 54 L. T. 294; 34 W. R. 270.

In a foreclosure action against a mortgagor and subsequent mortgagees, the mortgagor made default of appearance, and the remaining defendants appeared but made default in pleading. Upon motion for judgment under Ord. XXVII. r. 11, the plaintiffs filed an affidavit in support of their claim:—Held, that the costs of the affidavit must be disallowed against all the defendants. *Jones* v. *Harris*, 55 L. T. 884.

The court does not require evidence upon motion for judgment in default of pleading. *Bagley* v. *Searle*, infra.

—— **Delivery of Minutes.**]—In a vendor's action for specific performance, the plaintiff moved for a common form judgment against the defendant, he having made default in pleading. The notice of motion did not state the terms of the proposed judgment:—Held, having regard to the form of the notice of motion, that minutes must be prepared and a copy delivered to the defendant. *Bagley* v. *Searle*, 56 L. T. 306; 35 W. R. 404.

Upon a motion for judgment in default of pleading in a specific performance action, the plaintiff asked for an order in the usual form, but no minutes of the proposed judgment had been left with the judge's clerk before the cause was put into the paper:—Held, that, in such a case, where a copy of the minutes has not been delivered, the plaintiff should state in his notice of motion the precise words of the judgment for which he asks. *De Jongh* v. *Newman*, 56 L. T. 180; 35 W. R. 403.

—— **Judgment confined to Statement of Claim.**]—Where a married woman is the defendant to an action on a contract, and has made default in delivering a defence, the plaintiff's statement of claim must contain an allegation that the defendant has a separate estate; otherwise the court will refuse to make an order against the defendant on the statement of claim under Ord. XXVII. r. 11. *Tetley* v. *Griffith*, 57 L. T. 673; 36 W. R. 96.

By his statement of claim the plaintiff asked for specific performance and ancillary relief, but not for any declaration of lien. Upon a motion for judgment as in default of defence:—Held, that the plaintiff could not have any declaration of lien. *Tacon* v. *National Standard Investment Co.*, 56 L. J., Ch. 529; 56 L. T. 165.

In an action for specific performance, the statement of claim alleged an agreement (to which agreement the plaintiff claimed leave to refer) whereby the defendant agreed to purchase from the plaintiff certain hereditaments situate in the parish of St. Peter the Great, otherwise sub-deanery, in the city of Chester and described in the schedule to the said agreement. The schedule was not set out in the statement of claim. The defendant appeared, but did not put in a defence. On the motion for judgment in default of delivery of a defence:—Held, that the evidence was admissible as to the agreement. Held also, that the property not being sufficiently described in the statement of claim, the statement of claim must be amended, setting out the property sufficiently to enable the court to give judgment in accordance with the pleadings, and the amended statement of claim must be re-served. *Smith* v. *Buchan*, 58 L. T. 710; 36 W. R. 631.

On a motion for judgment in default of defence in a foreclosure action, the plaintiff (an equitable mortgagee of leaseholds) asking for a personal judgment against the defendant, the mortgagor, for the amount which the plaintiff, by his statement of claim, alleged to be due, on the ground that the defendant, by not putting in a defence, had admitted that that amount was due from him. The plaintiff had not asked for a personal judgment by his statement of claim. The defendant did not appear at the hearing:—Held, that the defendant's admission by not pleading could only be treated as made for the purpose of the relief asked by the statement of claim. The court, therefore, merely directed an account of what was due to the plaintiff for principal and interest under his mortgage. *Faithfull* v. *Woodley*, 59 L. J., Ch. 304; 43 Ch. D. 287; 61 L. T. 808; 38 W. R. 326.

Where a plaintiff, in an action for infringement of a patent, upon motion for judgment, heard as a short cause, asked for such judgment as upon his statement of claim the court should consider him entitled to, and his statement of claim stated "Particulars of breaches are delivered herewith":—Held, that the particulars of breaches might be regarded as forming part of the statement of claim. *United Telephone Co.* v. *Smith*, 61 L. T. 617; 38 W. R. 70.

—— **Interlocutory or Final Judgment—Discretion.**]—Under Ord. XXVII. r. 11, which provides that "if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the court . . . shall consider the plaintiff entitled to," the court may, in its discretion, refuse to give judgment, or may give an interlocutory judgment instead of a final judgment. *Charles* v. *Shepherd*, 61 L. J., Q. B. 768; [1892] 2 Q. B. 622; 67 L. T. 67—C. A.

If a defendant makes default in delivering a defence, and the plaintiff has set down the

action on motion for judgment, the motion for judgment may, by consent of all parties, be taken as an ordinary motion, and the order taken at once. *Bowen* v. *Bowen*, 24 W. R. 246.

—— **Notice.**] — When a defendant was in default, the court ordered two clear days' notice of the intention to set down the action on motion for judgment to be given him. *Roupell* v. *Parsons*, 34 L. T. 56; 24 W. R. 269.

When a defendant has made default in delivering a defence or demurrer, the action may be set down on motion for judgment without previous notice of motion. *Gillot* v. *Ker*, 24 W. R. 428.

—— **Hearing.**]—When an action is set down on motion for judgment in default of pleading, the court will fix an early day for the hearing. *Meakin* v. *Sykes*, 24 W. R. 293.

—— **Discretion to deprive Successful Plaintiff of Costs.**]—The court, in giving judgment in favour of a plaintiff, where the defendant has made default in delivering a defence, has a discretion to deprive the plaintiff of the costs of the action, and in dealing with the question of costs the court is not bound to look only at the statement of claim. *Young* v. *Thomas*, 61 L. J., Ch. 496; [1892] 2 Ch. 134; 66 L. T. 575; 40 W. R. 468—C. A.

Striking out Defence—Application for Judgment — Defendant out of Jurisdiction.] — An English testator had executed a deed in favour of creditors which comprised real estate in Trinidad, but, though valid according to the law of England, did not pass the legal estate of the land in Trinidad to the trustees of the deed, because it was not executed as required by the law of Trinidad. The testator died intestate as to real estate, and the legal estate was vested in M., a British subject residing in Trinidad, and in the other defendants who resided in England. An action was brought by the trustee of the deed and another creditor to enforce the trusts of the deed against the real estate in Trinidad. The plaintiffs had been advised by a barrister practising in Trinidad, and they alleged in their stasement of claim that under the law of Trinidad the deed bound the beneficial interest of the debtor, and of all persons claiming through him in the real estate in Trinidad; and the plaintiffs claimed to have such estate vested in the trustee of the creditor's deed, and to have that property sold under the direction of the court to pay the creditors under the trusts of the deed. Pursuant to leave the writ was served in Trinidad on M., and he appeared and delivered a defence denying the plaintiffs' allegation that the beneficial interest in the land was bound. This defence was afterwards struck out under r. 21 of Ord. XXXI., because the defendant failed to obey an order to give discovery. By arrangement with the other defendants the action came on for trial, when the plaintiffs contended that M. was in the same position as if he had admitted the allegation in the statement of claim:—Held, that as the defence had only been struck out for a collateral reason, the law of Trinidad had not been sufficiently proved to justify the court in deciding; and that the action must stand over generally, with liberty to apply, with a view to proceedings being taken against M. in Trinidad. *Jenney* v. *Mackintosh*, 61 L. T. 108—C. A.

Non-delivery of Reply—Counter-claim.]—The plaintiff having made default in delivery of reply to the defendant's defence and counter-claim:—The court ordered final judgment to be entered for the defendant in respect of both the claim and counter-claim under Ord. XL. r. 11. *Lumsden* v. *Winter*, 51 L. J., Q. B. 413; 8 Q. B. D. 650; 30 W. R. 751; 46 J. P. 487.

The defendant in an action delivered a counter-claim. The action was dismissed for want of prosecution, the plaintiff having failed to deliver a reply:—Held, that, under Ord. XXVII. r. 11, the defendant was entitled to set down the action on motion for judgment on his counter-claim. *Roberts* v. *Booth*, [1893] 1 Ch. 52; 3 R. 151; 67 L. T. 646; 41 W. R. 220.

Judgment for default of pleading cannot be entered upon a counter-claim unless upon motion for judgment under Rules of the Supreme Court, 1883, Ord. XXVII. r. 11. *Jones* v. *Macaulay*, 60 L. J., Q. B. 258; [1891] 1 Q. B. 221; 64 L. T. 621; 39 W. R. 211—C. A.

Upon an application by a defendant who has delivered a counter-claim to dismiss an action for want of prosecution, he is entitled in default of reply to judgment on his counter-claim. *London Road Car Co.* v. *Kelly*, 18 L. R., Ir. 43.

Ord. XXIII. r. 4, and XXVII. rr. 11, 12, of the Rules of 1883, apply to a case where a defendant to a counter-claim has made default in pleading to it, and entitle the plaintiff in the counter-claim to move for judgment against the defaulting defendant. *Street* v. *Crump*, 25 Ch. D. 68; 49 L. T. 397; 32 W. R. 89.

Where a plaintiff fails to deliver a defence to a counter-claim, and his action is dismissed under a master's order, judgment on the counter-claim can only be signed by the defendant upon a motion for judgment under Ord. XXVII. r. 11. *Higgins* v. *Scott*, 58 L. J., Q. B. 97; 21 Q. B. D. 10; 58 L. T. 383. S. P., *Aitken* v. *Dunbar*, 46 L. J., Ch. 489; 25 W. R. 366.

Where the plaintiff makes default in delivery of reply to the defendant's defence and counter-claim, the court will order final judgment to be entered for the defendant in respect of both the original claim and the counter-claim, under Ord. XXXIX. r. 9. *Thornton* v. *Clinch*, 10 L. R., Ir. 378.

The plaintiff having made default in delivery of a reply to the defendant's defence and counter-claim, the court held that under Ord. XXIX. r. 12, and Ord. XL. r. 11, the defendant was entitled to an order dismissing the plaintiff's action with costs, and an order on the counter-claim for the relief thereby claimed with costs of the counter-claim. But as there were no positive admissions of fact on the pleadings, but only constructive admissions by reason of the absence of a reply, the action was ordered to be set down on motion for judgment, and notice of the setting down was directed to be given. *Caroli* v. *Hirst*, 48 L. T. 759; 31 W. R. 839.

Default in delivering Reply.]—Where the plaintiff made default in delivering a reply to a defence which, as to part of a claim for goods sold, alleged that the goods were not up to sample, and had been returned, and, admitting the residue of the claim, paid the amount of such residue into court; the defendant was allowed on motion to enter final judgment, with the costs of the action, and 3*l.* 3*s.* costs of the application. *Fussell* v. *O'Boyle*, 14 L. R., Ir. 53.

A defendant is entitled under Ord. XXXIX.

r. 9, to judgment on admissions of facts in the pleadings, by reason of the plaintiff not delivering a reply to the defence. *Elliott* v. *Harris*, 17 L. R., Ir. 351. *See* Ord. XXVII. r. 13.

Delivery of Pleadings after Prescribed Time.]—Notwithstanding the lapse of six weeks from appearance, requiring a statement of claim, the plaintiff may deliver a statement of claim without obtaining an order for that purpose, at any time before application by the defendant to dismiss for want of prosecution. *O'Connell* v. *O'Connell*, 6 L. R., Ir. 470. S. P., *Sampson* v. *O'Donnell*, 6 L. R., Ir. 471.

If a defendant does not deliver a defence within fourteen days after the statement of claim, the plaintiff is entitled to proceed with a motion for judgment under Ord. XXVIII. r. 10, notwithstanding that a defence is delivered subsequently to the service of notice of motion. *Potts* v. *Deane*, 11 L. R., Ir. 396.

In an action to recover possession of land a defendant may deliver his defence at any time before judgment entered against him, notwithstanding that the time limited by Ord. XXI. r. 1 (Ir.), has elapsed. *Harding* v. *Lyons*, 14 L. R., Ir. 302.

In an action to recover possession of land, a defendant may deliver his defence at any time before judgment entered against him, notwithstanding that the time limited by Ord. XXI. r. 1, has elapsed. *Kennane* v. *Mackey*, 24 L. R., Ir. 495.

Where, after the time for delivery of the defence had expired, and an order had been made fixing the mode of trial, a defendant delivered his defence without leave, the court, on motion by the plaintiff, set the defence aside. *Wilson* v. *Noble*, 11 L. R., Ir. 546.

In an action of ejectment on the title, a defendant applied for leave to deliver a defence after the time limited for doing so had expired; and such application having been refused, but before judgment entered, he delivered and filed a defence. The court, on motion by the plaintiff, set it aside as irregular. *Meehan* v. *Meehan*, 14 L. R., Ir. 300.

S. gave to G. a charge upon costs due from B. to S. G. brought his action against S. and B., asking for an account and foreclosure against S., and that B. might be ordered to pay the amount of the bill of costs (359*l.*) into court. The time for delivering defence was enlarged from the 1st of August to the 16th of August, 1882. No defence having been delivered, notice of motion for judgment was served on the 18th of November. On the 2nd of December B. took out a summons for leave to deliver defence, which was dismissed on the 6th. The defence which he proposed to put in alleged that there were other dealings between B. and S., and that no substantial part of the bill of costs was due, and moreover that B. was going to have the bill taxed. On the 19th of February, 1883, the motion for judgment came on for hearing. The court refused to look at the defence, and gave a judgment directing an account against S., and ordering B. to bring the 359*l.* into court. B. appealed:—Held, that on motion for judgment for want of defence, if a defence had been put in, though irregularly, the court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done, and that in the present case the order for bringing the 359*l.* into court must be discharged, and an account directed of what was due from B. to S. in respect of the bill of costs. *Gibbings* v. *Strong*, 26 Ch. D. 66; 50 L. T. 578; 32 W. R. 757—C. A.

The defendants in an action having obtained leave for further time to put in their defence suffered that time to expire. The plaintiff accordingly moved, under Ord. XXVII. r. 11, of the Rules of Court, 1883, for judgment on his statement of claim in default of defence. The defendants being served with notice of motion delivered their defence, but did not appear at the hearing of the motion:—Held, that the defence which had been delivered ought not to be treated as a mere nullity, though the plaintiff had rightly declined to state it to the court; but that, as the defence was not duly in form, the judgment would be according to the statement of claim, with a direction that the order was not to be drawn up for a week, and that the order now made was to be served on the defendants with notice that they were to be at liberty, within seven days from such service, to move to discharge the order. *Montagu* v. *Land Corporation of England*, 56 L. T. 730.

A defendant made default in putting in a defence under Ord. XXIX. r. 10 (1875), and the plaintiff gave notice of motion for judgment in default of defence. But before the motion was heard the defendant put in a defence:—Held, that, though put in after time, it could not be treated as a nullity, and that the plaintiff was not entitled to judgment in default of defence. But as the defence disclosed no real defence to the action, the court of appeal ordered the notice of motion to be amended and judgment to be given for the plaintiff on the admissions in the defence. *Gill* v. *Woodfin*, 53 L. J., Ch. 617; 25 Ch. D. 707; 50 L. T. 490; 32 W. R. 393—C. A.

The plaintiff delivered his reply after three weeks had elapsed from delivery of the defence, and subsequently the defendant, treating the facts stated in the defence as admitted, under Ord. XXIX. r. 12, by reason of the plaintiff's failure to reply in time, gave notice of motion for judgment under Ord. XL. r. 11:—Held, that the reply having been actually delivered before the notice of motion was given, the defendant was not entitled to judgment. *Graves* v. *Terry*, 51 L. J., Q. B. 464; 9 Q. B. D. 170; 30 W. R. 748.

A reply delivered more than three weeks after the delivery of the defence is irregular, unless the time for delivering the reply has been extended by the court. *Webb* v. *Kerr*, 14 L. R., Ir. 294.

Extension of Time by Court.]—A plaintiff being bound to deliver a statement of claim, and not having done so within the six weeks allowed by Ord. XXI. r. 1 (a), the defendant moved, under Ord. XXIX. r. 1, to dismiss the action with costs for want of prosecution. The court gave the plaintiff one week's time to take further proceedings, he paying the costs of the motion. *Higginbottom* v. *Aynsley*, 3 Ch. D. 288; 24 W. R. 782.

A writ was issued in August, 1877, in respect of a claim which would have become statute-barred in November, 1877. Appearances were entered in February, 1878. By a mistake of the clerk of the plaintiff's solicitor, the statement of claim was served too late by two days. The court allowed the plaintiff further time to deliver his

statement of claim. *Canadian Oil Works Corporation* v. *Hay*, 38 L. T. 549.

—— **Grounds for.**]—The court was moved for further time to plead to a penal action; the affidavit was to the effect that the defendant and others were about to petition parliament for a remission of the penalty:—Held, that as the right to sue had completely accrued, the court was estopped by the concessions of Magna Charta to delay the plaintiff in his suit: "Nulli differemus justitiam vel rectum." *Grant* v. *Ridley*, 5 Man. & G. 201; 6 Scott (N.R.) 176; 12 L. J., C. P. 151; 7 Jur. 883.

Where a plaintiff by his bill states documents to be in his possession, and it is necessary for the defendant to see them in order to put in his answer, the court, though it cannot compel their production, will extend the time for answering until after the plaintiff has produced them. *Taylor* v. *Heming*, 4 Beav. 235; 10 L. J., Ch. 369; 5 Jur. 766.

Pending the proceedings in the cause, the plaintiff indicted the defendants in respect of the same transactions; the time for answering was extended until after the trial of the indictment. *Lee* v. *Read*, 5 Beav. 381; 12 L. J., Ch. 26; 6 Jur. 1026.

A plaintiff, being indicted for felony, sued a banker for money the plaintiff had paid him, which was surmised to be the produce of the felony; the court, on application, will give time to plead in a month after the trial of the indictment. *Deakin* v. *Praed*, 4 Taunt. 825.

Extension of Time by Consent without Order.]—If a plaintiff consents in writing to grant a defendant an extension of time for the delivery of his defence under Ord. XXII. r. 1, an order for the purpose is unnecessary. *Ambroise* v. *Evelyn*, 48 L. J., Ch. 686; 10 Ch. D. 759; 27 W. R. 639.

Effect of Order when Time allowed to Expire.]—An order was made under Ord. XXIX. r. 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:—Held, that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim. *Whistler* v. *Hancock*, 47 L. J., Q. B. 152; 3 Q. B. D. 83; 37 L. T. 639; 26 W. R. 211.

An order having been made on the 6th of May dismissing the action for want of prosecution, if the statement of claim were not delivered within fourteen days, on the 19th of May the plaintiff took out a summons, returnable the next day, the last of the fourteen days, for further time to deliver statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a master made an order giving seven days more for delivery of statement of claim. Pollock, B., having rescinded the order of the master on the ground that he had no jurisdiction, the action being at an end on the 20th of May:—Held, that the decision of the learned judge was correct. *King* v. *Davenport*, 48 L. J., Q. B. 606; 4 Q. B. D. 402; 27 W. R. 798.

By the combined operation of Ord. LIV. r. 4, and Ord. LVII. r. 6, the court or a judge has power to enlarge the time limited by an order of a master for doing an act, even after the expiration of the time so limited, and the lapse of the four days' time for appealing, where the justice of the case requires it. On the 25th of March a master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day, but on the day following a summons was taken out "for further time to answer the interrogatories":—Held, that it was still competent to the court or a judge to enlarge the time for moving to set aside or vary the order of the 25th of March. *Whistler* v. *Hancock* (supra), distinguished. *Burke* v. *Rooney*, 48 L. J., C. P. 601; 4 C. P. D. 226; 27 W. R. 915.

Leave to Deliver after Time Expired.]—The time for delivering a reply which would have expired on the 25th July was extended to the 22nd of August, and then to the 19th of September. On the 26th of September, no reply having been delivered, the defendant served notice of motion for judgment. On the same day the plaintiff, by leave of the judge, served notice of motion for the following day for leave to deliver a reply, and on the 27th the judge refused the plaintiff's motion on the ground of unexplained delay:—Held, on appeal, that the application ought to have been granted on the terms of the plaintiff's paying the costs of it. *Eaton* v. *Storer*, 22 Ch. D. 91; 48 L. T. 204; 31 W. R. 488—C. A.

When a defendant in a foreclosure suit obtained an order for leave to file a counterclaim by way of set-off, and through the negligence of his solicitor no counter-claim was delivered, and a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counterclaim was refused on the ground of delay. *Wilkins* v. *Bedford*, 35 L. T. 622.

"Party Applying for Relief"—Who is.]—A defendant delivered a defence which, if uncontradicted, was a good defence to the plaintiff's claim; and the plaintiff did not reply or obtain further time within the three weeks limited by Ord. XXIV. r. 1. The defendant then, before the expiration of the six weeks within which a plaintiff must give notice of trial, moved under Ord. XL. r. 11, that the action might be dismissed with costs, on the ground that, by not replying, the plaintiff had admitted the defence within that rule:—Held, that a defendant seeking to dismiss an action under such circumstances was not a party applying for relief within the meaning of the rule. *Linton* v. *Linton*, 46 L. J., Ch. 64; 3 Ch. D. 793; 24 W. R. 962.

Setting Aside Judgment obtained by Default.]—A defendant obtained an order to set aside a judgment which had been entered against him in default, with liberty to appear and defend the action upon terms of paying to the plaintiff all his costs of the action subsequent to delivery of the statement of claim. *Williams* v. *Brisco*, 29 W. R. 713.

An order was made on the defendant in an action to produce certain documents for inspection. The defendant wilfully refused production, and accordingly an order was made under Ord. XXXI. r. 21, to strike out the defence, and judgment was given against the defendant in default of pleading. On an application by the defendant, under Ord. XXVII. r. 15, the court refused to

set aside the judgment. *Haigh* v. *Haigh*, 55 L. J., Ch. 190; 31 Ch. D. 478; 53 L. T. 863; 34 W. R. 120.

Motion for Judgment—Chambers.]—Quære, whether a motion for judgment for default in pleading should not be made in chambers. *Rumley* v. *Winn*, 58 L. J., Q. B. 128; 22 Q. B. D. 265; 60 L. T. 32.

Summons for Time.]—A judgment signed after a summons for further time to plead is returnable is irregular. *Morris* v. *Hunt*, 2 B. & Ald. 355; 20 R. R. 472.

When further time to plead was given by a plaintiff's attorney, upon being served with a paper which purported to be a summons for time to plead:—Held, that the attorney was justified in signing judgment for want of a plea, after he had discovered that no summons had been issued. *Lowne* v. *Loader*, 3 Hodges, 55.

A judgment signed on the morning after the time for pleading has expired, whilst the parties are attending a judge on a summons for time to plead, returnable before the judgment is actually signed, is irregular. *Abernethy* v. *Paton*, 6 Scott, 586.

A defendant served two consecutive summonses for leave to plead several matters, neither of which was attended by the plaintiff. On the return of the second summons, on which day the time for pleading expired, he took out a third summons, returnable the following day. The plaintiff did not attend this summons, but signed judgment after it was returnable:—Held, that the third summons was no stay of proceedings, and that the judgment was regular. *Hawkins* v. *Wilkinson*, 2 Ex. 340; 17 L. J., Ex. 230.

Order "Peremptory" for Delivery.]—By Ord. XIX. r. 8, of the Rules of the Supreme Court, 1883, "the party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons":—Held, that where, upon an application for extension of the time for delivering a pleading, an order "peremptory" is made for delivery of the pleading within a time limited by the order, the time continues to run, notwithstanding that the applicant subsequently obtains an order for particulars. *Falch* v. *Axthelm*, 59 L. J., Q. B. 161; 24 Q. B. D. 174; 38 W. R. 196—C. A.

A summons for further time to plead after an order for time to plead peremptorily is regular, and, if returnable at the opening of the office on the day after the order expires, it operates as a stay of proceedings till disposed of. *Beazley* v. *Bailey*, 16 M. & W. 58; 5 D. & L. 271; 16 L. J., Ex. 1; 10 Jur. 906.

Former Practice.] — Signing judgment for want of a plea is an act to be done by the plaintiff at his peril. *Anon.*, 1 Chit. 356.

Judgment for want of a plea may be signed on a holiday. *Bennett* v. *Potter*, 2 C. & J. 622; 1 L. J., Ex. 258.

But not on a dies non juridicus. *Harrison* v. *Smith*, 9 B. & C. 243; 7 L. J. (o.s.) K. B. 171.

A plaintiff cannot treat a plea pleaded in the name of a person who was not an attorney, as a nullity. *Hill* v. *Mills*, 2 D. P. C. 696.

A defendant obtained an order for leave to plead several matters, but at the time the order was obtained he was not enabled to draw up the rule, the rule office being then closed. He delivered the pleas, with notice that the rule would be drawn up and delivered as soon as it could be obtained. On the morning of the following day, the time for pleading having expired, the plaintiff signed judgment as for want of a plea:—Held, that the judgment was regular. *Glen* v. *Lewis*, 22 L. J., Ex. 24; 8 Ex. 132; 16 Jur. 1121.

A misstatement of a defendant's christian name in the commencement of his plea does not entitle the plaintiff to treat it as a nullity, and to sign judgment as for want of a plea. *Anon.*, 7 D. & R. 511.

If a defendant, who is an attorney, really appears in person, but in point of form, as attorney, a plea in the name of another attorney cannot be treated as a nullity, on the ground of no order for change of attorney having been served. *Kerrison* v. *Wallinghorough*, 5 D. P. C. 564.

A plea delivered after the time for pleading expired, but before judgment has been actually signed, is regular. *Ampthill* v. *Semple*, 2 Tyr. 312; 2 C. & J. 358; 1 D. P. C. 316; 1 L. J., Ex. 102.

After the time for pleading expired, the defendant's attorney tendered a plea at the plaintiff's attorney's office; the plaintiff's attorney's clerk had just set out to sign judgment at the proper office; the defendant's attorney pursued, and, arriving immediately after judgment had been signed, again tendered the plea:—Held, that the judgment was regular. *Stafford* v. *Nichols*, 4 Bing. (N.C.) 693; 6 Scott, 577; 1 Arn. 262.

Where the time for pleading expired on the 19th, and a summons to stay proceedings was made returnable at eleven o'clock on the 20th, the plaintiff could not sign judgment for want of a plea before the return of the summons; and a plea delivered by the defendant before that time operated as a waiver of the summons. *Barton* v. *Warren*, 3 D. & L. 142; 14 L. J., Q. B. 312; 10 Jur. 375.

—— **Setting Aside.**] — The court will not restrain a defendant from pleading the statute of limitations on setting aside an interlocutory judgment. *Maddocks* v. *Holmes*, 1 Bos. & P. 228.

The court will set aside a regular interlocutory judgment on affidavit of merits, though it is defendant's intention to plead his infancy. *Delafield* v. *Tanner*, 1 Marsh. 391; 5 Taunt. 856.

So, the court will set aside a regular judgment on an affidavit of merits, though bankruptcy is intended to be pleaded. *Evans* v. *Gill*, 1 Bos. & P. 52.

To set aside a judgment signed for want of a plea upon payment of costs, the affidavit must state that the defendant has a good defence upon the merits; that he has a good and meritorious defence is not sufficient. *Bower* v. *Kemp*, 1 C. & J. 287; 1 D. P. C. 281; 9 L. J. (o.s.) Ex. 80.

The mere fact of a plea being clearly insufficient in point of law is not a ground for signing judgment as for want of a plea. *Cowper* v. *Jones*, 4 D. P. C. 591.

If a defendant seeks to set aside an interlocutory judgment for irregularity, he must come within a reasonable time from his knowing that it is signed. *Grant* v. *Flower*, 5 D. P. C. 419; 2 H. & W. 326.

Time—How calculated.] — When a plaintiff obtains an order to amend his declaration, and the defendant at the same time, by the same or another order obtains time to plead, that time must be calculated from the time that the plaintiff amends, and not from the date of the order for time, although the latter order does not refer to the former. *Davies* v. *Stanley*, 8 D. P. C. 433.

A month's time to plead means a lunar month. *Tullett* v. *Linfield*, 3 Burr. 1455. *S.C.*, nom. *Talbot* v. *Linfield*, 1 W. Bl. 450.

Where three months' time to plead is given generally, they are to be reckoned by lunar months, and not by calendar months. *Soper* v. *Curtis*, 2 D. P. C. 237.

Before the regular time of pleading expired the defendant obtained an order for seven days' time to plead, the defendant then being under terms to take short notice of trial at the sittings:—Held, that the further time ought to be reckoned from the date of the order, as the cause could not otherwise be tried at the sittings. *Simpson* v. *Cooper*, 2 Scott, 840; 1 Hodges, 448.

A defendant obtained four days' time to plead:—Held, that the time given by the judge's order was to be computed from the date of the order, and not from the expiration of the original time to plead. *Lane* v. *Parsons*, 3 Bing. (N.C.) 264; 3 Scott, 652; 5 D. P. C. 359; 2 Hodges, 277; 6 L. J., C. P. 26.

A defendant who has a day's time to plead from the happening of an event, has the whole of the day following that on which the event happens in which to plead. *Connelly* v. *Bremner*, 1 H. & R. 612; 35 L. J., C. P. 319; L. R. 1 C. P. 557; 12 Jur. (N.S.) 762; 14 L. T. 520; 14 W. R. 781.

Where time to plead is given, such time is to be reckoned from the expiration of the rule to plead, and not from the date of the order. *Aspinal* v. *Smyth*, 2 Moore, 655.

h. Amendment and Striking out Pleadings.

1. Amendment by Parties of their own Pleadings.

a. *In what Cases.*

Claim introducing a new Cause of Action—Amendment of Writ.]—In amending a statement of claim without leave, under Ord. XXVI. r. 1, a plaintiff is not justified in adding a new and distinct cause of action uncovered by the indorsement of the writ of summons; and such an amendment is liable to be set aside. Where it becomes necessary to make an amendment of this nature, the plaintiff should first obtain leave (on notice to the defendant) to amend the writ of summons. *Large* v. *Large* (W. N. 1877, 198) and *Johnson* v. *Palmer* (4 C. P. D. 258) observed on. *Moore* v. *Alwill*, 8 L. R., Ir. 245. S. P., *United Telephone Co.* v. *Tasker*, 59 L. T. 852.

Extent of Power of Court.]—There is no kind of error or mistake which if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. —Per Bowen, L.J. *Cropper* v. *Smith*, 53 L. J., Ch. 891; 26 Ch. D. 710; 51 L. T. 733; 33 W. R. 60.

It is the duty of a plaintiff to come fully prepared at the hearing to ask the court for a decree; and if he is not so prepared, and the suit appears defective from his default, it is then a matter of discretion or indulgence to grant him leave to supply the defect. *Bierdermann* v. *Seymour*, 1 Beav. 594.

The court will allow an amendment of pleadings where a party to the action would not be seriously and irremediably damnified by such amendment being allowed, or where no injury would be caused which could not be compensated for by costs. *Claparede* v. *Commercial Union Association*, 32 W. R. 262—C. A. S. P., *Trufort, In re, Trafford* v. *Blanc*, 53 L. T. 498; 34 W. R. 56.

In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances; the defence denied that that particular sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. Fry, J., having held that the denial was evasive, and amounted to an admission that some bribe had been given, and having refused leave to amend the statement of defence:—Held, by the court of appeal, that leave to amend the statement of defence ought to be given. *Tildesley* v. *Harper*, 48 L. J., Ch. 495; 10 Ch. D. 393; 39 L. T. 552; 27 W. R. 249—C. A.

Per Bramwell, L.J.: As a general rule, leave to amend ought not to be refused unless the court is satisfied that the party applying is acting mala fide, or that his blunder has done some injury to the other side, which cannot be compensated by payment of costs, or otherwise. *Ib.*

All such amendments in pleadings are to be allowed as may be necessary for enabling the real question at issue to be tried, subject to the limitation that the whole nature of the action may not be changed by amendment. Where, therefore, an action was brought for the rescission of a contract for the sale of land, and one of the defendants, who had entered into the contract on behalf of others of the defendants, who were the real vendors, disclaimed by his defence all interest in the contract:—Held, that such defendant's defence should be amended by confining the disclaimer to any beneficial interest in the contract, and stating that he only contracted as agent, and that such defendant should be added as a plaintiff, in a counter-claim by the real vendors, to compel the specific performance of the contract. *Blenkhorn* v. *Penrose*, 43 L. T. 668; 29 W. R. 237.

Reasonable and bonâ fide Cause of Action.] —An amendment in a statement of claim, under Ord. XXVI. r. 1, will not be allowed, unless the court is satisfied that there are reasonable grounds for the cause of action sought to be saved by the amendment, and that such cause of action is presented bonâ fide for the benefit of the plaintiff. *Dillon* v. *Balfour*, 20 L. R., Ir. 600.

Prejudice to Plaintiff.] — The defendants, a tramway company, were sued in respect of

injuries alleged to have been occasioned to the plaintiff through their not having maintained a road upon which their tramway ran, in a safe and proper condition. Six months after the close of the pleadings the defendants applied for leave to amend their defence by setting up a contract under s. 29 of the Tramways Act, 1870, by which the liability to maintain the road was shifted from them to the vestry, the road authority of the district. Since the close of the pleadings the statutory period of limitation within which the plaintiff could have sued the vestry had elapsed :—Held, that the defendants ought not to be allowed to amend their defence, because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance. *Steward* v. *North Metropolitan Tramways Co.*, 55 L. J., Q. B. 157 ; 16 Q. B. D. 556 ; 54 L. T. 35 ; 34 W. R. 316 ; 50 J. P. 324—C. A.

Claim barred by Statute of Limitations.]—A plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations. *Weldon* v. *Neal*, 56 L. J., Q. B. 621 ; 19 Q. B. D. 394 ; 35 W. R. 820—C. A.

No Title to sue when Writ issued.]—Where there has been no title to sue at the time of filing an original bill or information, a decree cannot be founded upon a right of suit subsequently acquired and brought forward by a supplemental bill, or by way of amendment, the rule applying not only in cases where the title to sue in respect of the whole matter of the suit is acquired subsequently to filing the original bill, but also in cases where the title to sue in respect of any of the matter of the suit is so acquired ; and the principle being that there must be a right of suit when the suit is commenced ; and a supplemental bill is not the commencement, but the continuance of the suit. *Att.-Gen.* v. *Avon (otherwise Aberavon) Corporation*, 3 De G. J.& S. 537.

If a plaintiff has no title to maintain his suit at the time when the bill is filed, he cannot carry on the suit by subsequently acquiring a title and amending the bill accordingly. *Evans* v. *Bagshaw*, 39 L. J., Ch. 145 ; L. R. 5 Ch. 340 ; 18 W. R. 657.

Unintentional Omission.]—When to a declaration on contract there is a plea of payment which could not have been intended to admit the liability contended for by the plaintiff, the court will allow the defendant to amend. *Henderson* v. *Squire*, 10 B. & S. 183 ; 38 L. J., Q. B. 73 ; L. R. 4 Q. B. 170 ; 19 L. T. 601 ; 17 W. R. 519.

If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the court, on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered before ; but in such case the suit ought to be disposed of without prejudice to the matter omitted to be put in issue, which the plaintiff may prosecute in any future suit. *M'Neill* v. *Cahill*, 2 Bligh, 229.

Where pleadings are informal, and do not raise the question the parties intended to raise, the court or a judge is bound to alter them, so as to make them in accordance with the intention of the parties. *Ritchie* v. *Van Gelder*, 9 Ex. 762 ; 18 Jur. 385 ; 2 W. R. 418.

But when pleadings raise the question in dispute between the parties, it is discretionary with the court or judge whether they will allow others to be substituted in order to raise some other question. *Ib.*

Therefore, where issue was joined on never indebted, the court held itself not bound to allow a plea of illegality of consideration for the contract between the parties to be substituted for never indebted, although it was sworn that that illegality was the real question in controversy between the parties. *Ib.*

Leave to amend will be granted where a slip appears in the pleadings, but not so as to raise a fresh cause of action. *Clarke* v. *York*, 47 L. T. 381 ; 31 W. R. 62.

Fraud and Misrepresentation.]—Amendments as a rule at the trial are not allowed to raise a charge of fraud at a time when the case has been launched independently of fraud. *Hendriks* v. *Montagu*, 50 L. J., Ch. 257 ; 17 Ch. D. 642 ; 44 L. T. 89 ; 30 W. R. 168.

A judge has an absolute discretion to allow any amendment of the pleadings. Therefore, where, in the middle of the trial of a probate suit before the court and a jury, one party applied to amend, by adding a plea of fraud :—Held, that the judge had the right to exercise his discretion in favour of the party applying to add the plea. *Riding* v. *Hawkins*, 58 L. J., P. 48 ; 14 P. D. 56 ; 60 L. T. 869 ; 37 W. R. 575.

The statement of claim in an action for fraudulent misrepresentation in a prospectus relating to a company, contained a general allegation, that the prospectus comprised many untrue and misleading statements, and then set out certain specific instances of alleged misrepresentation, amongst others the following : "That the plastic or surface clay on the Fletton property was of an average depth of thirteen feet, whereas, in fact, at the deepest part such clay was only eleven feet or thereabouts in depth, diminishing to two feet." At the trial the plaintiff proposed to adduce evidence that there was an average depth of six feet of clay, that only four feet of this could be used for making the best bricks, and that instead of there being thirty-three acres in the property, as stated in the prospectus, there were in reality only eighteen acres :—Held, that evidence of these alleged misrepresentations could not be admitted as they had not been specifically pleaded, and that leave to amend would not be granted. *Symonds* v. *City Bank*, 34 W. R. 364.

Undue Influence.]—M. A. D., the testatrix, in 1853, made her will, by which she gave her property equally between the plaintiffs, defendants and interveners. In an action by the plaintiffs propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of all interest in her estate. In the course of the plaintiffs' case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will. The court allowed the pleadings to be amended by adding statements to that effect, and praying

for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners. *Betts* v. *Doughty*, 48 L. J., P. 71 ; 5 P. D. 26 ; 41 L. T. 560.

To Raise Fruitless Inquiry.]—I do not think I ought to allow an amendment for the purpose of directing what would probably be a fruitless inquiry—Per Kay, J. *Yorkshire Railway Waggon Co.* v. *Maclure*, 51 L. J., Ch. 259 ; 19 Ch. D. 489 ; 45 L. T. 751 ; 30 W. R. 291.

Cause of Action not entirely changed.] — The plaintiff and the defendant each had a lease of a field from each of two tenants in common. The defendant entered the field, and cut, made into hay and removed a crop of growing grass. He also put a lock on the gate of the field, but the gate was not always kept locked. In an action of trespass and trover by the plaintiff against the defendant :—Held, that it would not lie, as they were tenants in common, and nothing amounting in law to an ouster having occurred, and that the plaintiff could not amend his declaration by changing the action into one of account, under 4 Anne, c. 16, s. 27, since that would be to change the entire character of the action and the questions at issue. *Jacobs* v. *Seward*, 41 L. J., C. P. 221 ; L. R. 5 H. L. 464 ; 27 L. T. 185. Affirming 18 W. R. 953—Ex. Ch. S. P., *Smurthwaite* v. *Richardson*, 15 C. B. (N.S.) 463.

Semble, an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction, ought not to be allowed. *Newby* v. *Sharpe*, 47 L. J., Ch. 617 ; 8 Ch. D. 39 ; 38 L. T. 583 ; 26 W. R. 685.

Where, to an action on a cheque, the defendant pleaded but one plea, which admitted the making the cheque, the court refused to permit him also to plead that the cheque required a stamp. *Jenkins* v. *Creech*, 5 D. P. C. 293.

Amendment allowed in a penal action which does not introduce any new substantive cause of action. *Maddock* v. *Hammet*, 7 Term Rep. 55.

Where a defendant pleaded never indebted to an action for money lent, and issue was joined thereon, the court refused to allow him to substitute a plea, that the money was lent for the purpose of purchasing shares in a foreign lottery and reselling them in England. *Ritchie* v. *Van Gelden*, 9 Ex. 762 ; 18 Jur. 385.

Where an amendment merely consists in a correction of a blunder in the statement of the contract, and does not vary the real question the parties came to try, the judge is warranted in allowing it without imposing any condition. *St. Losky* v. *Green*, 9 C. B. (N.S.) 370 ; 2 F. & F. 106 ; 30 L. J., C. P. 19 ; 7 Jur. (N.S) 394 ; 3 L. T. 297 ; 9 W. R. 119.

A declaration that the defendant contracted to sell to the plaintiff "a cargo of Merthyr coal *of the description called through and through* to be hand-picked." This description being proved to be inconsistent and unintelligible, and the real contest being whether or not the contract was for "hand-picked coal," the judge amended it by striking out the words in italics, the costs being the defendant's costs in the cause. The jury having found for him :—Held, that the amendment was properly made. *Ib.*

To an action for false imprisonment, the defendant pleaded a justification of several facts which constituted reasonable and probable cause for his suspecting that the plaintiff had stolen his goods. He failed to prove all the allegations, and the judge amended it by altering one and striking out others :—Held, that the amendment was properly made, the facts stated in the plea, as amended, affording sufficient reasonable and probable cause for the suspicion. *Hailes* v. *Marks*, 7 H. & N. 56 ; 30 L. J., Ex. 389 ; 7 Jur. (N.S.) 851 ; 4 L. T. 805 ; 9 W. R. 808.

A declaration that the plaintiff entered into the service of the defendant as a commercial traveller at a yearly salary, and that he agreed to continue him in his employ for a whole year, and that he discharged him. It was proved that there was a usage in the trade that commercial travellers should be dismissed with a three months' notice :—Held, that the contract was not proved, the condition as to the notice not being in defeasance of the contract, but forming part of it, but that the plaintiff ought to have been allowed to amend at the trial, without costs. *Metzner* v. *Bolton*, 9 Ex. 518 ; 2 C. L. R. 685 ; 23 L. J., Ex. 130 ; 2 W. R. 302.

A plaintiff declared as for an injury to land in his possession, which, however, turned out on the trial to have been in the possession of his tenant. The real question in controversy between the parties was, whether the land was the plaintiff's property, and whether there was a right of way across it :—Held, that the judge had power to amend the declaration, so as to adapt it to an injury to the plaintiff's reversionary interest. *May* v. *Footner*, 5 El. & Bl. 505 ; 25 L. J., Q. B. 32 ; 1 Jur. (N.S.) 1019 ; 4 W. R. 9.

Explanatory Words.]—A declaration that the defendant published of the plaintiff that "a receipt was obtained from the defendant by fraudulent means, and that the plaintiff was cognisant of such fraud." The judge allowed an amendment, by introducing the letter alleged to contain the libel, with the words "meaning thereby" immediately before the libel charged :—Held, properly made. *Saunders* v. *Bate*, 1 H. & N. 402.

—— **And Particulars.**]—A declaration that the defendant, by falsely representing that he was paying 70*l.* a month for stock consumed, and was taking 100*l.* a month as receipts from his business as a publican, induced the plaintiff to purchase the business. At the trial it appeared that the payments and receipts were as alleged, but the business was chiefly out-door business, and that the representation was that it was done over the counter. The judge amended the declaration by inserting the words, "and that the business was a bar business, carried on at home, and chiefly over the counter, and not a business done elsewhere or out of the house" :—Held, that he had power to make the amendment, under s. 222 of the 15 & 16 Vict. c. 76. *Roles* v. *Davis*, 4 H. & N. 484 ; 1 F. & F. 563 ; 28 L. J., Ex. 287.

Insertion of Particulars.]—A plea of justification in an action for a malicious prosecution, on a charge of receiving stolen goods, alleged that the goods had been stolen by "some persons unknown," and the evidence shewed that the plaintiff had received the goods from a servant of the defendant, named John Press :—Held, that the judge had properly exercised his discretion in allowing the plea to be amended, by striking out the words "some person unknown," and substituting the words "one John Press."

Pratt v. *Hanbury*, 14 Q. B. 190; 19 L. J., Q. B. 17; 13 Jur. 1003.

At the trial of an action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transhipped for exportation, evidence was given that the defendants had acted as custom-house agents for the foreign manufacturing firm, in getting the goods landed and stored in this country. Leave was given to the plaintiff, at the hearing of the trial, to amend the statement of claim by alleging this practice, and that such practice was an infringement. *Nobel's Explosive Co.* v. *Jones*, 49 L. J., Ch. 726; 17 Ch. D. 721; 42 L. T. 754; 28 W. R. 653.

Involving Different Cause of Action.]—An amendment will not be allowed at the trial, where, in tort, the plaintiff has stated one cause of action, and the evidence, failing to sustain it, has endeavoured to raise another one. *Bradworth* v. *Foshaw*, 10 W. R. 760.

Leave at the hearing to amend a bill by the introduction of matter which will make a new case, although not formerly granted, may now, under Judicature Act, Ord. XXVII. r. 1, be given in a suit brought to a hearing upon motion for decree under the old practice. *Budding* v. *Murdoch*, 45 L. J., Ch. 213; 1 Ch. D. 42; 24 W. R. 23.

Amendments as a rule at the trial are not allowed to raise a charge of fraud at a time when the case has been launched independently of fraud. *Hendriks* v. *Montagu*, 50 L. J., Ch. 257; 17 Ch. D. 642; 44 L. T. 89; 30 W. R. 168.

A declaration for giving a false character of P., a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he had dismissed P. was the decrease in his business, and recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty. It appeared that P. had been guilty of dishonesty while in the defendant's employ, but that the defendant had not mentioned that fact to the plaintiff when he recommended him to try P. It also appeared, however, that P. had not been dismissed on account of his dishonesty, but really for the reason which the defendant had assigned to the plaintiff:—Held, that this evidence did not support the declaration, and the judge refused to allow an amendment by inserting an allegation that P., whilst in the defendant's employ, was guilty of dishonesty, instead of the allegation that "P. had been dismissed from the employment of the defendant on account of dishonesty," and that the amendment was properly refused, the matter in controversy between the parties being, not whether the defendant had fraudulently suppressed the fact that P. had been guilty of dishonesty, but whether he had given the true reason for having dismissed him. *Wilkin* v. *Reed*, 15 C. B. 192; 2 C. L. R. 796; 23 L. J., C. P. 193; 18 Jur. 1081; 2 W. R. 556.

In a foreclosure action a defence and counterclaim were put in claiming payment of what should be found due to the defendant on taking the accounts, but not expressly claiming to open the accounts or specifying improper charges. An application to amend at the hearing was refused. The court, however, permitted the parties to give evidence as to the accounts, on the ground that it might be the duty of the court under Ord. XXVIII. r. 1, to make all such amendments as should be necessary for determining the real question between the parties, and having heard the evidence without ordering amendment, the court treated the pleadings as amended, and decided on the evidence. *Ward* v. *Sharp*, 53 L. J., Ch. 313; 50 L. T. 557; 32 W. R. 584.

A plaintiff in his statement of claim asked for rescission of his contract to take shares in the defendant company on the ground of misrepresentations in the prospectus. A winding-up order was subsequently made. The plaintiff after this amended his statement of claim:—Held, that a shareholder may save his rights and claim relief on the grounds originally put forward before the commencement of the winding-up; that each allegation of fraud is like a separate count in an indictment; that an amendment introducing new matter failed; but that amendments which merely enlarged and made more precise the original allegations must stand. *Cocksedge* v. *Metropolitan Coal Consumers Association*, 64 L. T. 826; 39 W. R. 637. Affirmed 65 L. T. 432—C. A.

An allottee of shares brought an action for fraudulent misrepresentation against directors of his company, and by the indorsement on the writ he claimed indemnity and rescission of his contract to take shares. The company was ordered to be wound up. The plaintiff by his claim asked for indemnity, but not rescission. An application to determine whether the plaintiff was to be a contributory stood over pending this trial:—Held, that the plaintiff could not obtain rescission on the pleadings and leave to amend was refused. *Cargill* v. *Bower*, 47 L. J., Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.

In an action for an excessive distress not averring that the sum distrained for was not due, with a count for selling before the expiration of five days, the plaintiff at the trial applied to amend, by adding a count for distraining and selling goods to satisfy more rent than was due. The judge refused to allow the amendment, on the ground that it was not a matter in dispute at the commencement of the action:—Held, properly disallowed. *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L. J., Ex. 246.

Action changed to Information.]—An action may, by amendment of the writ and statement of claim, be turned into an information and action without prejudice to a pending motion in the action, the necessary sanction of the attorney-general being obtained. *Caldwell* v. *Pagham Harbour Reclamation Co.*, 45 L. J., Ch. 796; 2 Ch. D. 221; 24 W. R. 690.

No Denial or General Traverse.]—The defendant delivered a defence containing only a general denial:—Held, that this amounted to an admission of the allegations in the statement of claim, but leave to amend was given. *Green* v. *Sevin*, 13 Ch. D. 589; 41 L. T. 724.

In an action for damages for an alleged infringement of copyright in a song, the defendant, by his defence, alleged that the song had not been registered at Stationers' Hall until the 9th of December, 1876, and added, "the defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register":—Held, that under this pleading the defendant was only

entitled to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated, and that leave to amend the statement of defence so as to raise the latter point ought not to be given, even though by the plaintiff's own evidence at the trial it for the first time appeared that the name of the publisher had been untruly entered in the register. *Collette* v. *Goode*, 47 L. J., Ch. 370; 7 Ch. D. 842; 38 L. T. 504. See also *Crowe* v. *Barnicot*, 46 L. J., Ch. 855; 6 Ch. D. 753; 37 L. T. 68; 25 W. R. 789.

The plaintiff claimed to be tenant in possession of a part of the foreshore of the sea at Margate, and he sought to restrain the defendant from removing shingle from the foreshore, and from placing bathing machines upon it. The defendant claimed by forty years' enjoyment an easement entitling him to do the acts complained of, and by his defence denied that the plaintiff was or ever had been in possession of the foreshore in question, "save subject to the rights of the defendant." At the trial Fry, J., refused the defendant leave to amend his defence by striking out the qualifying words, making the denial of the plaintiff's possession an absolute one, and claiming the ownership of the foreshore:—Held, that the defendant should have been allowed to amend. *Laird* v. *Briggs*, 19 Ch. D. 22; 45 L. T. 238—C. A. Reversing 50 L. J., Ch. 260; 29 W. R. 197.

An allegation in the statement of claim was not denied in the defence, though evidence was adduced contradicting it. On the defendant, at a late stage of the case, asking leave to amend:—Held, that on the balance of convenience, leave to amend must be refused. *Lowther* v. *Heaver*, 59 L. T. 631; 37 W. R. 55. Affirmed infra in C. A.

The plaintiff claimed, as assignee of four plots of land comprised in a building agreement, that the defendant might be ordered to execute to him separate leases of the plots. It was a necessary part of the plaintiff's case to shew that the houses on the plots of land had been roofed in at the time when he acquired the title, and the statement of claim contained an allegation that the plaintiff's predecessor in title had roofed in the houses by March, 1887. The defendant did not deny this or traverse the allegation by his defence, but alleged, as grounds for resisting the plaintiff's claim, that there had been breaches of the conditions in the building agreement under which the plaintiff's predecessor in title held with regard to building and payment of rent. At the trial of the action it came out in the evidence that small portions of the roofs of the four houses were not thoroughly completed. The defendant applied for liberty to amend, traversing the allegation in the statement of claim:—Held, that the defendant had not traversed the allegation that the roofs were completed, but had relied on other grounds for refusing to grant the leases, and that he must be taken to have decided not to rely on the roofs not being completed, and that it was too late for him at the trial to ask for leave to amend. *Lowther* v. *Heaver*, 58 L. J., Ch. 482; 41 Ch. D. 248; 60 L. T. 310; 37 W. R. 465—C. A.

Where a party who is entitled to a limited right exercises it in excess, so as to cause a nuisance or create a right of action entire in its nature (as where a window or a drain is enlarged or applied to other purposes than originally authorised), as the entire nuisance may be abated, an action for an obstruction of the original right of easement cannot be maintained, until its exercise has been reduced within its original limits; and if an action is brought for the obstruction, in which the right is declared upon according to its enlarged exercise, and the declaration is not supported by the proof, on a traverse of the right as laid, an amendment will not be allowed, as the effect would be to evade, and not to determine the question really in controversy between the parties. *Cawkwell* v. *Russell*, 26 L. J., Ex. 34.

Damages — Claim Increased.]—Where the damages were laid at 10*l*., though the sum sought to be recovered was 150*l*., and the jury returned a verdict for 150*l*., the court made a rule absolute for amending the declaration by increasing the damages. *Tebbs* v. *Barron*, 5 Scott (N.R.) 837; 4 Man. & G. 844; 12 L. J., C. P. 33.

To an action on a bill of exchange the defendant pleaded that he did not accept, and proved that the bill was accepted by his partner in the name of the firm, and included a private debt due from the partner, as well as a debt due from the firm. The defendant had given the partner no authority to accept in the name of the firm for his private debt. Quære, whether the plea was proved. In such a case the court amended the declaration by adding a count for the consideration, and directed a verdict to be entered for the sum really due from the firm upon terms. *Eleston* v. *Deacon*, L. R. 2 C. P. 20.

The claim in a declaration may be amended by increasing its amount under the Common Law Procedure Act, 1852, s. 222, by the judge at the trial of the action. *Knowlman* v. *Bluett*, 43 L. J., Ex. 29; L. R. 9 Ex. 1; 29 L. T. 462; 22 W. R. 77.

Effect of Delay.]—Amendment allowed after the time limited for bringing another action, there having been no unnecessary delay in his proceedings. *Cross* v. *Kaye*, 6 Term Rep. 543.

But the court will not permit any amendments to be made where the plaintiff has been guilty of delay in carrying on the suit. *Ranking* v. *Marsh*, 8 Term Rep. 30. S. P., *Steel* v. *Sowerby*, 6 Term Rep. 161.

And it was held an unreasonable delay where the action had been depending for four years. *Goff* v. *Popplewell*, 2 Term Rep. 707.

An application to the court to amend pleas does not fall within the rule respecting the setting aside proceedings for irregularity, with regard to the promptness of the application. *Welsh* or *Welch* v. *Hall*, 9 M. & W. 14; 1 D. (N.S.) 365; 11 L. J., Ex. 57.

The court refused to allow a replication to be amended after the lapse of a year after judgment pronounced on demurrer, the case having previously stood over that the parties might mutually agree to amend, and both having declined to do so. *Hammond* v. *Colls*, 3 C. B. 212.

The court will not give leave to a plaintiff to amend his bill if he has not taken any step in the prosecution of the suit for an undue length of time (in this case, two years after answers put in), and is not able to explain his delay. *Altree* v. *Horden*, 3 Jur. 816.

—— **Matter struck out—Time for Appealing expired.**]—In action under s. 32 of the Patents Acts of 1883 to restrain a patentee from issuing threats, the plaintiffs, in their statement of

claim, alleged that the defendant's patent was invalid, and the court ordered this to be struck out. After the time for appealing had long expired, the plaintiffs applied to the judge to whom the action had been transferred for leave to amend by inserting the same allegation. The application was refused:—Held, by Cotton and Bowen, L.JJ., that liberty to amend ought to be given, but upon special terms, in order that the defendants might not suffer any loss by the plaintiffs not having taken the proper course of appealing in due time from the first order. Fry, L.J., dissented, and was of opinion that, though the amendment was in itself proper, it was not competent to the court to allow it, when doing so was inconsistent with and substantially reversed the first order of the court, which was not liable to be appealed from. *Kurtz* v. *Spence*, 36 Ch. D. 770; 58 L. T. 320; 36 W. R. 438—C. A.

—— **Demurrable Petition—Evidence gone into.**]—Where, after a petition to wind up a company had been opened, and the evidence gone into, counsel for the respondent raised the point that the petition was demurrable, the court gave leave to amend the petition on the ground that it is the duty of the respondent to be prompt with a demurrer, and that he should have insisted upon the court giving a decision upon the demurrer before the evidence was gone into. *White Star Consolidated Gold Mining Co., In re*, 48 L. T. 815.

Where former Order Neglected.]—Where a plaintiff had obtained an order for leave to amend his declaration on payment of costs, but had not made the amendment, the judge who tried the cause refused to allow the declaration to be amended at the trial. *Geickie* v. *Monck*, 1 Car. & K. 555.

Estoppel by Record.]—An action was brought against two defendants claiming damages for the wrongful removal of certain furniture and delivery of such of the furniture as had not been sold. The plaintiff had previously recovered judgment in another action against three other persons in respect of the same matters. At the trial, after the plaintiff's evidence and that of one defendant had been heard, the defendants asked leave to amend their defence by adding a plea of merger of the cause of action in the previous judgment. There was some evidence of acts by the defendants subsequently to the judgment which might give the plaintiffs a fresh cause of action:—Held, that the defence of the judgment in the previous action could not be raised unless pleaded, and that the amendment asked for should not be allowed, as it was not possible to put the plaintiffs in the same position as if the defendants had pleaded it at first. *Edevain* v. *Cohen*, 43 Ch. D. 187; 62 L. T. 17; 38 W. R. 177—C. A.

Bills of Sale Act.]—Where in an action on an agreement for sale reserving the vendor's lien a defence of the Bills of Sale Act is intended to be relied on, it should be pleaded; but leave to amend was given at the trial, so as to raise the question. *Coburn* v. *Collins*, 56 L. T. 431; 35 W. R 610.

Omission to Plead Statute of Limitations.]—In an action for goods bargained and sold, where the defendant pleaded a set-off, the particulars of which had not been delivered till after joinder of issue, the judge considered he had no power to allow the plaintiff at the trial to reply the statute of limitations to the plea of set-off. *Brancker* v. *Crozier*, 16 L. T. 391.

—— **Statute of Frauds.**]—In an action to have it declared that the defendant was the plaintiff's agent and trustee of a certain house, the defendant pleaded the 4th section of the statute of frauds. After the reply of the plaintiff's counsel, the defendant asked to amend his defence by pleading the 7th section, which had been mainly relied upon in argument:—Held, that leave to amend should be refused. *James* v. *Smith*, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396. Affirmed, on other grounds, 65 L. T. 544—C. A.

Pleading restored after Amendment.]—A judge allowed a declaration, in an action on a mortgage deed, to be amended by inserting a claim of interest, and after an objection to the stamp on the deed, the plaintiff abandoned the claim of interest, and the judge gave leave to alter the record again, by striking out the part inserted to which the defendant objected. On a motion to restore the record to its condition as first amended, the court refused to interfere with the discretion of the judge. *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 96; 23 L. J., C. P. 64; 2 W. R. 193.

Case adjourned after Amendment.]—Observation as to the danger of allowing a party to amend his case upon a reference back to chambers, after it has been brought before the court, and the exact point in which evidence is thought to be defective is known. *Basham* v. *Smith*, 22 Beav. 190.

Where a substantial point is taken at the bar upon the evidence, but is not sufficiently raised by the pleadings, the court may either give leave to amend or dismiss the bill without prejudice; but the practice of allowing a cause to stand over for amendment should be very sparingly resorted to, and only upon special grounds. *Gossip* v. *Wright*, 2 N. R. 152; 32 L. J., Ch. 648; 9 Jur. (N.S.) 592; 8 L. T. 627; 11 W. R. 602.

After Joinder of Issue.]—An action was brought by a municipal corporation to restrain the local board from interfering with water mains and pipes laid down by the corporation in the district of the local board. Issue was joined and admissions made to raise the point of law whether the corporation had any legal right to break up the streets vested in the local board, which was decided against the plaintiffs. The plaintiffs then moved to be allowed to amend their reply by pleading acquiescence and estoppel by conduct on the part of the defendants:—Held, that the court would allow the amendment, but only on the terms of the plaintiffs paying the costs which might turn out to have been thrown away by reason of the amendment, and of the costs of the motion being costs in the action, but to be the defendants' in any event. *Preston Corporation* v. *Fullwood Local Board*, 34 W. R. 200.

In an action for specific performance of an agreement to grant a lease and build a house, issue had been joined, the pleadings shewed no real dispute between the parties, and the action had been set down for trial. The plaintiff had taken possession under the agreement:—Held, that leave ought not to be given to the defendant to amend his counter-claim by adding thereto a

claim for recovery of the land agreed to be let. *Clark* v. *Wray*, 55 L. J., Ch. 119 ; 31 Ch. D. 68 ; 53 L. T. 485 ; 34 W. R. 69.

After replication filed and evidence closed, the court will not give leave to withdraw replication, and amend the bill. *Godbold* v. *Ellis*, 23 W. R. 333.

The court, after notice of trial given and countermanded, allowed the defendant, the trial not being delayed thereby, to add upon terms a plea. *Field* v. *Sawyer*, 5 C. B. 845 ; 5 D. & L. 777 ; 17 L. J., C. P. 211.

Leave to amend pleadings ought to be granted even at the last moment, where it is necessary to enable the court to finally dispose of the questions between the parties, if the party making the application is acting bonâ fide, and his opponent can be fully indemnified against any injury occasioned to him ; but such leave is an indulgence, and ought only to be granted on terms. *Tildesley* v. *Harper* (10 Ch. D. 393) followed. *Trufort, In re, Trafford* v. *Blanc*, 53 L. T. 498 ; 34 W. R. 56.

In a suit to set aside a settlement on the ground of fraud and surprise on the plaintiff, evidence was filed in reply tending to shew that he, at the time of executing the settlement, was of infirm mind. Upon the hearing of a motion for leave to use this evidence (which had been objected to as not being properly evidence in reply), the plaintiff asked for leave to amend the bill, and go into fresh evidence. The cause was at issue before the 1st of November, 1875 ; and the hearing had been fixed, and only accidentally postponed. Leave was given to the plaintiff to amend the bill, and go into further evidence. *Rwe* v. *Davies*, 2 Ch. D. 729 ; 24 W. R. 606.

An application for liberty to file a supplemental answer, for the purpose of pleading the Statute of Limitations, made after the cause was at issue and witnesses were in the course of examination, refused, with costs. *Percival* v. *Caney*, 14 Jur. 473.

At Trial—Objection must be Raised.]—An objection to the form of action should be expressly taken at nisi prius, in order that the judge may make such amendment as may be necessary for the purpose of determining the real question in controversy. *Marks* v. *Feldham*, 10 B. & S. 371.

—— **Time of Application.**]—The proper time to apply for an amendment of pleadings is at the conclusion of the applicant's case ; but a judge, sitting without a jury, may in his discretion allow an amendment after he has begun delivering his decision. *Rainy* v. *Bravo*, L. R. 4 P. C. 287 ; 27 L. T. 249 ; 20 W. R. 873.

The plaintiff claimed specific performance of a contract for the purchase of a business by the defendant, or, in the alternative, damages. The statement of claim contained an allegation, which was denied by the defendant, that the plaintiff "is and always has been ready and willing to perform the contract so far as it is to be performed by him." The plaintiff, after action brought, sold the property, the subject-matter of the contract, but neither before nor at the hearing of the action did he ask to amend by striking out the claim for specific performance :—Held, that the action being for specific performance, and the plaintiff by his own act having made performance impossible, he was not ready and willing to perform the same at the time of the hearing of the action, and that as he had not applied to amend the claim at the proper time, namely, either before the hearing or before the case was opened at the hearing, leave to amend would not be granted. *Hipgrave* v. *Case*, 54 L. J., Ch. 399 ; 28 Ch. D. 356 ; 52 L. T. 242—C. A.

A plaintiff who has failed upon the main issue raised by his bill, and insisted upon by him at the hearing, will not be allowed after the hearing to amend his bill for the purpose of putting in issue, and obtaining collateral relief upon, a point disclosed by the defendant in his answer, but of which the plaintiff has hitherto neglected to avail himself by amendment. *Knox* v. *Gye*, 9 Jur. (N.S.) 1227 ; 9 L. T. 573 ; 12 W. R. 145. Affirmed, 10 Jur. (N.S.) 861 ; 11 L. T. 201 ; 12 W. R. 1125—L.JJ.

A plaintiff brought an action for injury to his land. The defendant pleaded a right of way under the Prescription Act, and at common law. At the trial, after the counsel for the defendant had summed up his evidence, the judge allowed an amendment by adding a plea of a limited right of way over the land at such times of the year when certain fields of the defendant were under cultivation. A verdict was entered for the plaintiff by consent on all the other issues, and the jury found the issue raised by the added plea for the defendant :—Held, that the amendment was properly allowed and that the added plea was valid. *Jones* v. *Bulkeley*, 24 L. T. 104.

After Verdict.]—Leave to amend after verdict by pleading a consideration for an agreement and alleging it as a substantive cause of action, refused. *Noad* v. *Murrow*, 40 L. T. 100.

The court allowed a defendant to amend a plea of not guilty by statute by inserting in the margin statutes necessary to justify the trespass complained of, after verdict for the defendant and a rule nisi to set it aside. *Edwards* v. *Hodges*, 15 C. B. 477 ; 3 C. L. R. 472 ; 24 L. J., M. C. 81 ; 1 Jur. (N.S.) 91 ; 3 W. R. 112.

After Judgment.]—The court refused to allow a plea to be amended after judgment pronounced thereon. *Smith* v. *L. B. & S. C. Ry.*, 7 C. B. 793.

Where a writ had been issued, and a declaration delivered, in which a blank was left for the christian name of the defendant, to which he pleaded, and afterwards gave a written consent, signed with his name in full, to an order for payment of the debt, on which judgment was signed ; the court, a year and a half after the judgment was signed, amended the declaration and judgment, by inserting the christian name of the defendant, in order to enable the plaintiff to proceed to outlawry. *Wood* v. *Hume*, 1 B. C. Rep. 189 ; 4 D. & L. 136 ; 15 L. J., Q. B. 319 ; 10 Jur. 1008.

In 1875 an injunction was granted restraining the defendants, the corporation of Birmingham, from polluting by sewage the river Tame ; but its operation was suspended for five years, so as to give the defendants time to carry out works for the prevention of the nuisance complained of. After the passing of the Public Health Act, 1875, a new local government district for Birmingham was created, upon whom devolved all the duties and liabilities of the old local authority. On a summons by the plaintiffs at the expiration of the five years, for leave to amend the information and bill by adding the new district as defendants : —Held, that no amendment in the pleadings could be made after final judgment, and that the new district could only be brought before the

court by action. *Att.-Gen.* v. *Birmingham Corporation*, 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127.

Where an amendment of a statement of claim will raise a question not raised on the original pleadings, will involve an estate in further intricacies, and can be more conveniently raised in a separate and independent action, the court will refuse leave to amend. *Blight, In re, Blight* v. *Hartnoll*, 45 L. T. 531.

Where, after an order had been made in an action for the partition and sale of certain property, in which it was referred to as "firstly, &c., described in the said statement of claim," it was discovered that the property was there misdescribed, leave was given to amend the statement of claim, and the order was ordered to be postdated as of a day after the amendment had been made. *Winkley* v. *Winkley*, 44 L. T. 572; 29 W. R. 628.

b. *Practice.*

Nature of proposed Amendment.]—The court will give leave to a plaintiff to amend his statement of claim after reply and joinder of issue under Ord. XXVII. r. 1, without requiring to be satisfied as to the materiality of the proposed amendment, the plaintiff paying the costs of the application. *Chesterfield Co.* v. *Black*, 25 W. R. 409.

The court will allow a party to amend his pleadings under Ord. XXVII. r. 1, without requiring an affidavit shewing the nature and necessity of the proposed amendments. *Cargill* v. *Bower*, 46 L. J., Ch. 175; 4 Ch. D. 78; 35 L. T. 621; 25 W. R. 221.

An affidavit in support of a special application for leave to amend an information and bill, the amendments of which had been approved by the attorney-general, was made by the solicitor alone, the plaintiff not joining: —Held, that the rule that the plaintiff must join in the case of a bill does not apply to an information and bill; and that the affidavit was sufficient. *Att.-Gen.* v. *Castleford Local Board*, 40 L. J., Ch. 636; L. R. 6 Ch. 853; 25 L. T. 371; 19 W. R. 1074.

In giving or refusing leave to amend a bill the court will not act upon the opinion of counsel, but will form its own judgment as to the materiality of the proposed amendment. *Hemming* v. *Maddick*, L. R. 9 Eq. 175.

Leave to amend a plea will not be granted unless the court is told precisely what the amendment is to be, and how the slip happened. *Jackson* v. *Rowe*, 4 Russ. 514; 9 L. J. (O.S.) Ch. 32; 28 R. R. 168. S. P., *Newman* v. *Wallis*, 2 Bro. C. C. 147; *Wood* v. *Strickland*, 2 Ves. & B. 150.

Upon an application to file a supplemental answer, the defendant should state, on his notice of motion, the facts intended to be introduced therein. *Smith* v. *Hartley*, 5 Beav. 432.

A notice of motion for liberty to file a supplemental answer ought to specify the new facts to be introduced. *Haslar* v. *Hollis*, 2 Beav. 236; 3 Jur. 996.

Facts in Defence.]—It is not necessary to amend a bill for the purpose of introducing facts disclosed in the answer on which the plaintiff means to rely as parts of his cases, entitling him to the relief which he has prayed. *Attwood* v. ——, 1 Russ. 353.

Clerical Errors.] — Leave given to amend clerical errors in the christian names of the parties to a suit without reserving a copy of the bill so amended. *Fish* v. *Rivers*, 23 L. T. 486; 19 W. R. 93.

Death of Opposite Party.]—After the death of a defendant, and pending the appointment by the court of his representative, leave to amend the bill was refused. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 376; 20 L. T. 692.

Party in Contempt.]—A plaintiff in contempt is at liberty to proceed with the cause in the ordinary way. Therefore a special order for leave to amend was granted to a plaintiff in contempt as necessary for the next step. *Chatterton* v. *Thomas*, 36 L. J., Ch. 592.

Order — What Amendments allowed.] — An order to amend as plaintiffs may be advised does not authorise the names of co-plaintiffs to be struck out. *Sloggett* v. *Colins*, 13 Sim. 456; 7 Jur. 639.

An order, made at the hearing, that the cause should stand over, with leave to amend by adding proper parties and apt words to charge them, or shew that other parties are not necessary, or to file a supplemental bill, does not entitle the plaintiff to introduce, by amendment, any charge against the original defendants which is not necessary to explain the amendment. *Gibson* v. *Ingo*, 5 Hare, 156.

The plaintiff praying relief to which he is not entitled, viz., a sale under a trust, instead of a redemption or foreclosure as a mortgagee, cannot have the different relief under the general prayer; but the proper relief may be obtained by amendment, and for that purpose, another party being necessary, liberty was given to amend by adding parties, which includes the introduction in the statement of facts consequential upon that addition, and praying such relief as he may be advised. *Palk* v. *Clinton*, 12 Ves. 48; 8 R. R. 283.

Leave to amend by adding parties implies liberty to introduce as much new matter as is requisite to shew the interest of those parties. *Hawkins* v. *Miles*, 1 L. J. (O.S.) Ch. 76.

Under a common order to amend, a plaintiff may introduce new plaintiffs on the record. *Hitchens* v. *Congreve*, 5 L. J. (O.S.) Ch. 176.

A plaintiff who had obtained leave to amend his bill for the purpose of adding a new party, and availed himself of this permission to insert a fresh paragraph in the bill, constituting a new case against an original defendant; the court ordered the fresh paragraph to be expunged. *Barlow* v. *M'Murray*, 12 Jur. (N.S.) 519; 14 L. T. 511.

At the hearing of an injunction suit to restrain cutting seaweed on the sea-shore—the bill stating a title based on user and one established at law—the cause was directed to stand over, with liberty to amend by making the attorney-general a party. The bill was amended by making the attorney-general a party, but another amendment was also made, stating that the plaintiffs had established their right against the crown to wreck washed on the sea-shore under certain proceedings therein referred to. The court directed the latter averment to be struck out, as not warranted by the order. *Calbeck* v. *M'Ginty*, Ir. R. 6 Eq. 210. *See* ante, PARTIES, cols. 50 et seq.

Under an order to strike out the name of one defendant, and giving general liberty to amend, the plaintiff is not justified in striking out the name of another defendant. *Wymer* v. *Dodds*, 48 L. J., Ch. 568; 11 Ch. D. 436; 40 L. T. 420; 27 W. R. 675.

Plaintiff Amending Claim without Leave.]—When a plaintiff has amended his statement of claim after delivery of the defence, and no other pleading having been delivered, moves for judgment on the amended statement of claim, the defendant may either obtain leave to amend his defence, or put in a new defence, or he may proceed with his original defence, in which case the amendment in the amended statement of claim will be taken to be admitted, and the statement of defence will stand as an answer pro tanto. *Boddy* v. *Wall*, 47 L. J., Ch. 112; 7 Ch. D. 164; 26 W. R. 348.

When a plaintiff delivers an amended statement of claim, the defendant must either deliver a new defence or amend his original defence, and so on, toties quoties, until the pleadings are closed. *Durling* v. *Lawrence*, 46 L. J., Ch. 808. Disapproved of in preceding case.

—— **Disallowance of.**]—A plaintiff had amended his claim without leave before reply. The defendant contended that what had been done by the plaintiff amounted to a discontinuance of his original action and the commencement of a new one:—Held, that the proper course for the defendant to have adopted was to have moved, under Ord. XXVIII. r. 4, within eight days after the delivery of the amended pleading, for a disallowance of the amendment, or allowance thereof subject to terms as to costs or otherwise, provision for the costs of such amendments being made by r. 13 of the same order. *Bourne* v. *Coulter*, 53 L. J., Ch. 699; 50 L. T. 321.

Order—Form and Operation.]—It is contrary to the practice to insert in the judgment as drawn up any mention of the refusal of leave to amend. *Laird* v. *Briggs*, 16 Ch. D. 663; 44 L. T. 361—C. A.

An order for leave to amend operates from the time of service only, and therefore an intermediate step taken by the defendant after the orders made and before it is served, is regular. *Price* v. *Webb*, 2 Hare, 515; 13 L. J., Ch. 50.

Form of Amended Pleading.]—The requirements of Ord. XXVIII. r. 9, as to marking amended pleadings with the date of the amendment and of the order, do not under rule 10 apply to the copy of the amended document delivered to the opposite party. *Hanmer* v. *Clifton*, [1894] 1 Q. B. 238; 10 R. 55; 42 W. R. 287.

Where a plaintiff amends his bill, if he can interline the original ingrossment fair and legible, he may introduce, strike out or substitute upon the original record; but where the plaintiff cannot affect his amendment by interlineation, but is under the necessity of having a new ingrossment, such new ingrossment must contain the whole of the plaintiff's case, as he wishes to present it to the court; there can be but one entire record containing the whole case. *M'Comb* v. *Armstrong*, 2 Moll. 295.

Where more than two folios in one place are introduced by amendment into a bill, it must be reprinted. *Stone* v. *Davies*, 3 De G. M. & G. 240; 1 Eq. R. 190; 22 L. J., Ch. 672; 17 Jur. 585.

On what Terms Leave Granted.]—A bill as amended asked for an account on the footing of wilful default on instances which were disclosed by the answer, but which were not specifically alleged in the amended bill. The judge at the hearing allowed the bill to be amended, giving the defendant leave to answer further, and file fresh affidavits upon the question of default, the plaintiff not being allowed to bring further evidence, and on terms of the plaintiff's paying the costs of the day before amending. *King* v. *Corke*, 45 L. J., Ch. 190; 1 Ch. D. 57; 33 L. T. 375; 24 W. R. 23.

Discharging Order.]—A defendant added to the record by revivor cannot, after moving to dismiss for want of prosecution, move to discharge as irregular an order of course to amend, obtained before he was made a party to the suit. *Kettlewell* v. *Barstow*, 39 L. J., Ch. 846; L. R. 10 Eq. 210; 22 L. T. 541; 18 W. R. 885.

Where amendments are introduced into a bill irregularly, and the defendant does not come to the court to complain of the irregularity, but by his answer to the amended bill insists upon the objection, and reserves to himself the same benefit of it as if he had pleaded it in bar, the objection may be urged at the hearing, and will entitle the defendants to the costs. *Milligan* v. *Mitchell*, 1 Myl. & C. 433; 7 L. J., Ch. 37.

Amended Statement of Claim—Effect of.]—A defendant who has put in a defence to an original statement of claim, cannot, when the plaintiff afterwards delivers an amended statement of claim, which alleges no new matter against him, apply to strike out the amended statement of claim, on the ground that it discloses no reasonable cause of action. *Jenkins* v. *Rees*, 33 W. R. 929.

A defendant put in a defence, not demurring to any part of the statement of claim. The statement of claim was amended, not making a substantially new case. The defendant obtained leave to amend his defence, and put in a defence and demurrer to part of the statement of claim:—Held, that the rule of chancery practice, that a defendant cannot demur to what he has previously answered, is no longer in force; that leave to amend the defence authorised the putting in a demurrer to part of the statement of claim; and that the defendant's pleading was regular. *Powell* v. *Jewesbury*, 9 Ch. D. 34; 39 L. T. 213; 27 W. R. 142—C. A.

Where the original bill and the amended bill were substantially the same, as the plaintiff had admitted the sufficiency of the answers to the original bill, he was precluded from objecting to the sufficiency of the answers to the amended bill. *Wich* v. *Parker*, 22 Beav. 59; 2 Jur. (N.S.) 582; 4 W. R. 452.

The original and amended bills together constitute one record; and when the original bill was filed within the time allowed by the 2 & 3 Will. 4, c. 100, as to prescription in tithe suits, but the amended bill was not within the time:—Held, that the whole suit was within the time. *Thorpe* v. *Mattingley*, 2 Y. & Coll. 421; 8 L. J., Ex. Eq. 9. But see *Plowden* v. *Thorpe*, West, 42; 7 Cl. & F. 137.

Although the amended bill is the pleading exclusively, and so far as regards the rights of the parties, the charges of the original bill, omitted in the amended bill, are as if they never existed; yet that does not extend to debar the court of the assistance to be derived from the matter expunged, in determining quo animo the suit was instituted. *Fitzgerald* v. *O'Flaherty*, 1 Moll. 347.

Where the bill has been amended, the court, with a view to the question of costs, may look at the frame of the bill as it stood before amendment. *Parkhurst* v. *Lowten*, 5 L. J. (O.S.) Ch. 120.

Abandonment of Order.]—A plaintiff, after obtaining an order to amend his declaration, with leave to the defendant to plead de novo, may abandon that order, and proceed to trial without procuring it to be rescinded. *Black* v. *Sangster*, 1 C. M. & R. 521; 3 D. P. C. 206; 5 Tyr. 171; 4 L. J., Ex. 4.

A defendant obtained leave to amend a plea, and to add another, upon the terms of paying the costs of the amendment and of the application, but afterwards declined to avail himself of the rule. The court refused to make a rule ordering him to pay such costs. *Field* v. *Sawyer*, 6 C. B. 71.

If an order for leave to amend is abandoned after service, the opposite party has no right to costs incurred before the amendment, on the supposition that the order would be acted upon by the party obtaining it. *Brown* v. *Millington*, 22 L. J., Ex. 138; 17 Jur. 144.

Costs on.]—Where, from facts elicited in the examination of witnesses, and which had been in the exclusive cognisance of the defendants, it appeared that the true point at issue between the parties was not raised by the pleadings as they stood, the plaintiffs obtained leave to amend their statement of claim, but without adducing fresh evidence; the defendants being allowed both to amend their defence and to adduce fresh evidence. The plaintiffs having succeeded on the issue thus raised, and the court being of opinion that the defect in the original pleadings arose from the defendants' default in withholding information, the whole of the costs, including those caused by the amendment, were awarded to the plaintiffs. *Nobel's Explosives Co.* v. *Jones*, 49 L. J., Ch. 726; 42 L. T. 754; 28 W. R. 653.

An amendment to the pleadings made at the trial by the court mero motu in order to raise the real point at issue, is no ground for departing from the usual rule as to the costs of the action. *Nottage* v. *Jackson*, 11 Q. B. D. 627—C. A.

A defendant who has put in a joint defence will be allowed to put in a separate and amended defence, but will be ordered to pay the costs rendered necessary by not having put in such defence at an earlier period, subject, however, to such directions as the court may think fit to give where it sees that unnecessary or oppressive costs have been incurred by the plaintiff in opposing the application. *Cargill* v. *Bower*, 46 L. J., Ch. 175; 4 Ch. D. 78; 35 L. T. 621; 25 W. R. 221.

Where a plea to the bill is filed, and the plea is overruled, with liberty to amend, and the amended plea is put in and allowed, the defendant is not entitled to the costs of correcting his own mistake, but is entitled to the costs which he would have had if the plea, which was allowed, had been the plea which was first filed. *Clayton* v. *Meadows*, 2 Hare, 26.

A plaintiff declared for freight, omitting the words "money payable by the defendant to the plaintiff," in disregard of the form given by 15 & 16 Vict. c. 76, schedule (B). The defendant pleaded, and after verdict for the plaintiff the court refused to arrest the judgment for the omission of those words, holding the defect cured by pleading over. The plaintiff having signed judgment, the defendant brought error on that point. The plaintiff applied to a judge for leave to amend the declaration, so as to make it in accordance with the form in the schedule. The judge having referred the matter to the court:—Held, first, that the application to amend was rightly made, and not to the court of error. *Wilkinson* v. *Sharland*, 3 C. L. R. 619; 11 Ex. 33; 1 Jur. (N.S.) 405; 3 W. R. 418.

Held, secondly, that the court had power to make the amendment. *Ib.*

Held, thirdly, that the amendment ought to be allowed, on payment by the plaintiff of the costs of the motion in arrest of judgment, of the proceedings in error, of the summons at chambers and of the rule to amend. *Ib.*

—— **Suing In formâ pauperis.**]—A party suing in formâ pauperis is not allowed, as a matter of right, to amend without payment of costs. *Fowler* v. *Bank of England*, 6 Q. B. 878; 2 D. & L. 790; 14 L. J., Q. B. 178; 9 Jur. 107.

—— **Vexatious Application.**]—Where a defendant came to the court in a vexatious and expensive manner to apply for an amendment which might have been obtained at chambers, his rule was discharged with costs, unless he would consent to pay the costs of the amendment. *Brunswick (Duke)* v. *Sloman*, 5 C. B. 218.

—— **Payment of, a Condition Precedent.**]—If leave is given to amend proceedings in a cause, on payment of the costs, payment is a condition precedent. *Levy* v. *Drew*, 5 D. & L. 307; 2 B. C. Rep. 141; 12 Jur. 119.

—— **Time Extended.**]—A plaintiff, who desires an extension of time to amend his bill, but has omitted to get it, is liable to pay the costs of a motion to dismiss for want of prosecution, although the extension which he desires may be allowed him. *London and Colonial Co.* v. *Elworthy*, 18 W. R. 246.

Review by Court of Judge's Decision.]—The court will not review a judge's decision as to allowing or withholding an amendment; nor will the court grant a new trial, on the ground that the counsel's discretion, as to assenting to an amendment offered by the judge, is fettered by a strong expression of opinion on his part. *Lucas* v. *Beale*, 10 C. B. 739. S. P., *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64; 2 W. R. 193.

A plaintiff bought of the defendant the household furniture, fixtures, utensils in trade, &c., of a public-house, "as per inventory taken by W. W.," for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. In an action for this misrepresentation, the declaration alleged the agreement to be for the purchase of the goodwill, furniture, fixtures, &c.:—Held, that the declaration substantially stated the true nature of the agreement, and that, at all events, the court would, if

necessary, amend it. *Cater* v. *Wood*, 19 C. B. (N.S.) 286.

The court has power to amend the record where leave to move to enter a verdict is reserved, notwithstanding the judge at the trial expressly refuses to allow an amendment, or to reserve leave to amend. *Ib.*

Where an amendment is in the discretion of the judge at nisi prius, the court has no power to review his decision where he had refused to allow an amendment. *Holden* v. *Ballantyne*, 29 L. J., Q. B. 148; 6 Jur. (N.S.) 451; 2 L. T. 149; 8 W. R. 390.

Under s. 222 of the Common Law Procedure Act, 1852, if an amendment is improperly granted or refused by a judge at nisi prius, the court has no power to review his decision; but a substantive application may be made to the court for an amendment, by virtue of its general jurisdiction. *Brennan* v. *Howard*, 1 H. & N. 138; 25 L. J., Ex. 289; 2 Jur. (N.S.) 546; 4 W. R. 609.

Action on a contract to deliver at Cardiff a cargo in March. Breach, that the defendant would not accept or pay for the goods. Pleas, non assumpsit, and that the plaintiff was not ready or willing to deliver at Cardiff in March. At the trial it appeared that the defendant had by letter requested the plaintiff to postpone the shipment for the defendant's convenience; that the ship arrived in Cardiff on the evening of the 31st of March, and consequently, that the cargo was not ready for delivery until April. The judge, on the plaintiff's application, amended the declaration by making an averment that at the defendant's request the plaintiff delayed the shipment, and the defendant promised to accept a delivery of that shipment with reasonable speed, and exonerated the plaintiff from delivering in March. The defendant objected to the amendment, and requested a postponement of the trial, which the judge refused; thereupon the defendant refused to alter his pleas or appear further, and the jury, under the judge's direction, assessed the damages. On a motion for a new trial:—Held, that whether the discretion of a judge at nisi prius in making an amendment to raise the real point in controversy, and in imposing terms, be reviewable in law or not, it was in this case properly exercised; and that no injustice being suggested to have been sustained by the defendant in consequence of the refusal to postpone the trial, the discretion of the judge in that respect ought not to be reversed. *Tennyson* v. *O'Brien*, 5 El. & Bl. 497. S.P., *Savage* v. *Canning*, Ir. R. 1 C. L. 434; 16 W. R. 133.

Action on a cheque and on an account stated. Pleas, non fecit, and that the account was stated of the cheque only, and that it was given for money lost by gaming. At the trial, it appeared that the defendant entered a gaming-house, and there lost at billiards a sum of money for which he gave an I O U, and subsequently sent the plaintiff an unstamped cheque. The cheque was not received in evidence. The judge intimated generally that he would make what amendments were necessary; neither party asking for any amendment, the question was left to the jury whether the account was stated of money lost by gaming. The jury found for the defendant:—Held, that the court had without consent power to amend the plea, by making it apply to an account stated concerning the consideration of the cheque, so as to raise on the record the question really tried. *Parsons* v. *Alexander*, 5 El. & Bl. 263; 1 Jur. (N.S.) 660; 3 W. R. 510.

The judge at nisi prius having refused to allow a defendant to add a plea of fraud, the court refused to interfere. *Speeding* v. *Young*, 16 C. B. (N.S.) 824.

2. Compelling Amendment of, and Striking out Pleadings of Opposite Party.

a. *Practice.*

Under Judicature Acts.]—Charges and statements which would not have been improper under the former system, may nevertheless be struck out under the judicature acts. *Watson* v. *Rodwell*, 45 L. J., Ch. 744; 3 Ch. D. 380; 35 L. T. 86; 24 W. R. 1009.

Application, how made.]—Applications to strike out, under Ord. XXVII. r. 1, should be made by summons and not by motion. *Marriott* v. *Marriott*, 26 W. R. 416.

If made by motion, the costs given will not exceed those of a summons attended by counsel. *Ib.*

Upon motion by a defendant, the whole of a faulty reply was ordered to be struck out as embarrassing, although the notice of motion did not in terms ask to have the whole reply struck out, but only to have particular passages struck out, without specifying them otherwise than by reference to what was to be left in; and leave was given to the plaintiff to put in such other reply as he might be advised. *Williamson* v. *L. & N. W. Ry.*, 48 L. J., Ch. 559; 12 Ch. D. 787; 27 W. R. 724.

—— **When made.**]—After joinder of issue, a motion to set aside a defence will not be entertained. *Hackett* v. *Lalor*, 12 L. R., Ir. 44.

Reference for scandal may be at any time, not so as to mere impertinence. Scandal includes impertinence, but a matter may be impertinent without being scandalous. Nothing scandalous that is strictly relevant to the merits. *Fenhoulet* v. *Passavant*, 2 Ves. 24.

After the pleadings are closed and the action set down for trial, it is too late for the defendant to move to strike out the statement of claim as being frivolous or vexatious. *Cross* v. *Howe (Earl)*, 62 L. J., Ch. 342; 3 R. 218.

Where no defence has been filed, the court, though (semble) having jurisdiction, will not exercise the power under R. S. C. 1883, Ord. XXV. r. 4, of striking out a pleading in actions where difficult questions of law or fact are likely to arise. *Att.-Gen. of the Duchy of Lancaster* v. *L. & N. W. Ry.*, infra.

—— **Based on Pleadings alone.**]—Applications under Ord. XXV. r. 4, must be tried upon the allegations contained in the pleadings, and evidence in support of the applicant's case is not admissible. *Peru Republic* v. *Peruvian Guano Co.*, 56 L. J., Ch. 1081; 36 Ch. D. 489; 57 L. T. 337; 36 W. R. 217.

Such an application must be founded on the pleadings alone, and cannot be supplemented by extrinsic evidence—per A. L. Smith, L.J. *Att.-Gen. of the Duchy of Lancaster* v. *L. & N. W. Ry.*, 62 L. J., Ch. 271; [1892] 3 Ch. 274; 2 R. 84; 67 L. T. 810—C. A.

—— **"The Pleadings"—Particulars.**]—Semble, the words, "the pleadings," in Ord. XXV. r. 4, include particulars. *Davey* v. *Bentinck*, 62

L. J., Q. B. 114; [1893] 1 Q. B. 185; 4 R. 144; 67 L. T. 742; 41 W. R. 181—C. A.

—— **By whom made.**]—A stranger to a cause cannot, as of course, except to and refer a pleading alleged to be scandalous and impertinent as between the parties, but he may be authorised so to do upon making a special application to the court. *Williams* v. *Douglas*, 5 Beav. 82; 6 Jur. 379.

Reference for scandal and impertinence on the joint petition of plaintiff, and of his solicitor, the pleading being scandalous as to the latter. *Bishop* v. *Willis*, 5 Beav. 83, n.

The plaintiff was ordered to pay some costs to the defendant, and, on the other hand, the defendant was ordered to pay other costs to the plaintiff. The plaintiff being in contempt for non-payment of costs, moved that the costs might be set off:—Held, that it was competent for the plaintiff, though in contempt, to refer for scandal and impertinence an affidavit filed on the part of the defendant in opposition to the motion. *Cattell* v. *Simons*, 5 Beav. 396.

If an affidavit is filed containing scandalous statements, the court can act in the matter, not only on the application of the aggrieved party, but also on the application of any party to the action, or without any application at all. *Cracknell* v. *Janson*, 39 L. T. 32.

—— **Applicant having Pleaded improperly.**]—One cannot say that any reply to a bad defence is itself bad; there cannot be a bad answer to a bad question. The defence here being bad, we cannot decide on the reply, it simply becomes immaterial. *Clarke* v. *Bradlaugh*, 50 L. J., Q. B. 342; 44 L. T. 667; 29 W. R. 516—C. A.

In pleading, whoever makes the first fault, from whichever side the demurrer comes, shall have judgment against him. *Palmer* v. *Stone*, 2 Wils. 96.

Plea, demurrer and replication thereto, and demurrer to the replication, the plea being bad, the plaintiff is entitled to judgment on the whole record, the first fault being in the plea. *Lockwood* v. *Nash*, 18 C. B. 536.

Alternative Order—Payment into Court.]—A judge ought not to make an order dismissing an action as frivolous and vexatious, with the alternative that the plaintiff may proceed on payment of a sum of money into court by way of security for the defendant's costs if the latter should get a verdict. Per Wills, J. *Mittens* v. *Foreman*, 58 L. J., Q. B. 40.

Matter of Discretion.]—Although the court of appeal will not readily interfere with the discretion of the court of first instance in a matter of procedure, it is its duty to exercise its own discretion as to whether a pleading is so framed as to embarrass the opposite party. In a case, therefore, where a statement of claim was in the opinion of the court of appeal calculated to embarrass the defendant by reason of its stating immaterial facts, and setting out at great length documents which could not be material except as evidence by way of admission, it was ordered to be struck out, though a motion for that purpose had been dismissed with costs by the court below. *Davy* v. *Garrett*, 47 L. J., Ch. 218; 7 Ch. D. 473; 38 L. T. 77; 26 W. R. 225—C. A.

When pleadings are such as should be struck out, they ought to be struck out by the judge, and not left to be dealt with as a question of costs; but when the judge has exercised his discretion on the subject, the court of appeal will not interfere, unless he has acted on a wrong principle. *Watson* v. *Rodwell*, 45 L. J., Ch. 744; 3 Ch. D. 380; 35 L. T. 86; 24 W. R. 1009—C. A.

The striking out of pleadings as embarrassing, under Ord. XXVII. r. 1, is a matter of discretion in the judge, and, as a general rule, no appeal from this order will be entertained. *Golding* v. *Wharton Salt Works Co.*, 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423—C. A.

b. *On what Grounds.*

For Prolixity.]—Although there is no rule of court specially giving power to the court to take pleadings off the file for prolixity, yet the court has an inherent power to do so, to prevent its records from being made the instruments of oppression. *Hill* v. *Hart-Davis*, 26 Ch. D. 470; 51 L. T. 279—C. A.

Prolixity in setting forth important documents is not impertinence. *Low* v. *Williams*, 2 Sim. & S. 574; 4 L. J. (o.s.) Ch. 199.

Mere prolixity of expression does not constitute impertinence. *Anon.*, 2 L. J. (o.s.) Ch. 143.

Superfluous or prolix clauses or words in a sentence, are not to be deemed impertinent. *Anon.*, 2 L. J. (o.s.) Ch. 108.

A few unnecessary words in a bill do not render it impertinent. *Del Ponte* v. *De Tastet*, Turn. & R. 487; 2 L. J. (o.s.) Ch. 35.

Prolixity in an answer is impertinence, but it is a question of degree. Therefore, in a bill for an account of money transactions between the plaintiff and the defendant, it having been required that the defendant should set forth in a schedule a variety of minute particulars concerning certain securities which were alleged to have been deposited with him:—Held, that it was not an act of impertinence to annex to the answer a schedule with columns. *Gompertz* v. *Best*, 1 Y. & Coll. 114; 4 L. J., Ex. Eq. 17.

An answer to a bill for an account, setting out particulars in detail, although in some sense to be called pertinent, yet, if manifestly not called for by the nature of the case, may be held impertinent, as being vexatious and oppressive. *Norway* v. *Rowe*, 1 Mer. 347; 12 R. R. 157.

When Irrelevant.]—The whole of a statement of claim, parts of which are unintelligible, other parts of which are irrelevant, and other parts of which contain offensive charges against the defendant, may be struck out. *Cashin* v. *Cradock*, 3 Ch. D. 376; 35 L. T. 452; 25 W. R. 4—C. A.

Exceptions for impertinence cannot be sustained unless it appears clearly that the statements excepted to cannot be material at the hearing of the cause. *Richards* v. *Att.-Gen.*, 12 Cl. & F. 30. Affirming, 6 Beav. 444; 12 L. J., Ch. 393; 7 Jur. 362; 1 Ph. 383; 13 L. J., Ch. 38; 8 Jur. 230.

Though a plaintiff cannot compel a defendant to make a discovery of his returns for income tax, still a statement (as evidence of a misrepresentation of the value of his business) that he made such returns is not impertinent.

Mitchell v. *Koecker*, 12 Beav. 44 ; 18 L. J., Ch. 294.

Where, in a foreclosure suit, a defendant, for the alleged purpose of proving that the plaintiff was actuated by an angry feeling in filing his bill, introduced into his answer matter from a public document reflecting upon the character of the plaintiff, and to which document he asked permission to refer:—Held, that such matter was irrelevant to the question at issue, and must be expunged before the hearing. *Edmunds* v. *Brougham* (*Lord*), 12 Jur. (N.S.) 156 ; 13 L. T. 790.

Matter ought not, at the commencement of a suit, to be treated as impertinent, which may, at the hearing, be found relevant. *Reeves* v. *Baker*, 13 Beav. 436.

Where a bill alleged solvency, it was not irrelevant for the defendant to introduce a statement of fraudulent practices committed from time to time to conceal the fact of insolvency. *Balguy* v. *Broadhurst*, 20 L. J., Ch. 55.

Where the owners of land adjoining a public footpath brought an action against the local board to restrain the removal of posts erected by the plaintiffs to prevent vehicular traffic over the footpath, the court struck out as irrelevant allegations in the statement of claim that one of the members of the board, who was also an adjoining landowner, had taken an active part in the plaintiffs' negotiations with the board for the protection of the footpath, and had acted therein with a view to his own private interest, and that consequently the plaintiffs had not succeeded in inducing the board to take any steps for the protection of the footpath. *Murray* v. *Epsom Local Board*, 66 L. J., Ch. 107 ; [1897] 1 Ch. 35 ; 75 L. T. 579 ; 45 W. R. 185 ; 61 J. P. 71.

The judge may order the pleading to be reformed under 16 & 17 Vict. c. 80, s. 1, and if his order is not obeyed, the judge may himself expunge the offensive passage, for he is authorised "to strike out of the record any matter which he may deem irrelevant or unnecessary." *Hamilton* v. *Anderson*, 3 Macq. H. L. 363.

In a suit for specific performance of an agreement for a lease, the defendant may, by his answer, put in issue any fact tending to shew the insolvency of the plaintiff, however it may impeach the plaintiff's respectability ; but mere imputations on the moral character of the plaintiff are impertinent. *Pearson* v. *Knapp*, 1 Myl. & K. 312.

Statements in an answer are impertinent if they are neither called for by the bill, nor material to the defence with reference to the order or decree which may be made on the bill. Statements in an answer to a bill of revivor which merely show irregularity and misconduct in the former proceedings in the suit are impertinent. *Wagstaff* v. *Bryan*, 1 Russ. & M. 28 ; 8 L. J., Ch. (O.S.) 41.

What the plaintiff cannot reply to, and produce evidence to (from its not being relevant to the issue), is impertinent, and if it further attacks his character it is scandalous. *Corbett* v. *Tottenham*, 2 Moll. 319 ; 1 Ball & B. 59.

In an action by a stockholder in a railway company to restrain the company from subscribing out of their funds the sum of 1,000*l.* towards the Imperial Institute, on the ground that the proposed subscription was ultra vires and illegal, the company delivered a defence which contained paragraphs alleging a circular from the secretary of the Institute inviting railway companies to subscribe, and stating the amounts of the capital and average net annual income of the company, the objects of the Institute, an agreement with another railway company for through booking to the Institute, which it was said would lead to increased traffic over the defendants' line, and the practice of railway companies as to contributing to exhibitions, regattas, race meetings, and other objects calculated to encourage traffic over their lines. The plaintiff moved under Ord. XIX. r. 27, to strike out these paragraphs:—Held, that a reasonable latitude must be given to that rule, and parties must be allowed to plead reasons why a particular act said to be ultra vires was not ultra vires ; that it would be a wrong application of the rule to order such reasons to be struck out unless the matter sought to be struck out was utterly irrelevant ; and that it was not the meaning of the rule that any matter alleged in the defence as a reason should be struck out merely because it was a bad reason ; and that it could not be said that any part of the defence was so irrelevant that the rule ought to be applied. *Tomkinson* v. *S. E. Ry.*, 57 L. T. 358.

A person who has himself introduced into his evidence matter not relevant to the real issues between himself and his opponent, cannot be heard to complain if his opponent, in answer to the matter so introduced, inserts in his affidavit passages which would otherwise be liable to be expunged for impertinence. *Bruff* v. *Cobbold*, *Ayres*, *Ex parte*, 26 L. T. 786 ; 20 W. R. 734.

When Embarrassing.]—A pleading raising by way of defence an issue which the defendant is not entitled to raise, is embarrassing, and can be struck out under Ord. XXVII. r. 1. *Liardet* v. *Hammond Electric Light and Power Co.*, 31 W. R. 710—C. A. S. P., *Heugh* v. *Chamberlain*, 25 W. R. 742.

The power of the courts or judges to set aside pleadings as tending to embarrass, is limited to such as are at once embarrassing and irregular, informal or tricky, and contrary to the rules and practice of pleading, and does not extend to such as merely put the opposite party to difficult, expensive and needless proof. *Welland Ry.* v. *Blake*, 6 H. & N. 410 ; 30 L. J., Ex. 161 ; 7 Jur. (N.S.) 373 ; 3 L. T. 678 ; 9 W. R. 386. See *Lamb* v. *Beaumont*, 49 L. T. 772 ; *Brooking* v. *Maudslay*, 55 L. T. 343 ; 6 Asp. M. C. 13.

It was not a general rule of practice that where a plea traversed an allegation in the declaration, and the plaintiff demurred to the plea, he would be put to his election whether the demurrer should be set aside as frivolous, or the allegation struck out, though this would be done if the plaintiff's pleading appeared to be so framed as to entrap or unfairly perplex the defendant. So held before s. 52 of the Common Law Procedure Act, 1852. *Tallis* v. *Tallis*, 1 El. & Bl. 397, n. ; 21 L. J., Q. B. 269 ; 16 Jur. 744.

Pleadings will not necessarily be struck out as embarrassing because they are inconsistent. *Morgan*, *In re*, *Owen* v. *Morgan*, 56 L. J., Ch. 603 ; 35 Ch. D. 492 ; 56 L. T. 503 ; 35 W. R. 705—C. A.

In an action by the representatives of a wife against the executor of the husband in respect of sums of money and stock alleged to have been received by the husband as trustee for the separate use of the wife, the defence pleaded

(1) that the sums had not been received; (2) if received, not as trustee; (3) if received, repayment; (4) alternatively, free gift by the wife to the husband; (5) alternatively, accord and satisfaction; (6) alternatively, set-off; (7) the Statute of Limitations; (8) laches and delay. On a summons to have defences 3, 4, 5, and 6 struck out, it was held that the defence was embarrassing, and the defendant had leave to amend. Upon appeal, the court discharged the order, and directed the defendant either to amend or to give particulars within fourteen days after discovery of documents. *Ib.*

The plaintiff claimed that a partnership agreement might be set aside and cancelled on the ground of misrepresentation and fraud, and that a sum he had brought into the enterprise should be returned to him; or in the alternative that the partnership accounts might be taken, and the partnership dissolved. The defendant moved for an order compelling the plaintiff to amend his statement of claim by confining it to one of the two grounds of action in respect of which he sought relief:—Held, that the plaintiff was entitled to claim such alternative relief; and the motion was dismissed with costs. *Bagot* v. *Easton*, 47 L. J., Ch. 225; 7 Ch. D. 1; 37 L. T. 369; 26 W. R. 66—C. A.

The defendant in an action for libel, after admitting publication, pleaded that, except as afterwards admitted, the words used by him were fair comment on a matter of public interest, and, to the extent of the facts to be stated afterwards, were true in substance and in fact. He then proceeded to justify the various statements in the alleged libel, but admitted that he had used words of the plaintiff, being the words complained of, which were not wholly justified by the facts, and could not be considered in every respect fair comment, and he paid the sum of forty shillings into court, and said the same was sufficient to satisfy the plaintiff's claim:—Held, that, as the defendant had pleaded justification to the whole of the libel, and had paid money into court in respect of a portion, such a plea was both embarrassing and contrary to the provisions of Ord. XXII. r. 1, and ought to be struck out. *Fleming* v. *Dollar*, 58 L. J., Q. B. 548; 23 Q. B. D. 388; 61 L. T. 230; 37 W. R. 684.

The defendant in his defence to an action of slander denied having spoken the words alleged, and set out other words which he admitted having spoken, and which he alleged were true and were spoken on a privileged occasion:—Held, that this pleading was embarrassing, and ought to be struck out. *Rassam* v. *Budge*, 62 L. J., Q. B. 312; [1893] 1 Q. B. 571; 5 R. 336; 68 L. T. 717; 41 W. R. 377; 57 J. P. 361.

An allegation on the breach of a contract, that the defendant fraudulently omitted to deliver, true accounts, and delivered untrue accounts was ordered to be amended, as embarrassing, by omitting the word "fraudulently." *Great Ship Co.* v. *Russell*, 3 F. & F. 94.

To an action on a specialty, the defendant pleaded the 3 & 4 Will. 4, c. 42, s. 3, to which the plaintiff replied that the defendant, before suit, made an acknowledgment that the debt remained unpaid and due to the plaintiff within the true intent and meaning of the statute, and that the action was brought within twenty years after such acknowledgment:—Held, that the replication was a pleading, so framed as to prejudice the fair trial of the cause, and ought to be amended by specifying the mode of acknowledgment relied on. *Forsyth* v. *Bristowe*, 8 Ex. 347; 22 L. J., Ex. 70; 17 Jur. 46.

A plea, to an action on a contract, that the plaintiff was suing on his own behalf, whereas he made the contract as agent for a company, will not be struck out as embarrassing. *Golding* v. *Wharton Salt Works Co.*, 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423—C. A.

A claim in which the vendor of goods and the indorsees of a bill, given by the purchaser to the vendor for the price, jointly sue the purchaser to recover the price and also upon the dishonoured bill, is embarrassing, and may therefore be struck out. *Smith* v. *Richardson*, 48 L. J., C. P. 140; 4 C. P. D. 112; 40 L. T. 256; 27 W. R. 230.

In an action to restrain the obstruction of an alleged private right of way, the plaintiff ought to shew in his statement of claim whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the termini of the way and its course. If the plaintiff omits to do this, his statement of claim is embarrassing, and the court will order it to be amended. *Harris* v. *Jenkins*, 52 L. J., Ch. 437; 22 Ch. D. 481; 47 L. T. 570; 31 W. R. 137.

The statement of claim in an action for the recovery of land, after alleging facts which would shew a title in Frances Evelyn, contained a statement that "the said Frances Evelyn died intestate as to real estate, and leaving Sir Hugh Evelyn her heir at law," and then stated facts which shewed a title in the plaintiff to Sir Hugh Evelyn's estate:—Held, on a summons to strike out the paragraph above stated, that it was not embarrassing, and was a sufficient statement of the facts on which the plaintiff relied under Judicature Act, Ord. XIX. r. 4. *Evelyn* v. *Evelyn*, 42 L. T. 248; 28 W. R. 531.

In an action to enforce the compromise of a former action brought in assertion of rights of water, as to which disputes had arisen, the plaintiff will not be allowed, by setting out in his statement of claim the allegations as to his right and the corresponding liabilities of the defendant which were contained in his former statement of claim, to re-litigate the questions raised in the former action, and intended to have been finally disposed of by the compromise. Such allegations were accordingly ordered to be struck out under Ord. XIX. r. 27, as embarrassing and unnecessary, though a motion for that purpose had been refused by the court below. *Knowles* v. *Roberts*, 38 Ch. D. 263; 58 L. T. 259—C. A.

—— **Statement of Title.**] — See *Philipps* v. *Philipps*, and other cases, ante, col. 824.

—— **Effect of Delay.**] — By an agreement made in 1890, the plaintiff agreed to employ, and the defendant to work for and serve the plaintiff as tailor, hosier, or outfitter, and it was agreed "that the defendant should not for the space of three years act as tailor, hosier, or outfitter, or take service or act as agent in such business within a radius of twenty-five miles of the plaintiff's shop, under a penalty of 500*l.* as liquidated damages." On the 10th June, 1893, the defendant left the plaintiff's service, and committed a breach of the agreement. The plaintiff brought this action claiming an injunction and 500*l.* liquidated damages for breach of the agreement, and on motion obtained an interim injunction. The action was then set down for the point of law to be argued as to

whether the defendant was not, on payment of 500*l.* absolved from any obligation under the agreement. The plaintiff now asked for an injunction, but withdrew the claim for damages:—Held, that the defendant ought, when the motion came on, to have called on the plaintiff to elect whether he asked for an injunction or liquidated damages, as he could not have both, and the pleadings were therefore embarrassing to the defendant:—Held, that the defendant having gone on, was too late in taking the point, and there must be an injunction for three years after the 10th July, 1893. *Gent* v. *Harrison*, 69 L. T. 307.

No Reasonable Cause of Action or Answer.]—Demurrers are in form abolished, but Ord. XXV. takes notice of three forms, in which the object of demurrers may be obtained; first, by raising on the pleadings a question of law, so that the parties may have it decided quickly; secondly, by raising the question on a pleading whether it discloses any reasonable cause of action or answer, in which case the court may order the pleading to be struck out, not necessarily disposing of the whole action; and, thirdly, in case an action or defence is shown by the pleadings to be frivolous or vexatious, then the court or a judge can dismiss the whole action, or order it to be stayed, or judgment to be entered accordingly as may be just—Per Selborne, L. C. *Burstall* v. *Beyfus*, 53 L. J., Ch. 565; 26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418.

The court has an inherent jurisdiction not to allow an action to proceed which must fail. *Chatterton* v. *Secretary of State for India*, 64 L. J., Q. B. 676; [1895] 2 Q. B. 189; 14 R. 504; 72 L. T. 858; 59 J. P. 596—C. A.

Although proceedings under rr. 2 and 4 of Ord. XXV. take the place of demurrers in the sense that the court is enabled, when it sees no reasonable ground of action or defence, to put an end to the action or defence, the court is not bound to regard the case with the same strictness as under the old practice on demurrer, the court now having more regard to the reasonableness or unreasonableness of the claim or defence. *Dadswell* v. *Jacobs*, 56 L. J., Ch. 233; 34 Ch. D. 278; 55 L. T. 857; 35 W. R. 261—C. A.

A pleading will not be struck out under Ord. XXV. r. 4, on the ground that it discloses no reasonable cause of action, unless it is frivolous. Demurrers have not been abolished only in name, and the above rule is not to be construed so as to allow applications under it to take their place. *Batthyany, In re, Batthyany* v. *Walford*, 32 W. R. 379.

The power given by Ord. XXV. r. 4, of ordering any pleading "to be struck out on the ground that it discloses no reasonable cause of action," will be exercised where in the opinion of the court, there is no reasonable prospect that the case raised by the pleading will succeed at the hearing of the action; secus, where the pleading, though it might under the former practice have been open to demurrer, presents a substantial case. *Peru Republic* v. *Peruvian Guano Co.*, 56 L. J., Ch. 1081; 36 Ch. D. 489; 57 L. T. 337; 36 W. R. 217.

The plaintiff was charged by the defendants under 6 & 7 Vict. c. 96, s. 4, with having published a libel knowing the same to be false. At the preliminary stage of the proceedings the charge under s. 4 was withdrawn, but the prosecution for the minor offence under s. 5 of the same act was continued, and the plaintiff was committed for trial under the 5th section. An indictment was preferred against the plaintiff under the 4th section, and the jury found that the plaintiff issued the libel believing it to be true. This verdict was held to be one of guilty under the 5th section, and, after respite of judgment and argument, the plaintiff was sentenced to two months' imprisonment without hard labour. The plaintiff brought his action for malicious prosecution under the 4th section of the above act, and set forth the above facts in his statement of claim, in which he alleged that the finding of the jury was an acquittal under the 4th section, under which he had been indicted. The defendants applied to have the statement of claim struck out as not disclosing any reasonable cause of action:—Held, that the statement of claim ought not to be struck out as disclosing no reasonable ground of action, and that where a statement of claim discloses some ground of action, the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for its being struck out. *Boaler* v. *Holder*, 54 L. T. 298.

A plaintiff set out certain building agreements in his statement of claim, and alleged that by reason of the defendant having wrongfully entered into possession of the plaintiff's land and building materials, he had been unable to carry out his agreements and had thereby suffered loss. The plaintiff claimed specific performance of the agreements and damages. A motion under Ord. XXV. r. 4, to strike out the statement of claim upon the ground that it disclosed no reasonable cause of action was dismissed. *Boddington* v. *Rees*, 52 L. T. 209.

Where a statement of claim alleges that A.—as trustee and guardian of B.—took possession of lands, this constitutes (at most) a constructive trust and not an express trust, and such possession having been taken in 1771, the statement of claim was on motion ordered to be struck out as disclosing no reasonable cause of action, and the action was dismissed as frivolous and vexatious, and leave to appeal was refused. Lord Cairns' definition of an express trust in *Cunningham* v. *Foot* (3 App. Cas. 984) applied. Bowen, L.J.'s dictum in *Soar* v. *Ashwell* ([1893] 2 Q. B. 390) followed; *Life Association of Scotland* v. *Siddals* (3 De G. F. & J. 58) explained. *Price* v. *Phillips*, 13 R. 191.

When a statement of claim contains two causes of action, one of which the defendant admits to be reasonable, it cannot be struck out under Ord. XXV. r. 4, *Grosvenor* v. *White*, 61 L. T. 663; 38 W. R. 201.

An affidavit in interlocutory proceedings is privileged, and therefore where a plaintiff alleged that the defendant had libelled him in such an affidavit, the statement of claim was struck out under Ord. XXV. r. 4. *Gompas* v. *White*, 54 J. P. 22.

An action was brought on an order made by justices under 16 & 17 Vict. c. 97, s. 96, directing the guardians of a union to pay certain costs for the maintenance of a lunatic pauper in an asylum. The guardians defended the action. An application was then made to have the defence struck out:—Held, that though the order itself could not be appealed against, yet where such order formed the subject-matter of an action, a defendant was entitled to plead to such action, and if such plea affords no answer to the statement of claim the proper mode of

objection was by demurrer. *Finch* v. *York Union*, 35 L. T. 360.

—— **Waiver of Objection.**]—A defendant who has delivered a defence cannot, when the plaintiff afterwards delivers an amended statement of claim which alleges no new matter against him, apply to strike out the amended statement of claim on the ground that it discloses no reasonable cause of action. *Jenkins* v. *Rees*, 33 W. R. 929.

Abuse of Process—Delay.]—The court has, under its inherent jurisdiction, power to strike out any pleading, whether a statement of claim or a defence, which is an abuse of the process of the court. *Remmington* v. *Scoles*, 66 L. J., Ch. 526; [1897] 2 Ch. 1; 76 L. T. 667; 45 W. R. 580—C. A.

A defence contained no substantive allegations, but was confined to refusals to admit and denials of all the material allegations in the statement of claim, which allegations the defendant had substantially admitted in prior proceedings between the parties:—Held, that the defence was not a real defence, but was put in for the purpose of delay, and ought to be struck out. *Ib.*

Frivolous and Vexatious Actions.] — Ord. XXV. r. 4, enables the court to deal in an easy and summary manner with demurrable actions, and also affirms the inherent power of the court to protect itself from the abuse of its procedure by the bringing of frivolous and vexatious actions. *Metropolitian Bank* v. *Pooley*, 54 L. J., Q. B. 449; 10 App. Cas. 210; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.)

The probate division has, apart from Ord. XXV. r. 4, an inherent jurisdiction, in common with other courts, to stay proceedings which are frivolous and vexatious, and an abuse of the process of the court. *Willis* v. *Beauchamp* (*Earl*), 55 L. J., P. 17; 11 P. D. 59; 54 L. T. 185; 34 W. R. 357—C. A.

The principles on which the court ought to act in staying proceedings as frivolous and vexatious discussed and explained. *Kellaway* v. *Bury*, 66 L. T. 599—C. A.

Any action may be stayed as being vexatious when it is clear that no relief can be obtained at the trial. *Barrett* v. *Day*, 59 L. J., Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38 W. R. 362.

No application ought to be made to set aside a pleading as frivolous, unless it is either manifestly so on the face of it, or is pleaded in direct opposition to some decided case. *Papineau* v. *King*, 10 M. & W. 216; 2 D. (N.S.) 226; 12 L. J., Ex. 32; 6 Jur. 539.

The exercise by a court of its inherent jurisdiction to dismiss an action as an abuse of its process is not justified merely by great improbability in the case made by the pleadings. But all the circumstances may be considered. *Lawrance* v. *Norreys* (*Lord*), 59 L. J., Ch. 681; 15 App. Cas. 210; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708—H. L. (E.) See *Hamilton* v. *Anderson*, 6 W. R. 737—H. L.

Where, in a statement of claim, a charge of concealed fraud, within s. 26 of the Statute of Limitations (3 & 4 Will. 4, c. 27), was stated vaguely and generally, and previous litigation with reference to the same subject-matter led to the conclusion, which was confirmed by an affidavit filed on the plaintiff's behalf, that the allegations were an afterthought and wholly incapable of proof:—Held, that the action was properly dismissed as an abuse of the process of the court. *Ib.*

The plaintiff, by his statement of claim in an action for recovery of land brought in 1892, alleged that he was the heir-at-law of J., who died intestate in 1798, and that, on the death of J., his real estate was wrongfully taken possession of by the mother of G. C., in the name of G. C., as the heir-at-law—as the mother falsely alleged—of J.; that G. C. died an infant in 1805, whereupon G. C.'s mother continued to hold possession in the name of a supposititious child, R. C., on the false pretence that such child was a brother of G. C., and as such was heir-at-law of J.; that both R. C., and afterwards the defendant, who claimed as a volunteer under R. C., remained in possession knowing the above facts, and fraudulently concealed the same from the true heir of J.; that the plaintiff and his predecessors had been deprived of the estate by the said concealed fraud, which had not, and could not with reasonable diligence have been discovered until 1879; and that the plaintiff, at the time of such discovery, was an infant, and only attained, twenty-one in 1887. The defendant moved to have the action dismissed as frivolous or vexatious; and, in support of his application, adduced evidence to shew that the allegation that R. C. was a supposititious child had been publicly made in 1853:—Held, (a) that the allegations in the statement of claim as to the entry in 1798 on behalf of G. C. did not shew a case of concealed fraud within s. 26 of 3 & 4 Will. 4, c. 27, but only a wrongful entry under a false claim as heir-at-law; (b) that the statute began to run as against the plaintiff and his predecessors in 1798, and that, as possession adverse to the plaintiff and his predecessors had been held ever since, the operation of the statute was not suspended by what was alleged to have been done in 1805; (c) that the plaintiff or his predecessors knew, or might with reasonable diligence have known, the alleged concealed fraud more than twelve years before action brought; and, accordingly, that the action should be dismissed as frivolous or vexatious. *Lawrance* v. *Norreys* (15 App. Cas. 210) followed; *Trustees, Executors and Agency Co.* v. *Short* (13 App. Cas. 793) distinguished. *Willis* v. *Howe* (*Earl*), 62 L. J., Ch. 690; [1893] 2 Ch. 545; 2 R. 427; 69 L. T. 358; 41 W. R. 433—C. A.

No action can be brought by a bankrupt for maliciously procuring his adjudication so long as the adjudication itself has not been set aside. Such an action may be dismissed as frivolous and vexatious on summons under Ord. XXV. r. 4. *Metropolitan Bank* v. *Pooley*, supra.

An action for malicious prosecution ought not to be stayed as frivolous and vexatious on the ground that the defendant is the trustee under the plaintiff's bankruptcy, and has prosecuted him by order of the court under s. 16 of the Debtors Act, 1869. *Mittens* v. *Foreman*, 58 L. J., Q. B. 40.

There is an inherent jurisdiction in the high court to strike out a defence which is frivolous and vexatious, and an abuse of the procedure. *Reichel* v. *Magrath*, 59 L. J., Q. B. 159; 14 App. Cas. 665; 54 J. P. 196—H. L. (E.)

The appellant brought an action against his bishops and the patrons of a benefice, claiming a declaration that he was vicar of the benefice,

and that an instrument of resignation which he had executed was void, and an injunction to restrain the bishops from instituting, and the patrons from presenting any other person to the benefice. The action was tried, and judgment was given against the appellant on the ground that the vicarage was void by reason of his resignation thereof with the consent of the bishop. Afterwards the respondent, having been duly appointed to the benefice as the appellant's successor, brought an action against the appellant, claiming a declaration that the respondent was vicar, and a perpetual injunction to restrain the appellant from depriving the respondent of the use and occupation of the house and lands. In his defence the appellant set up the same case as that on which he had been defeated in the action in which he was plaintiff:—Held, that there was an inherent jurisdiction in the court to strike out the defence as frivolous and vexatious, and an abuse of the procedure, and to enter judgment for the plaintiff with a declaration and injunction as claimed. *Ib.*

In an action brought by the plaintiff against the defendant for libel in respect of the publication of a pamphlet purporting to be the judgment delivered in court in a certain action between the parties, the jury found that the pamphlet was a fair, honest and accurate report of the judgment, and was published without malice, and judgment was accordingly entered for the defendant. The plaintiff afterwards commenced a second action for libel in respect of the same pamphlet, but relying upon defamatory passages in the pamphlet other than those relied upon in the first action. The different defamatory statements, however, relied upon in both actions were all spoken of the plaintiff in the same character:—Held that the subject-matter of the second action was res judicata, and that an order striking out the statement of claim and dismissing the action was rightly made:—Held, also (assuming the matter was not res judicata, the defamatory passages relied upon in the two actions not being the same), that the second action was an abuse of the process of the court and ought to be dismissed. *Macdougall* v. *Knight*, 59 L. J., Q. B. 517; 25 Q. B. D. 1; 63 L. T. 43; 38 W. R. 553; 54 J. P. 788—C. A.

Since the judicature acts, it is the practice in foreclosure actions to make a personal order for payment of the sum found due for principal and interest. A second action brought to recover arrears of interest on the mortgage while the foreclosure action is still pending will be stayed as vexatious. *Poulett* v. *Hill*, 62 L. J., Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503—C. A.

A suit instituted by a plaintiff having only a nominal interest, on behalf of a body of shareholders, not for the benefit of himself, but for improper purposes, at the instigation of another person, who indemnifies the plaintiff against the costs of the suit, will be treated as an imposition on the court, and the bill will be ordered to be taken off the file. *Robson* v. *Dodds*, 38 L. J., Ch. 547; L. R. 8 Eq. 301; 20 L. T. 968; 17 W. R. 782.

A bill filed by a member of a building society on behalf of himself and the other members, against the directors of the society, to restrain certain proceedings alleged to be ultra vires, was ordered to be taken off the file upon evidence that the plaintiff was a person of small means, and had purchased one share in the society for the purpose of instituting the suit, and that the suit was really instituted by his solicitor, who was not a shareholder, for the purpose of annoying two of the directors. *Ib.*

A plaintiff having lost money by speculating in the shares of a company, purchased five shares, for the purpose of qualifying himself as a shareholder, and then filed a bill, on behalf of himself and the other shareholders, against the company and other persons, impeaching certain transactions between them on the ground of fraud. The bill also impeached certain preliminary proceedings which had been taken for the purpose of winding-up and re-constituting the company. After the bill was filed, the company was wound up and re-constituted. The defendants put in answers which were excepted to for insufficiency, and while the exceptions were pending, they moved to take the bill off the file, or to stay proceedings:—Held, first, that at that stage of the cause, the defendants not having sufficiently denied the charges of fraud, the mala fides of the plaintiff in filing the bill was no ground for taking the bill off the file. *Seaton* v. *Grant*, L. R. 2 Ch. 489; 16 L. T. 758; 15 W. R. 602.

Held, secondly, that the small interest of the plaintiff was no objection to the bill, as it was filed on behalf of himself and other shareholders. *Ib.*

Held, thirdly, that as the bill impeached the preliminary proceedings in the winding-up, the fact of the company having been wound up subsequently was no ground for staying the proceedings. *Ib.*

Where a statement of claim relies on a specified document as constituting the plaintiff's case, if the court refers to such document and sees that the claim is not maintainable, it may strike out the claim as frivolous or vexatious. *Whitworth* v. *Darbishire*, 5 R. 198; 68 L. T. 216; 41 W. R. 317.

Where some defendants deliver a defence traversing the allegations in the statement of claim, and other defendants, without delivering any defence, put in evidence in denial that is not distinct and conclusive, the court will not dismiss the action as frivolous and vexatious, or as an abuse of the process of the court. *Fletcher* v. *Bethom*, 3 R. 589; 68 L. T. 438; 41 W. R. 621.

Scandalous Matter—Relevancy.]—Scandalous matter, as allegations reflecting upon moral character and not relevant to the subject, to be expunged from the record, whether in a suit or bankruptcy, and without an application. *Simpson, Ex parte*, 15 Ves. 476; 10 R. R. 104.

Allegations, material to the issue, are not impertinent, and being relevant and pertinent, though they may be false, and of whatever nature, are not scandalous. *Ib.*

Matter in an answer relevant according to the case made by the bill, is not scandalous, whatever may be the nature of it. *St. John (Lord)* v. *St. John (Lady)*, 11 Ves. 526.

Improper to charge in a bill that a woman had a criminal conversation with particular persons, as it would affect the character of strangers and fill it with private scandal. *Clarke* v. *Periam*, 2 Atk. 339; 9 Mod. 340.

If facts stated in answer are relevant and material, they cannot be treated as scandalous; and, if they constitute a fraud, the answer is not scandalous, only because it draws the legal

conclusion which the premises furnish. *Montriou* v. *Carvick*, 6 Jur. 97.

A creditor filed a bill against the debtor's executor, stating first, that the defendant was a person of bad character, of drunken habits and violent behaviour, and then adducing instances in support of that statement, and praying that the assets might be administered under the direction of the court, and for an injunction and receiver:—Held, that the general statement and instances were relevant to the relief asked, and therefore were not scandalous. *Everet* v. *Prythergch*, 12 Sim. 365; 11 L. J., Ch. 54; 6 Jur. 3.

In a bill by the testator's son and heir-at-law, impeaching a will on the ground of undue influence exercised by a female defendant over the testator's mind, an allegation that she, at a time specified, was discovered to have engaged in a criminal connection with the testator, and that she openly cohabited with him as if she had been his wife, is not scandalous or impertinent. *Anon.*, 1 Myl. & C. 78. *S. C.*, sub nom. *Evans* v. *Owen*, 2 Myl. & K. 382; 5 L. J., Ch. 74.

Upon a cross-bill by a father and his daughters to be relieved from a mortgage which the mortgagee sought to foreclose, it is not irrelevant or scandalous to state that the money was lent to the father under professions of friendship, spontaneously, that the mortgagee might, in the position of creditor, continue his visits to the family, and maintain his influence and effect his object, that being the seduction of one of the daughters; and exceptions for scandal were overruled. *W.* v. *B.*, 31 L. J., Ch. 755; 8 Jur. (N.S.) 1141; 10 W. R. 617. See *Dickson* v. *Wilton*, 11 W. R. 365.

In a suit for the winding-up of a partnership long ago terminated, the ground for relief being the possession of the assets by the defendant, and his unwillingness to account, the bill contained statements of fraudulent misrepresentations alleged to have been made by the defendant for the purpose of inducing the plaintiff to join the business. Such statements were ordered to be expunged as scandalous. *Atwool* v. *Ferrier*, 14 L. T. 728; 14 W. R. 1014.

In an action by a wife against her husband for a rectification of the marriage settlement, an allegation in the statement of claim that the plaintiff had refused to live with the defendant because of his having committed a criminal assault upon a young girl, was ordered to be struck out as being scandalous and irrelevant, and the costs of the application to strike out were ordered to be paid by the wife's next friend in the action. *Coyle* v. *Cumming*, 40 L. T. 455; 27 W. R. 529.

A statement of claim alleged in effect that the plaintiff being desirous of borrowing money, agreed with H. to borrow it from him on personal security only, and to insure his life in the defendants' office as collateral security for the loan, and to pay a premium on such insurance to the defendants; and that the plaintiff for the purpose of so borrowing, as the defendants knew, did so insure and pay a premium. That H. throughout was an agent of the defendants, and that the transaction was a contrivance of the defendants to obtain the premium. That neither H. nor the defendants ever lent or intended to lend any money to the plaintiff, and, further, that this was the usual course of conduct of the defendants:—Held, that the paragraphs stating that it was the usual course of conduct of the defendants, were scandalous and irrelevant, and should be struck out, as amounting at the most to mere evidence, which by Ord. XIX. r. 4, is not to be pleaded; and, further, that the matter therein contained was not even evidence, and that evidence could not be given upon a trial, in chief, of such conduct being the usual course of conduct of the defendants. *Blake* v. *Albion Life Assurance Society*, 45 L. J., C. P. 663; 35 L. T. 269; 24 W. R. 677. But see *S. C.*, 48 L. J., C. P. 169; 4 C. P. D. 94; 40 L. T. 211; 27 W. R. 321; 14 Cox, C. C. 246.

A bill charged that a bill of exchange ought to be delivered up to be cancelled, on the ground of fraud, and that "A. B., one of the defendants, had knowledge that another of the defendants, C. D., had been mixed up with irregular transactions connected with bills of exchange":—Held, to be not scandalous, and that such defendant was bound to answer. *Finney* v. *Godfrey*, 21 L. T. 631.

A bill alleged that under a contract the plaintiff was entitled to shares in a company which had been placed under the control of the defendant, who was to dispose of them as he should from his experience in such matters think fit. It then alleged that the defendant was in fact in league with other persons, whom he called a syndicate, in order to deal with the shares and contrive operations on the stock exchange (popularly called rigging the market) for the purpose of bringing the shares up to a fictitious value in the market. The bill prayed a decree for specific performance of the contract, and that the defendant might be restrained by injunction until the plaintiff's claim should be satisfied, from parting with the shares in his possession:—Held, that the allegation of improperly dealing with the shares was scandalous matter, and not pertinent to the relief sought, and must be expunged from the bill. *Rubery* v. *Grant*, 42 L. J., Ch. 19; L. R. 13 Eq. 443; 26 L. T. 538.

Scandalous matter irrelevant to the real question at issue in a suit, but relevant to an irrelevant issue raised by a party to the suit, will not be expunged by the court at the instance of the person who raised the irrelevant issue. *Bruff* v. *Cobbold, Ayres, Ex parte*, 26 L. T. 786; 20 W. R. 734.

C. and C., who carried on an extensive and well-known business as auctioneers under the firm of Christie, Manson & Woods, filed a bill to restrain the issuing of the prospectus of a limited company, to be "formed for the purpose of acquiring and working the well-known and rapidly-increasing auction and general land, estate and house agency business of Messrs. Christie & Christie." The bill alleged that the business of the plaintiffs was the only well-known business of auctioneers connected with Christie, and that the description in the prospectus of the business therein mentioned was inapplicable to any business of the defendants the Christies, and was inserted to induce the public to believe that the business was that of the plaintiffs. The bill then alleged that C. J. Christie, one of the defendants, was adjudicated bankrupt in 1869 and paid no dividend, and had obtained his order of discharge in 1870; that in 1869 he was committed for trial at the Marylebone police court on a charge of fraud by means of false cheques; that a report in the "Times," which was set out in the bill, was a correct report of what took place at the committal; and that the money in respect of which the charge

was made was subsequently paid by a relation, and the prosecution abandoned. The defendants, the Christies, excepted for scandal to the allegations as to the criminal proceedings in 1869:—Held, that the allegations were scandalous and must be expunged, for that the defendant having committed, in 1869, a fraud wholly unconnected with the subject-matter of this suit would have been irrelevant, and that à fortiori, an allegation that he had been committed for trial on a charge of having been guilty of such fraud, without any allegation that he had been guilty of it, was irrelevant. *Christie* v. *Christie*, 42 L. J., Ch. 544; L. R. 8 Ch. 499; 28 L. T. 607; 21 W. R. 493.

A wife, living apart from her husband, filed a bill against him in respect of property to her separate use, and interrogated him as to the truth of statements in her bill, of their marriage, separation and arrangements with regard to her separate property. The interrogatory concluded with the words "or how otherwise." In his answer the husband alleged his belief that his wife had been guilty of adultery. He also filed a bill against her, relating to her separate property, in which the same charges were repeated. The wife excepted for scandal to the allegations respecting her adultery:—Held, that these allegations were scandalous and must be expunged, as, whether true or not, they were irrelevant to the issues to be decided at the hearing of the causes. *Pearse* v. *Pearse*, 29 L. T. 453; 22 W. R. 69.

L. brought an action against B. claiming (1) to restrain him from continuing a connection between his premises and L.'s private drain; (2) to have a building which had been erected by B. pulled down as darkening L.'s ancient lights; (3) damages. B., by his defence, alleged that the drain in question did not belong to L.; that he (B.) had never connected his premises with any drain belonging to L. who, however, had constructed a new drain, for private purposes of his own, below and in connection with the existing main sewer; and he alleged that "the plaintiff's acts aforesaid were in various particulars unlawful, but the defendant is in no wise responsible for them":—Held, that the latter allegation was ambiguous, "scandalous, and embarrassing," and must be struck out. *Lumb* v. *Beaumont*, 49 L. T. 772.

In an action respecting a policy of marine insurance, the plaintiff, the underwriter, by his statement of claim alleged that the risk was of a special and dangerous character, as the defendants well knew; that they failed to communicate such fact to the plaintiff; that the ship was unseaworthy when she commenced her voyage; and that the defendants knew of but concealed the fact of her being unseaworthy. The defendants admitted that the ship was unseaworthy, but stated that the unseaworthiness was solely owing to her being overladen, and was not known to them. They wholly denied the allegations of concealment and non-communication of facts. The plaintiff in his reply joined issue generally, but stated that he did not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendants of material facts:—Held, that Ord. XIX. r. 27, applied; that the allegations in the statement of claim were clearly unnecessary, because the plaintiff subsequently stated that he did not intend to ask any relief grounded on concealment or non-communication, and that they were consequently scandalous and embarrassing, and must be struck out. *Brooking* v. *Maudslay*, 55 L. T. 343; 6 Asp. M. C. 13.

In bill for removal of trustee, it is not scandalous or impertinent to challenge every act of trustee as misconduct. *Portsmouth* v. *Fellows*. 5 Madd. 450; 21 R. R. 335.

Nor to impute to him any corrupt or improper motive in execution of trust. *Ib.*

Nor to allege that his conduct is the vindictive consequence of some act on the part of the cestui que trust, or of some change in his situation. *Ib.*

But it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility. *Ib.*

To a bill filed to enforce an alleged title to real and personal property. the defendant, in his answer, said, "The plaintiff is desirous of annoying and harassing the defendant, to extort money from him." "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal, but the exceptions were overruled. *Stanton* v. *Holmes*, 20 L. J., Ch. 203; 15 Jur. 763.

Affidavits ordered to be taken off the file for containing scandalous and irrelevant matter. *Goddard* v. *Parr*, 24 L. J., Ch. 783; 3 W. R. 633. *See also* EVIDENCE.

An application was made that certain parts of a bill of costs delivered might be expunged for scandal and impertinency. It was contended, in opposition, that the jurisdiction of the court was confined to scandalous and impertinent matter in pleadings and affidavits, and that, therefore, the application could not be entertained:—Held, that every proceeding, of whatever nature, in the court of chancery, which was made the vehicle for the introduction of scandalous or irrelevant matter, could be amended or otherwise dealt with under the general jurisdiction of the court. *Miller, In re, Love* v. *Hills*, 54 L. J., Ch. 205; 51 L. T. 853; 33 W. R. 210.

Untruth of Averments.]—The court will not, upon an application to strike out a defence, go into the question whether the allegations in the defence are true or false, and so try the case before the time; but it will allow affidavit evidence to shew that the defence is an abuse of its process. *Hildige* v. *O'Farrell* (8 L. R., Ir. 158) distinguished. *Remmington* v. *Scoles*, 66 L. J., Ch. 526; [1897] 2 Ch. 1; 76 L. T. 667; 45 W. R. 580—C. A.

The court will not set aside a defence upon affidavits of its untruth. *Hildige* v. *O'Farrell*, 8 L. R., Ir. 158—C. A.

Where a plea is false and sham, and calculated to embarrass, the court will set it aside, upon an affidavit of its being a false and sham plea. *Nutt* v. *Rush*, 4 Ex. 490; 7 D. & L. 192; 19 L. J., Ex. 54.

If a plea is so pleaded that it is manifestly intended to embarrass the plaintiff, the court, on affidavit that the plea is false, will set it aside. *Levy* v. *Railton*, 14 Q. B. 418; 19 L. J., Q. B. 16; 14 Jur. 19.

Claim Seeking Relief not Asked by Writ.]—An action was commenced by the plaintiffs in 1884 against the defendants for alleged infringement of the plaintiffs' patent. The action was

however, discontinued in consequence of the evidence adduced by the defendants on interlocutory proceedings, and the plaintiffs paid the costs. The plaintiffs, in May, 1888, commenced another action against the defendants for the same object; and by their writ they claimed an injunction, delivery up of the infringing instruments, and an account, or damages and costs. The statement of claim in the second action contained an allegation that since discontinuing the former action, the plaintiffs had discovered that the defendant's evidence which led to its discontinuance was false. The statement of claim then contained a claim (which did not appear in the writ) that the second action might be treated as supplemental to the previous action, and that the defendants might be ordered to repay the costs paid to them in the previous action, and to pay the costs, charges, and expenses of the plaintiffs of that action as between solicitor and client:—Held, that it was irregular to introduce into the statement of claim a different cause of action not mentioned in the writ; that the causes of action contained in the statement of claim were entirely separate and distinct; and that the two paragraphs above mentioned must be struck out, leaving the plaintiffs to bring a separate action. *United Telephone Co.* v. *Tasker*, 59 L. T. 852. S. P., *Moore* v. *Alwill*, 8 L. R., Ir. 245.

Change of Interest by Assignment.]—A trustee in bankruptcy commenced an action to obtain a declaration that a deed, which purported to be an absolute conveyance of real estate, by the bankrupt, was in fact a mortgage, and to redeem such mortgage; and subsequently sold and assigned his interest in the subject matter of the action to C., who claimed to carry on the action in the name of the original plaintiff:—Held, on the application of the defendant, that C. was bound to amend the title of the action so as to shew that he was the real plaintiff, and to introduce such averments in the statement of claim as would disclose his title. *Seear* v. *Lawson*, or *Chatterton* v. *Lawson*, 50 L. J., Ch. 139; 16 Ch. D. 121; 43 L. T. 716; 29 W. R. 109.

Affected Compliance with Order.] — In an action against a stockbroker by his late employer, to re-open accounts on the ground of fraud, the plaintiff, by his statement of claim, alleged that the accounts delivered were untrue and unfair, that brokerage and commission had been improperly charged, and that excessive and unfair profit had been made. The defendant thereupon took out a summons for further and better particulars as to these charges, or that in default, the paragraphs containing these charges be struck out. The plaintiff amended his statement of claim by stating that all the accounts rendered were untrue, that the defendant had the particulars of the profits made by him, that the improper and excessive charges appeared in the accounts, and that the defendant was well aware of them:—Held, that this was a mere affectation of compliance with the order, and that the paragraphs complained of must be struck out, four days' leave to amend being given. *Harbord* v. *Monk*, 38 L. T. 411.

When Unintelligible.]—Parts of a statement of claim that are unintelligible may be struck out. *Cashin* v. *Cradock*, 3 Ch. D. 376; 35 L. T. 452; 25 W. R. 4—C. A.

i. ADMISSIONS BY PLEADING.

1. Generally.

Extent of.]—An admission of a fact on record amounts merely to a waiver of requiring proof of that fact; but if the other party seeks to have any inference drawn by the jury from the fact so admitted, he must prove it like any other fact. *Edmunds* v. *Groves*, 2 M. & W. 642; 5 D. P. C. 775; M. & H. 211; 6 L. J., Ex. 203.

An admission by pleading is an admission for all purposes of the cause. *Bingham* v. *Stanley*, 2 Q. B. 117; 1 G. & D. 237; 10 L. J., Q. B. 319; 6 Jur. 389.

An admission on the face of one plea cannot be made use of to prove or disprove another plea. *Stracey* v. *Blake*, 1 M. & W. 168; 1 Tyr. & G. 528.

An averment in one count of a declaration, or in one distinct plea, cannot be insisted on as an admission of any fact in another count or plea. *Harington* v. *Macmorris*, 5 Taunt. 228; 1 Marsh. 33.

Where a declaration contains two inconsistent counts, and the defendant pays money into court upon the second count, which the plaintiff accepts, the defendant cannot read the second count, and the proceedings therein, to the jury as conclusive, or as any evidence to negative an allegation in the first count. *Gould* v. *Oliver*, 2 Scott (N.R.) 241; 2 Man. & G. 208.

By not traversing an averment of a total loss in a declaration on a policy of insurance of a ship, the defendant admits no more than that there is some partial loss. *King* v. *Walker*, 3 H. & C. 209; 33 L. J., Ex. 325; 11 Jur. (N.S.) 43; 13 W. R. 232—Ex. Ch.

In an action against two on joint promises, they pleaded severally. Both pleaded non assumpsit, and one infancy. The plaintiff, in answer to the latter plea, admitted on the record that he could not deny the infancy, and he entered a nolle prosequi as to the defendant pleading it, but went to trial against the other:—Held, that he could not recover against this last, his admission on the record being conclusive evidence that there was no joint promise. *Boyle* v. *Webster*, 17 Q. B. 950; 21 L. J., Q. B. 202; 16 Jur. 683.

To an action for money had and received, the defendant pleaded in abatement, that the promises in the declaration mentioned were made by him jointly with other persons, thirteen in number (naming them), who were still living within the jurisdiction. Replication, that the promises were not made by the defendant jointly with the other persons named in the plea. The particulars of demand stated that the action was brought to recover cash deposited with or received by the defendant as the plaintiff's banker. At the trial the plaintiff began, and called a witness, who proved that she had a banking account, on which a balance was due to her to the amount stated in the particulars, with a banking company, which had since become insolvent, and in which the persons mentioned in the plea, and others also, were shareholders. The witness was cross-examined as to the state of the banking accounts, and not as to the fact of the defendant being also a shareholder; but the plaintiff gave no affirmative evidence to prove that he was one:—Held, that the fact was sufficiently admitted by the pleadings and proceedings at the trial, to entitle the plaintiff to recover. *Crellin* v. *Calvert*, 14 M. & W. 11; 14 L. J., Ex. 375; 9 Jur. 810.

In another Action.]—An admission contained in a defence in one action cannot properly be treated as conclusive in other proceedings between the same parties but on a different issue. *Walters, In re, Neison* v. *Walters*, 61 L. T. 872.

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated. *Boileau* v. *Rutlin*, 2 Ex. 665; 12 Jur. 899.

Estopped from giving Evidence.]—An action against a witness, for not attending a trial pursuant to a subpœna, alleged that the plaintiff had a good cause of action in that suit, and that the testimony of the defendant was material evidence for the plaintiff. Plea, that the plaintiff could have proceeded to trial without the testimony of the defendant. Evidence was tendered on the part of the defendant at the trial, for the purpose of shewing that the plaintiff had not a cause of action in the original suit:—Held, that, as the defendant had not traversed the allegations that the plaintiff had a good cause of action, and that the evidence was material, these allegations were admitted, and that he was consequently estopped from giving the evidence tendered. *Needham* v. *Fraser*, 3 D. & L. 190; 1 C. B. 815; 14 L. J., C. P. 256; 9 Jur. 734.

A material allegation in a pleading, which is not traversed, is so far admitted, that it is not competent to the other party to disprove it. *Bonzi* v. *Stewart*, 4 Man. & G. 295; 5 Scott, (N.R.) 1; 11 L. J., C. P. 228.

In an action for negligence, in not properly securing a cow of the defendant in a slaughter-house, the declaration stated, that by means thereof the cow ran at, butted at, gored, killed, and destroyed a cow of the plaintiff. Plea, a payment of 30*s.* into court; and that the plaintiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages:—Held, that the defendant could not go into evidence, to shew that his cow had not killed the plaintiff's cow, as the contrary was admitted by the plea. *Lloyd* v. *Walkey*, 9 Car. & P. 771.

In an action for a libel, which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—Held, that the plaintiff could not go into evidence to shew that his wife was a respectable person, as on the pleading she must be taken to be so. *Guy* v. *Gregory*, 9 Car. & P. 584.

Where in an action on a charter-party, a plea took an issue on an immaterial part of a breach:—Held, that by so doing the defendant admitted the material part as stated in the declaration. *Deffeil* v. *Brocklebank*, 3 Bligh, 561.

On a declaration in the indebitatus form, the only plea being in confession and avoidance, and no one appearing to support it, the plaintiff must give evidence of the amount of his claim, as the sum laid in the declaration is not admitted. *Hayward* v. *Radcliffe*, 4 F. & F. 500.

Curing Defect.] — A defect in a particular pleading may be cured by an admission or a statement in the adversary's pleading, though the party calling it in aid may have demurred to such pleading. *Hyde* v. *Watts*, 1 D. & L. 479; 12 M. & W. 254; 13 L. J., Ex. 41.

2. Judgment on.

See Ord. XXXII. r. 6 (1883), Ord. XL. r. 11 (1875).

"Relief," what is.] — The term "relief" in Ord. XL. r. 11, is not limited to its old technical meaning of a plaintiff's remedy in a chancery suit, but means relief in its ordinary sense,—such, for instance, as the relief from liability incurred by being a defendant in an action. *Pascoe* v. *Richards*, 50 L. J., Ch. 337; 44 L. T. 87; 29 W. R. 330.

Indorsement on Writ — "Pleading." — The indorsement on a writ is not a "pleading" so as to entitle a plaintiff, without the consent of the defendant, to move thereon for an order on admissions in the pleadings under Rules of Court, 1875, Ord. XL. r. 11, in a case where the defendant, admitting the plaintiff's claim, has given notice that he does not require the delivery of a statement of claim. *Wallis* v. *Jackson*, 52 L. J., Ch. 384; 23 Ch. D. 204; 31 W. R. 519.

Who Entitled to Apply.] — A defendant delivered a defence which, if uncontradicted, was a good defence to the plaintiff's claim; and the plaintiff did not rely or obtain further time within the three weeks limited by Ord. XXIV. r. 1. The defendant then, before the expiration of the six weeks within which a plaintiff must give notice of trial, moved under Ord. XL. r. 11, that the action might be dismissed with costs, on the ground that, by not replying, the plaintiff had admitted the defence within that rule:—Held, that a defendant seeking to dismiss an action under such circumstances was not a party applying for relief within the meaning of the rule. *Linton* v. *Linton*, 46 L. J., Ch. 64; 3 Ch. D. 793; 24 W. R. 962. *But see cases* infra.

Order for Sale of Bonds.]—In a suit in which the bill was filed before the Judicature Acts came into operation, the plaintiff claimed a charge upon certain bonds of a foreign state which were deposited in the bank to the credit of the cause. The suit had not yet come to trial. The defendants in their answer had admitted the plaintiff's title. On an application for an order for the sale of the bonds, as perishable goods within the meaning of Ord. LII. r. 2; or upon admission of facts in the pleadings under Ord. XL. r. 11:—Held, that there must be a sale of the bonds on the ground that the defendants having by their answer admitted the plaintiff's title, Ord. XL. r. 11, applied, and there was no reason why the relief to which he was entitled should be delayed until the hearing. *Coddington* v. *Jacksonville, Pensacola, and Mobile Ry.*, 39 L. T. 12—C. A.

In Partition Actions.]—In a partition action in which the defendants by their defence admitted

the facts stated in the statement of claim shewing the title of the plaintiffs :—Held, that the plaintiffs were, under Ord. XL. r. 11, entitled to an order on motion directing the usual inquiries as to the persons interested in the property. *Gilbert* v. *Smith*, 45 L. J., Ch. 514 ; 2 Ch. D. 686 ; 35 L. T. 43 ; 24 W. R. 568—C. A.

An order for sale may be made in a partition action on a motion upon admissions in the pleadings under Rules of Court, 1875, Ord. XL. r. 11. In such an order the court will direct an account of rents and profits received by the plaintiff, where he has been in possession, and adjourn further consideration. *Burnell* v. *Burnell*, 48 L. J., Ch. 412 ; 11 Ch. D. 213 ; 27 W. R. 749.

Partnership Actions.] — In an action for dissolution of partnership, the plaintiffs by their statement of claim alleged that they and the defendant had agreed to take a lease of certain premises and to enter into partnership ; that draft articles of partnership were considered and approved by the plaintiffs and the defendant at an interview on a day named, subject to their being finally revised by the defendant's solicitor ; that the draft articles had not yet been revised, nor the articles executed ; that, although the draft articles were only settled subject to revision, the terms of the arrangement between the plaintiffs and defendant as therein provided were definitely agreed upon at the interview ; that the defendant had not intimated any objection to the terms of the articles ; that it was soon afterwards agreed that certain sums should be brought in by the plaintiffs and defendant ; that they had proceeded with the partnership undertaking, and the defendant had taken an active part in it, but that he had not contributed his share, and notice had been given him to withdraw from the undertaking. The defendant, in his defence, admitted that he had agreed to enter into partnership as alleged, and added, "The defendant denies that the terms of the arrangement between myself and the plaintiffs were definitely agreed upon as alleged" :—Held, upon motion for judgment on admissions of fact in the pleadings under Ord. XL. r. 11, that there should be a decree for dissolution, with an inquiry, if desired by the defendant, as to the terms of the arrangement for partnership. *Thorp* v. *Holdsworth*, 45 L. J., Ch. 406 ; 3 Ch. D. 637.

In a partnership action, where there was no default in pleading, a district registrar by consent made a decree for accounts and inquiries, appointed a receiver, and directed a sale of the partnership property :—Held, that all these proceedings were invalid, and the plaintiff must commence afresh as from before decree ; but, on motion under Ord. XL. r. 11, on admissions in the pleadings, an order was made directing accounts and inquiries to be taken and made in the district registry ; the same receiver was, by consent, re-appointed by name by the court. *Brassington* v. *Cussons*, 24 W. R. 880.

In a suit to take the accounts of a partnership the defendants by their answer, filed before the 1st of November, 1875, admitted the partnership, and that they had not accounted ; and alleged that the plaintiff had not accounted, and that moneys were due from him to them. The plaintiff joined issue and moved before the hearing, upon affidavit of service, that the accounts of the partnership dealings might be taken :—Held, that he was entitled to the order under Ord. XXXIII. or Ord. XL. r. 11, and order made accordingly. *Turquand* v. *Wilson*, 45 L. J., Ch. 104 ; 1 Ch. D. 85 ; 24 W. R. 56.

Order to Account and Hand over Securities.]—When a defendant, who was agent for trustees of a trust estate, admitted by his answer that he was liable to account, and that he had in his possession securities belonging to the trust estate, the court on motion by the trustees, notice of which was given to the defendant, made an order directing him to account and to hand over the securities. *Rumsey* v. *Reade*, 45 L. J., Ch. 489 ; 1 Ch. D. 643 ; 33 L. T. 803 ; 24 W. R. 245.

Against one of several Defendants.]—A defence was delivered in an action brought against a husband and wife upon a joint and several promissory note given by them, which, purporting to be the defence of both, raised no defence as regarded the husband :—Held, upon motion for judgment, that the plaintiffs were entitled under Ord. XL. r. 11, to final judgment against the husband without waiting for the determination of the case against the wife. *Jenkins* v. *Davies*, 1 Ch. D. 696 ; 24 W. R. 690.

When three defendants had made default in delivering a defence, and another defendant had, by his defence, practically admitted the correctness of the statement of claim, and it was important to have the action tried against all at the same time, an order was made to set down the action on motion for judgment against the defendants in default, with liberty to give notice of motion, under Ord. XL. r. 11, for the same time against the defendant who had pleaded. *Smith, In re, Bridson* v. *Smith*, 24 W. R. 392.

When one of several defendants served has not appeared, while the others have appeared and delivered defences, the plaintiff may move for judgment, as against the defendants who have delivered defences, under Ord. XL. r. 11, upon admissions, and as against the defaulting defendant under the combined effect of Ords. XIII. r. 9, and XXIX. r. 10 ; but as against the latter the action must be set down on motion for judgment, and in both cases two clear days' notice of motion must be given. *Parsons* v. *Harris*, 6 Ch. D. 694 ; 25 W. R. 410.

Upon motion for final judgment against one of several defendants upon admission of the plaintiff's claim by such defendant, it is not necessary to serve the other defendants with notice of the motion, the cause of action being severable. *Macmillan* v. *Australasian Territories*, 76 L. T. 182.

Demurrer not to be raised by Motion.]—A demurrer to a defence ought not to be raised by way of motion for judgment under Ord. XL. r. 11. *Mellor* v. *Sidebottom*, 46 L. J., Ch. 398 ; 5 Ch. D. 342 ; 37 L. T. 7 ; 25 W. R. 401—C. A. *See now* Rules of Supreme Court, 1883, Ord. XXV.

Clear Case must be made.]—A plaintiff moving for judgment under Ord. XL. r. 11, on admissions in the defendant's pleadings, must have a clear case, and the mere admission or non-denial by the defendant of a right asserted by the plaintiff, but which has in fact no existence in law, is not sufficient to entitle the plaintiff to a judgment establishing the right. *Chilton* v. *London Corporation*, 47 L. J., Ch. 433 ; 7 Ch. D. 735 ; 38 L. T. 498 ; 26 W. R. 474.

Allegations not specifically denied.]—Unless the allegations in a statement of claim are specifically denied, the plaintiff is entitled to move for judgment as upon an admission of fact in the pleadings. *Rutter* v. *Tregent*, 48 L. J., Ch. 791; 12 Ch. D. 758; 41 L. T. 16; 27 W. R. 902.

In an action for an account of rents and profits, the defendant delivered a defence and a counter-claim to set off money due to him from the plaintiff under an award. The plaintiff in his reply simply joined issue generally, and the defendant then, treating the counter-claim as admitted, moved under the Judicature Act, Ord. XXXIII. and Ord. XL. rr. 10 and 11, for an account of what was due to him under it, or in the alternative that the reply might be struck out or amended under Ord. XXVII. r. 1, as tending to embarrass, and as being a non-compliance with the Rules of Court within Ord. LIX.: —Held, that the case was not one for an account under Ord. XXXIII.; that no order could be made on the counter-claim before the principal claim of the plaintiff was dealt with; and the alternative order was refused on the ground that a defendant could not dictate to a plaintiff the nature of pleadings. *Rolfe* v. *Maclaren*, 3 Ch. D. 106; 24 W. R. 816.

Defence merely craving Leave to refer to Documents.]—The statement of claim in a foreclosure action set out the purport and effect of several mortgage deeds, and alleged that they were duly executed. The statement of defence craved leave to refer to the deeds, when produced, and save as by such deeds, when produced, should appear, did not admit that the same were of or to the purport or effect in the statement of claim mentioned. Upon motion for judgment on admissions in the pleadings, the deeds being produced in court:—Held, that there was a sufficient admission of the execution of the deeds, and as it appeared, on their being produced in court, that they were of the dates and made between the parties mentioned in the statement of claim, the plaintiffs were entitled to judgment. *Barnard* v. *Wieland*, 30 W. R. 947.

Claim, Admission of—Counter-claim.]—In an action for a liquidated demand, the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater amount. The court refused an application under Ord. XL. r. 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into court to abide the result of the action. *Mersey Steamship Co.* v. *Shuttleworth*, 52 L. J., Q. B. 522; 11 Q. B. D. 531; 48 L. T. 625; 32 W. R. 245—C. A. Affirming 5 Asp. M. C. 48.

By Ord. XL. r. 11, any party to an action may, at any stage thereof, apply to the court or a judge for such order as he may, upon any admissions in the pleadings, be entitled to, without waiting for the determination of any other questions between the parties. In an action for goods sold and delivered, the defendant admitted the plaintiffs' claim, and set-off and counter-claimed for damages suffered and expenses incurred in respect of other goods which he alleged the plaintiffs had agreed to supply of a certain quality for exportation, but which, on arrival abroad after payment of the purchase-money, were found to be not of the quality contracted for, and were rejected by the defendant:—Held, on motion for judgment on admissions in the pleadings under Ord. XL. r. 11, that judgment must be entered for the plaintiffs on their claim on the terms that execution should not issue till after the trial of the counter-claim, if the defendant paid the amount into court within fourteen days. *Showell* v. *Bouron*, 52 L. J., Q. B. 284; 48 L. T. 613; 31 W. R. 550.

Part of Demand Admitted.]—A statement of claim alleged that the plaintiff was owner in fee simple of premises which he had on the 26th September, 1859, leased to M. for thirty-one years from the then next 25th December, at a yearly rent of 105*l*., payable quarterly. The statement then set forth the covenants in the lease, to pay rent, repair, and the conditions for re-entry for breaches of the covenants; and alleged that in 1870 the defendant took possession of, and since had occupied the premises, and that, at some time subsequently to 1870 he had become assignee of the lease, and that he had from 1870 till March, 1874, paid to the plaintiff the rent in accordance with the terms of the lease. Then breaches by the defendant of the various covenants were alleged, and the plaintiff claimed—(1) possession of the premises; (2) 157*l*. 10*s*. for arrears of rent to the 29th September, 1875, or for use and occupation; (3) 600*l*. damages for breaches of covenant; (4) mesne profits from the 29th September, 1875, to date of recovery of possession. The defendant, in his defence, denied that he was assignee of the lease, or that he had been guilty of breaches of covenant, but admitted that the lease had been avoided, and that the plaintiff was entitled to possession; he also therein admitted that he was in possession up to the 20th September, 1875, but alleged that he then ceased to be in possession. He brought into court 25*l*. to answer claim:—The court held that, upon the pleadings, the plaintiff was entitled under Ord. XIV. r. 4, to sign judgment at once for 157*l*. 10*s*., the rent to the 29th September, 1875. *Hanmer* (*Lord*) v. *Flight*, 35 L. T. 127; 24 W. R. 346. Reversed on other grounds, 36 L. T. 279—C. A.

In an action upon a fire policy to recover 1,000*l*., the defendant company pleaded that the policy was subjected to a condition that if at the time of loss or damage by fire there was any other insurance effected by the insured, or any other person, covering the same property, the defendant company should not be liable to pay or contribute more than their ratable proportion of such loss; that at the time of the alleged damage by fire the premises were insured against fire by a sub-tenant of the plaintiff, upon which insurance a certain sum was paid to the sub-tenant, who by covenant with the plaintiff was bound to keep the premises in repair, and that the apportionment of the loss which the defendant company were bound to pay under the policy was 62*l*. This sum was not brought into court. The plaintiff having moved under Ord. XXXIX. r. 9, for judgment for this sum without prejudice to his right to proceed for the residue of the amount claimed:—Held, that the rule only applied to cases in which the plaintiff was willing to accept the admitted sum in satisfaction of his claim, and that the motion must, therefore, be refused. *Andrews* v. *Patriotic Assurance Co.*, 18 L. R., Ir. 115.

Inquiry as to Damages—Infringement of Patent.]—Where in an action for the infringement of a patent the defendant admits the

validity of the patent, and admits ten infringements and no more, the plaintiff moving for judgment on admissions under Ord. XXXII. r. 6, is entitled to an injunction and an inquiry as to damages from the admitted infringements, but not to a general inquiry as to damages. *United Telephone Co.* v. *Donohue*, 55 L. J., Ch. 480; 31 Ch. D. 399; 54 L. T. 34; 34 W. R. 326—C. A.

Infant Defendants.]—The court will not make an order for judgment on admissions contained in a statement of defence which has been filed by infant defendants. Semble, the court will not make an order for judgment for want of defence in the case of infant defendants making default in filing a statement of defence. *Byrne* v. *Byrne*, 5 L. R., Ir. 134.

Non-delivery of Pleading.] — The plaintiff having made default in delivery of reply to the defendant's defence and counter-claim:—The court ordered final judgment to be entered for the defendant in respect of both the claim and counter-claim under Ord. XL. r. 11. *Lumsden* v. *Winter*, 51 L. J., Q. B. 413; 8 Q. B. D. 650; 30 W. R. 751; 46 J. P. 487. *See* col. 868.

Ord. XVIII. r. 10 (Irish) only applies to cases where both parties have pleaded. *Boak* v. *Moore*, 7 L. R., Ir. 322—C. A.

The plaintiff delivered his reply after three weeks had elapsed from delivery of the statement of defence, and subsequently the defendant, treating the facts stated in the defence as admitted, under Ord. XXIX. r. 12, by reason of the plaintiff's failure to reply in time, gave notice of motion for judgment under Ord. XL. r. 11:—Held, that the reply having been actually delivered before the notice of motion was given, the defendant was not entitled to judgment. *Graves* v. *Terry*, 51 L. J., Q. B. 464; 9 Q. B. D. 170; 30 W. R. 748. *See* col. 869.

A defendant is entitled, under Ord. XXXIX. r. 9, to judgment on admissions of facts in the pleadings, by reason of the plaintiff not delivering a reply to the defendant's defence. *Elliott* v. *Harris*, 17 L. R., Ir. 351.

See also Rules of Supreme Court, 1883, Ord. XXVII.

Waiver of Right.]—The plaintiff does not waive his right to judgment on the admissions by not having moved for judgment under Ord. XL. r. 11. *Tildesley* v. *Harper*, 47 L. J., Ch. 263; 7 Ch. D. 403; 38 L. T. 60; 26 W. R. 263.

Application, when made—At any Stage.]—A plaintiff may move for judgment upon admissions in the pleadings at any stage in the action, and notwithstanding that he has joined issue on the defence and given notice of trial. *Brown* v. *Pearson*, 21 Ch. D. 716; 46 L. T. 411; 30 W. R. 436.

A defendant who has put in a rejoinder, but not counter-claimed, is entitled to move, under Ord. XL. r. 11, to have the action dismissed on the ground that on the admissions in the pleadings the plaintiff is not entitled to the relief claimed. *Pascoe* v. *Richards*, 50 L. J., Ch. 337; 44 L. T. 87; 29 W. R. 330.

Order is Discretionary—Appeal.]—An action having been commenced in November, 1876, to enforce an equitable mortgage with written memorandum dated in February, 1876, the defendant admitted the mortgage, but alleged, by way of defence, that it was part of the agreement that the plaintiff should not require a legal mortgage, nor any payment of principal or interest for a year from the time of the advance. The plaintiff moved for the ordinary foreclosure decree on the admissions in the pleadings; and the motion was refused by Hall, V.-C.:—Held, that the vice-chancellor had a discretion as to whether a case was a proper one for making an order on motion under Ord. XL. r. 11; and that the court of appeal ought not to interfere with the exercise of that discretion. *Mellor* v. *Sidebottom*, 46 L. J., Ch. 398; 5 Ch. D. 342; 37 L. T. 7; 25 W. R. 401—C. A.

Not entertained simultaneously with Motion to strike out Counter-claim.]—A motion to set aside a counter-claim and a motion for judgment upon admissions of fact in the defence cannot be entertained simultaneously. *Church Temporalities Commissioners* v. *M'Ivor*, 3 L. R., Ir. 433.

Motion, how made.]—Upon admissions in a defence in an administration action, and upon a notice of motion for "a decree or decretal order," an order can, under Rules of Court, 1875, Ord. XL. r. 11, be made upon an ordinary motion without setting down the motion. *Barker's Estate, In re, Hetherington* v. *Longrigg*, 48 L. J., Ch. 171; 10 Ch. D. 162; 27 W. R. 393.

—— **Motion or Summons in Chambers.**]—An action was brought to restrain the defendants from publishing or issuing a certain trade circular. By their defence they offered to submit to a perpetual injunction in the terms of an interlocutory injunction which had already been obtained against them, "to be obtained on summons issued for that purpose." The action was set down on motion for judgment, and the plaintiffs moved for judgment for a perpetual injunction as offered by the defendants:—Held, that there was jurisdiction to make the order in chambers, that the application should have been so made, and that the plaintiffs should only be allowed such costs as would have been incurred upon a summons in chambers. *London Steam Dyeing Co.* v. *Digby*, 57 L. J., Ch. 505; 58 L. T. 724; 36 W. R. 497.

In an action to restrain the defendant from building so as to obstruct plaintiff's ancient lights, and for damages, the defendant paid 275*l.* into court in satisfaction of the claim for damages, and by his defence offered to undertake not to carry his buildings higher than they were at the commencement of the action, to consent to an order embodying this undertaking, and for payment to the plaintiff of the 275*l.*, and to pay the plaintiff's costs. The plaintiff accepted these terms, and prepared minutes which he sent to the defendant's solicitors with a notice that he should set down the action on motion for judgment as a short cause. The defendant's solicitors wrote that the matter could be concluded at much less cost on a summons in chambers and the defendant wished that course adopted. The plaintiff, nevertheless, proceeded with his motion:—Held, that the letter of the defendant's solicitors made the submission in the pleadings equivalent to that in *London Steam Dyeing Co.* v. *Digby* (57 L. J., Ch. 505), where the offer of the defendants in the pleadings was expressly to submit to an order for an injunction to be obtained in chambers; and that the plaintiff was only entitled to such costs of his motion as would

have been incurred on a summons in chambers. The plaintiff was allowed the costs of preparing minutes, and for the guidance of the taxing-master the judge intimated that he should have allowed counsel in chambers. *Allen* v. *Oakey*, 62 L. T. 724.

Applications for orders upon admissions on pleadings should be made by summons in chambers, to come on in court as adjourned summonses. *Gough* v. *Heatley*, 49 L. T. 772; 32 W. R. 385.

Form of Order.]—Form of order made on motion for judgment under the Judicature Act, Ord. XL. r. 11, when the further hearing of the action is adjourned. *Bennett* v. *Moore*, 1 Ch. D. 692.

j. AIDER BY VERDICT.

Defects and Omissions cured.] — After a verdict, the court will suppose everything to be right, unless the contrary appears on the record. *Bull* v. *Steward*, 1 Wils. 255.

Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined is such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict at common law. *Delamere* v. *Reg.*, 36 L. J., Q. B. 313; L. R. 2 H. L. 419; 17 L. T. 1.

If a declaration contains allegations capable of being understood in two senses, and in one sense it will sustain the action, and in the other it will not, after verdict it must be construed in the sense which will sustain the action. *Emmens* v. *Elderton*, 4 H. L. Cas. 624; 13 C. B. 495; 18 Jur. 21.

Declaration against a sheriff for an escape. Pleas, not guilty, and that the judgment debtor was discharged from custody on the production of a certificate of the registration of a trust deed under the Bankruptcy Act, 1861. Demurrer to the second plea, joinder of issue, and replication that the plaintiff was not a creditor bound or intended to be bound by the deed. Demurrer to the replication and joinder of issue. Judgment on the demurrers that the second plea was bad, and the replication good. At the trial there was a verdict for the plaintiff on the plea of not guilty, and for the defendant on the other issues. The court having decided that on the whole record the defendant was entitled to judgment: —Held, on appeal, that the decision was right; per Kelly, C.B., Martin, B., and Brett, J., on the ground that the defect (if any) in the second plea was cured by the replication which tendered the true issue in the cause, and the defendant having succeeded in this issue was entitled to judgment; per Channell, B., Cleasby, B., Keating, J., and Montague Smith, J., that the second plea, though perhaps informal, was sufficient, and the replication to it also sufficient, but the defendant having succeeded on this replication was entitled to judgment. *Dignam* v. *Baily*, 10 B. & S. 891; 40 L. J., Q. B. 68; L. R. 6 Q. B. 47; 23 L. T. 706; 19 W. R. 325—Ex. Ch.

A plea in bar, justifying under a statute which affords a defence arising subsequently to the commencement of the action is good after verdict. *Cobbett* v. *Grey*, 4 Ex. 729; 19 L. J., Ex. 137.

A declaration stated that the defendant was indebted to the plaintiff in 800*l.* for work of the plaintiff, as an attorney for the defendant, and at his request, and for other work of the plaintiff, by him done for the defendant and at his request, and for moneys paid for the defendant ("at his request" omitted), and for moneys had and received for the use of the plaintiff, and for moneys found to be due from the defendant to the plaintiff on an account stated: —Held, on motion in arrest of judgment, that the declaration was sufficient after verdict, that it contained one count only, and that the jury was to be presumed to have given their verdict on that part of it which was sufficient. *M'Gregor* v. *Graves*, 3 Ex. 34; 18 L. J., Ex. 109.

An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict. *Huntingtower* (*Lord*) v. *Gardiner*, 2 D. & R. 450; 1 B. & C. 297; 1 L. J. (O.S.) K. B. 120. S. P., *Hobson* v. *Middleton*, 9 D. & R. 249; 6 B. & C. 302.

A verdict will cure ambiguity, but it will not aid a case where the gist of the action is omitted. *Avery* v. *Hoole*, Cowp. 825; 2 Dougl. 683, n.

It will cure a defect in setting out a title, though it cannot cure a defective title. *Roe* d. *Wrangham* v. *Hersey*, 3 Wils. 274. S. P., *Small* d. *Baker* v. *Cole*, 2 Burr. 1159.

There is a distinction between a title defectively set forth and a defective title; to the former case the statutes of Jeofails extend, but to the latter, as the jury cannot examine into what was not set forth, they do not. *English* v. *Burnell*, 2 Wils. 258.

After a verdict, where the defendant's name is put in the count instead of the plaintiff's name, the court will reject the defendant's name as being surplusage. *Richards* v. *Symonds*, 3 Wils. 40.

The 32 Hen. 8, c. 30, providing that a discontinuance shall be cured by verdict, applies only to courts of record. *Chitty* v. *Dendy*, 4 N. & M. 842; 3 A. & E. 319; 1 H. & W. 169; 4 L. J., K. B. 195.

To a declaration on a bill of exchange for 65*l.* with the common counts, concluding to the plaintiff's damage of 200*l.*, the defendant pleaded as to 35*l.*, part of the bill, that it was an accommodation bill, as to 40*l.* parcel, &c., payment into court, and as to the residue, non assumpsit. The replication denied that the bill was an accommodation bill, and on the non assumpsit joined issue, but said nothing as to the payment into court:—Held, after verdict, that there was no discontinuance on the record, or that if there was, it was cured by verdict, or that a nolle prosequi might be entered as to the 40*l.* *Fallows* v. *Bird*, 2 C. M. & R. 457; 5 Tyr. 836; 4 D. P. C. 183; 1 Gale, 246; 4 L. J., Ex. 248.

If a local action is brought and tried in a wrong county, the defect is aided after verdict by 16 & 17 Car. 2, c. 8. *London Corporation* v. *Cole*, 7 Term Rep. 583.

None of the statutes of Jeofails will assist on a writ of error from an inferior court, where one of two counts in a declaration is not laid within the jurisdiction, and the damages are general. *Trevor* v. *Wall*, 1 Term Rep. 151.

But if it appears by the record that the plaint in an inferior court was laid before the cause of

action stated in the declaration accrued, the objection is aided by verdict. *Bishop* v. *Kaye*, 3 B. & Ald. 605. And see *Heather* v. *Bryan*, 1 Wils. 180.

Where, in an action on a bond by an administrator, the declaration alleged that administration was granted by the Bishop of Lichfield and Coventry, and the venue in the margin was laid in London, but the bond was stated to be made at Derby, which is within the diocese:—Held, to be sufficient, and that the bad venue laid in the margin was cured by the statute of Jeofails. *Mellor* v. *Barber*, 3 Term Rep. 287.

After a defence made on a writ of inquiry, the defendant is not allowed to take advantage of a mistake in the declaration. *Freeland* v. *Hunt*, 2 Wils. 380.

A mere defect in pleading, though a ground of general demurrer, will not, after verdict, render a judgment null and void, where a good cause of action is stated in the count. *Jack* v. *Tease*, 12 Ir. Ch. R. 279.

J. M.

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I. AGENCY GENERALLY.

A. CREATION OF RELATIONSHIP.

1. PRIOR AGREEMENT.

Consensus of Parties.]—The relation of principal and agent requires the consensus of both parties. There must be an express or implied assent to, or a subsequent ratification of, that relation. *Markwick* v. *Hardingham*, 15 Ch. D. 349; 43 L. T. 647; 29 W. R. 361—C. A.

No one can become the agent of another except by the will of the principal, manifested in writing, or orally, or by his being placed in a situation in which, according to the ordinary usages of mankind, he would be understood to represent and act for the principal. *Pole* v. *Leask*, 33 L. J., Ch. 155; 9 Jur. (N.S.) 829; 8 L. T. 645—H. L.

Acceptance of Agency—Communication of to Principal.]—A contract made by an agent under a written and signed offer of agency, purporting to have been duly and effectually accepted by the agent, will not, if such acceptance has not, in fact, been communicated to the principal, be binding upon the principal by estoppel. *Consort Deep Level Gold Mines, In re; Stark's and Elliston's Cases*, 66 L. J., Ch. 297; [1897] 1 Ch. 575; 76 L. T. 300; 45 W. R. 420—C. A.

Whether Writing Necessary.]—An agency may be established by parol. *James* v. *Smith*, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396. Affirmed, 65 L. T. 544—C. A.

Parol authority sufficient for a written agreement by an agent. *Deverell* v. *Bolton* (*Lord*), 18 Ves. 509.

Authority of agent may be by parol, though the agreement must be by writing. *Mortlock* v. *Buller*, 10 Ves. 311; 7 R. R. 417. And see *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith, 233; 7 R. R. 167.

The authority of an agent to contract for a lease of lands need not be in writing. *Callaghan* v. *Pepper*, 2 Ir. Eq. R. 399.

Agent to Sell.]—A. and B. advertised an estate for sale. The advertisement stated that "to treat and view the property applications are to be made to A. or B." Held, that this did not give A. authority to sell the estate, so as to bind B. without his concurrence. *Godwin* v. *Brind*, 17 W. R. 29.

Agent or Purchaser.]—When a person has goods consigned to him to sell, and he is bound, if he sells, to pay a fixed price to his employer at a fixed time after sale, but he may sell to his customers at any price and upon any credit he pleases, though he may be called an agent, yet the legal relation of principal and agent does not exist between him and his employer; on the contrary, the relation between him and his employer is that of purchaser and vendor, and a separate relation of vendor and purchaser exists between him and the persons to whom he sells, and the moneys which come to his hands by means of the sales which he effects are his own

moneys, and are not impressed with any trust for his employer. *White, Ex parte, Nevill, In re*, 40 L. J., Bk. 73; L. R. 6 Ch. 397; 24 L. T. 45; 19 W. R. 488.

A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for one lot, and also as a puffer in bidding for another lot, which was knocked down to him, and that he therefore purchased the lot, and signed the agreement for the purchase, as the agent of the vendor; but the statement in his depositions of the circumstances attending the signature was somewhat different from that in his answer, and he had signed an order on his attorney for payment of the deposit money:—Held, that there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account. The court cannot speculate on the damages which a jury might have given for the breach of an agreement, nor on the damage caused to property by failure of a sale: therefore the specific performance of an agreement for the sale of hereditaments, where the consideration money is 50*l.*, is not too small a matter for the jurisdiction of the court. The exercise of the jurisdiction is discretionary in the court; but the discretion is not arbitrary, but must be exercised according to the circumstances of the case. *Bennett* v. *Smith*, 16 Jur. 421.

A., a foreign merchant, employed B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) made out the invoices to B., and took in payment his acceptances payable at six months:—Held, that there was no contract of sale as between A. and B. *Seymour* v. *Pychlau*, 1 B. & Ald. 14.

When Presumed—Solicitor.]—Held, that, in a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 1 Russ. & M. 296; 8 L. J. (o.s.) Ch. 74.

Where the mortgagor is himself a solicitor and prepares the mortgage-deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction, although the mortgagor acting as such solicitor is not paid by the mortgagee, for the nature of the transaction is, that all expenses are borne by the mortgagor. *Hewitt* v. *Loosemore*, 9 Hare, 449; 21 L. J., Ch. 69; 15 Jur. 1097.

It does not necessarily follow in such a case, because the mortgagor is the solicitor of the mortgagee, that therefore the mortgagee has constructive notice of facts connected with the title which are known to the mortgagor. *Ib.*

A solicitor who pays off a mortgage debt due from his client must be taken to act as the agent of the client, and not on his own behalf; and if he receives the rent of the mortgaged property, the possession is that of the client; and the solicitor cannot be charged with wilful default, nor will the statute run against the client. *Ward* v. *Carttar*, L. R. 1 Eq. 29.

—— **Agent of Tenant.**]—A person appointed agent to pay the head-rent on the part of lessee for lives, with covenant for perpetual renewal, is the agent of the lessee, so that a demand and notice upon him will be binding upon the lessee, although he reside abroad, and be admittedly ignorant of the facts. *Butler* v. *Portarlington (Earl)*, 1 Dr. & War. 20; 1 Con. & L. 1; 4 Ir. Eq. R. 1.

The presumption is, that the tenant is acquainted with the title under which he claims, and the circumstances connected with it; and this holds until the contrary is proved. *Ib.*

Payment by an under-tenant C. to A. the head landlord, with the assent of B. the intermediate landlord, of the head-rent reserved by the lease from A. to B., does not of itself make C. such an agent to B. as to induce the court to decree a reversionary lease of the premises obtained by C. from A. a trust for B. *Maunsell* v. *O'Brien*, 1 Jones, 176.

—— **Co-Trustee.**]—A. and B., trustees of a will under which the plaintiff was entitled to a share of residue, which she had assigned to C. and D., the trustees of her marriage settlement, paid it to C. alone, without the knowledge of D. They afterwards transferred a legacy of stock settled upon similar trusts to C. and D., by whom it was subsequently sold out, and the proceeds were received by C. alone. D. left to C. the general management of the trust estate, and the choice of investments. Both funds were partially misapplied and lost by C. The plaintiff sought to have both funds made good:—Held, that the bill was not multifarious, though it asked no relief against A. and B., with respect to the legacy fund. *Margetts* v. *Perks*, 12 W. R. 517.

Held, also, that the conduct of D. did not justify A. and B. in considering C. as his agent authorised to receive the money. *Ib.*

—— **From Relationship.**]—In an action by indorsee against indorser of bills of exchange, accepted for the accommodation of the drawer, proof by the drawer of his delivery of the bills in question to the father-in-law of the plaintiff to be cashed, who retained a portion of the amount far beyond the legal interest, does not affix usury on the plaintiff, there being no evidence to shew that the father-in-law was acting as the agent of the plaintiff in the transaction:—Held, also, that in such circumstances, notice to plaintiff to prove consideration given for the bills was not sufficient to impose such burden upon him. *Basset* v. *Dodgin*, 10 Bing. 40; 3 M. & Sc. 417; 2 L. J., C. P. 259.

—— **Receiver whether Agent of Trustees for Debenture-holders.**]—By a deed made between a limited company and trustees for debenture-holders, the property of the company was transferred to the trustees, upon trust, to permit the company to carry on the business until the happening of one or other of events specified. On the happening of such event the trustees were empowered to appoint a receiver; but it was an express condition of the exercise of that power that "any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults." One of the events happened, and the trustees appointed a receiver, who took possession of the mortgaged premises and carried on the business of the company. An order was made for the winding-up of the company and a liquidator appointed, who permitted the receiver to carry on the business as before. The respondents sued the trustees for goods supplied to the receiver after the winding-up order:—Held, that the trustees were not principals of the receiver, and were therefore not liable for

the price of the goods supplied. *Gosling* v. *Gaskell*, 66 L. J., Q. B. 848 ; [1897] A. C. 575 ; 77 L. T. 314—H. L. (E.)

Agent of which of Two Parties—Reward for Information—Police.]—On 29th May the defendant instructed his printers to print handbills offering a reward of 25*l.* to the person who should give information to P., a superintendent of police, leading to the conviction of the perpetrator of a certain crime. The plaintiff, a police officer, on the same morning before the instructions to print the handbills had been given by the defendant, had communicated the desired information to a fellow police officer named C. with instructions to forward it to P., and C. thereupon communicated the information, in accordance with the rules of the force, to his own immediate superior officer L., who sent it on the same evening to P., whom it reached in due course on the following morning, the 30th May, after the time when the said handbills had been delivered to and had been distributed by him to the neighbouring police-stations :—Held, that the plaintiff, the importance of whose information was admitted, was entitled to the reward, the messengers, C. and L., through whom such information was conveyed to P., being the plaintiff's agents to convey, and not P.'s agents to receive, the said message. *Gibbons* v. *Proctor*, 64 L. T. 595 ; 55 J. P. 616.

—— **Insurance Premiums — Commission.**]—The plaintiff mortgaged her life interest in a fund to the defendants, it being part of the agreement that a policy should be effected on her life, and the premiums be secured on the mortgaged property. In an action for redemption the chief clerk found that 173*l.* 19*s.* 1*d.*, "premiums paid on policies," was due from the plaintiff to the defendants. L., a solicitor and agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On summons to vary the chief clerk's certificate by the amount of the commission, on the ground that the "premiums paid on policies" only amounted to 165*l.* 5*s.* :—Held, that after the premiums had been paid to the insurance offices, the mortgagor had no interest in them. The insurance offices received the premiums, and paid the commission out of them to their own agent. *Leete* v. *Wallace*, 58 L. T. 577.

Between Wrongdoers.]—There is no agency as between wrongdoers ; each of them is personally liable. *Heugh* v. *Abergavenny* (*Earl*), 23 W. R. 40.

2. RATIFICATION.

Equivalent to Previous Authority.]—The maxim of omnis ratihabitio retrotrahitur et mandato æquiparatur means, first, as applied to cases of contract, that if A., unauthorised by B., makes a contract on his behalf with C., which B. afterwards recognises and adopts, the contract is to be dealt with as having been originally made by his authority. Secondly, as applied to cases of tort, that where A., professing to act by the authority of B., does that which primâ facie amounts to a trespass, and B. afterwards assents to and adopts his act, A. is treated as having from the beginning acted by his authority, and B. becomes a trespasser unless he can justify the act. *Bird* v. *Brown*, 4 Ex. 786 ; 19 L. J., Ex. 154 ; 14 Jur. 132.

A subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority. *Maclean* v. *Dunn*, 1 M. & P. 761 ; 4 Bing. 722 ; 6 L. J. (O.S.) C. P. 184 ; 29 R. R. 714. S. P., *Foster* v. *Bates*, 12 M. & W. 226 ; 13 L. J., Ex. 88.

An act done by an agent of the government, though in excess of his authority, being ratified and adopted by the government, is equivalent to a previous authority. *Secretary of State for India* v. *Kamachee Boye Sahaba*, 7 Moore, Ind. App. 476 ; 13 Moore, P. C. 22.

Though subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shewn in such a case that there was a contract purporting to be made by and with the agent which, if the agent had authority, would be a valid binding contract. *Athy Guardians* v. *Murphy*, [1896] 1 Ir. R. 65.

Must be founded on Knowledge of the Facts.]—Acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction to which effect may be given thereby. *Banque Jacques-Cartier* v. *Banque d'Epargne de Montreal*, 57 L. J., P. C. 42 ; 13 App. Cas. 111—P. C.

Where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes : —Held, that the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed. *Ib.*

To constitute a binding ratification by a person of an act done in his name without any previous authority, there must be full knowledge on his part of the facts, and unequivocal adoption after such knowledge, or the circumstances must be such as to warrant the clear inference that the supposed principal was adopting the acts of the supposed agent, whatever they were. *Marsh* v. *Joseph*, 66 L. J., Ch. 128 ; [1897] 1 Ch. 213 ; 75 L. T. 558 ; 45 W. R. 209—C. A.

Option of Purchase—Limit of Time.]—Acceptance by an agent acting without authority of an option of purchase, which has to be exercised within a limited time, is not made effective by the principal's ratification after the time limited has expired. *Dibbins* v. *Dibbins*, 65 L. J., Ch. 724 ; [1896] 2 Ch. 348 ; 75 L. T. 137 ; 44 W. R. 595.

Who may Ratify.]—A person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and on his behalf. *Ancona* v. *Marks*, 7 H. & N. 686 ; 31 L. J., Ex. 163 ; 8 Jur. (N.S.) 516 ; 5 L. T. 753 ; 10 W. R. 251.

Therefore, where a holder of a bill of exchange, without the knowledge or authority of the plaintiff, indorsed and delivered it to an attorney for the plaintiff, and in order that an action might be brought upon it in his name, and the plaintiff after action ratified the act :—Held, that the subsequent ratification was equivalent to a prior authority, and that the plaintiff had a valid title to sue on the bill. *Ib.*

To entitle a person to sue upon a contract, it must be shewn that he himself made it, or that it was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him ;

and the person for whom the agent professes to act must be capable of being ascertained at the time. *Watson* v. *Swann*, 11 C. B. (N.S.) 756; 31 L. J., C. P. 210.

A party may ratify the acts of an agent whose name is unknown to him. *Foster* v. *Bates*, 1 D. & L. 400; 12 M. & W. 226; 13 L. J., Ex. 88; 7 Jur. 1093.

An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him; in such case, the principal is bound by the act, whether it is to his detriment or for his advantage, and whether it is founded on a tort or a contract, to the same extent and with all the consequences, which follow from the same act, if done by his previous authority; but it is otherwise where the party did not at the time assume to act as agent. *Wilson* v. *Tumman*, 6 Man. & G. 236; 6 Scott (N.R.) 894; 1 D. & L. 573; 12 L. J., C. P. 306.

Where A. does an act as agent for B., without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit, under the act of A. *Ib.*

In some cases, where an act, which if unauthorised would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, a subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and treat it as having been done by his direction; but this doctrine must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might have himself lawfully done the act which he ratifies. *Bird* v. *Brown*, supra.

H. was tenant to P. of lands under a lease which expired on the 29th September, 1880. P. brought ejectment to recover possession of the land, and for mesne profits, and after he was in a position to sign judgment, an agreement was entered into in the month of November, 1884, between H. and P., by which P. agreed to grant a lease to H. for thirty-one years from the 29th of September, 1884, H. paying 860*l.* on or before the 15th of December, as and for mesne profits up to that date and for costs, and that H. should be at liberty to sell subject to the landlord's approval. H. not having such sum of 860*l.*, judgment for possession was entered on the 16th December. After the entry of the judgment negotiations took place between P. and D., who had taken the land temporarily for grazing from H., for a lease of the said lands to D., and on the 2nd of January, 1885, D. paid P. 860*l.*, and the following day signed a proposal for a lease for thirty-five years from the 29th September, 1884, at a yearly rent of 200*l.* P. was only tenant for life of the lands, and could not take a fine, and there was no mention in the agreement with D. of the payment by him of 860*l.* On the 6th of January, 1885, the writ in the present action was issued by P. against H., claiming 1,000*l.* damages for mesne profits from the expiration of the lease on the 29th September, 1880, and in the alternative 1,000*l.* for use and occupation. H., by his defence, claimed the benefit of the payment by D. of the 860*l.*, and paid 6*d.* into court, on the count in trespass. At the trial P.'s agent deposed that he told D. that whoever gave him 860*l.* would get the land. D., who was examined for H., deposed that he knew 860*l.* was claimed from H., for arrears of rent and costs, and that he was willing to pay that sum on getting a good lease. The question left to the jury was "whether the 860*l.* was paid by D. and received by P. as for the rent of the farm due by H." They found that it was, and that the 6*d.* lodged in court was sufficient. Upon a motion by P. for a new trial:—Held, that there was evidence proper to be substituted to the jury that the 860*l.* was paid by D. and received by P., as and for the arrears of rent and costs, and that it was competent for H. to adopt and claim the benefit of the payment as a defence to the present action. *Purcell* v. *Henderson*, 16 L. R., Ir. 213. Affirmed, 16 L. R., Ir. 466—C. A.

Agreement with Company before Registration.]—When A. enters into a contract with B. before a company is in existence, that contract cannot be made binding on the company by mere ratification. *Empress Engineering Co., In re*, 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342—C. A.

By an agreement made before the registration of a company, it was agreed that B. should be secretary of the company for a term of five years at a specified salary, on condition that B. subscribed 2,000*l.* in respect of 200 fully paid-up shares of the company, which sum B. subscribed. At the first meeting of the directors a resolution was passed confirming the agreement between B. and the company. The company went into voluntary liquidation, subsequently continued under the supervision of the court. B. claimed for damages by reason of his engagement as secretary being terminated by the winding-up:—Held, that a company could not ratify or confirm anything that was done or any contract that was made before it came into existence; and, therefore, that the claim must be disallowed. *Dale and Plant, In re*, 61 L. T. 206; 1 Meg. 338. *And see Cases* sub tit. COMPANY.

After Repudiation of Contract—Effect of.]—The articles of association of a limited company provided that the directors should not be more than ten, nor less than three; and that the directors might determine the quorum necessary for the transaction of business. On the 22nd of October four persons were duly appointed directors. On the 24th of October S. applied for 100 shares. On the same day the first meeting of the directors was held; two only of the four directors were present. They resolved that two directors should form a quorum, and then made several allotments, including 100 to S. On the same evening S. received by post notice of the allotment to him; and on the next day he gave notice to the company that he withdrew his application. On the 26th of October the two directors who had been absent from the meeting of the 24th of October expressed in writing their approval of the resolution fixing two as a quorum. On the application by S. (under s. 35 of the Companies Act, 1862) to have his name removed from the register:—Held, that the allotment could not be ratified by what the other two directors did after S. had withdrawn his application. *Portuguese Consolidated Copper Mines, In re, Steele's Case*, 58 L. J., Ch. 491; 42 Ch. D. 160; 60 L. T. 857. See *S. C.*, 58 L. J., Ch 813; 42 Ch. D. 160; 1 Meg. 246—C. A.

Where a contract has been entered into by one as agent, although without his principal's authority, the principal may ratify, and afterwards enforce, the contract, notwithstanding

that the other party thereto has before the ratification repudiated it. *Bolton* v. *Lambert*, 58 L. J., Ch. 425 ; 41 Ch. D. 295 ; 60 L. T. 685 ; 37 W. R. 434—C. A.

Of Payments made by Strangers.]—*See* post, col. 1054.

Liability of Agent for Acts ratified by Principal.]—A., a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the governor of Sierra Leone to obtain the liberation of two British subjects, detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and, having landed at Dombocorro, took military possession of a barracoon belonging to B., who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, A. concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty he fired the barracoons of B., and carried away his slaves to Sierra Leone, where they were liberated. Some of B.'s goods used in the slave trade were claimed by the king as forfeited, and delivered up to him ; other goods were destroyed. These proceedings having been communicated to the lords of the admiralty, and the secretaries of state for the foreign and colonial departments, they respectively, by letter, adopted and ratified the act of A. :—Held, that the ratification of his act by the ministers of state was equivalent to a prior command, and rendered it an act of state, for which the crown was alone responsible. *Buron* v. *Denman*, 2 Ex. 167.

Liability of Principal for Wrongful Distress—Notice of Facts.]—A landlord authorised bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm ; the cattle were sold, and the landlord received the proceeds :—Held, that the landlord was not liable for the value of the cattle, unless he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts. *Lewis* v. *Read*, 13 M. & W. 834 ; 14 L. J., Ex. 295.

A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorise him to seize, unless he ratifies the broker's act, with knowledge of what he has done, but he is responsible for any irregularity by the broker in dealing with the distress he was authorised to make, as for selling the goods without notice of the distress, and without appraisement. *Haseler* v. *Lemoyne*, 5 C. B. (N.S.) 530 ; 28 L. J., C. P. 103 ; 4 Jur. (N.S.) 1279 ; 7 W. R. 14.

Conversion.]—If a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful. *Hilbery* v. *Hatton*, 2 H. & C. 822 ; 33 L. J., Ex. 190 ; 10 L. T. 39.

Evidence of.]—A., being the owner of a house, No. 17, employed B. to sell it. The plaintiff viewed No. 7 with a card obtained from B., and paid B. money, and received from him a receipt for it as and for a deposit on the purchase of No. 7, but, under a misapprehension, signed an agreement drawn up by B. for the purchase of No. 17 ; and then finding that under it he would acquire, not No. 7, but No. 17, applied to B. for repayment of his deposit, which A. authorised B. to make :—Held, that there was evidence of a ratification by A. of B.'s authority. *Benham* v. *Batty*, 12 L. T. 266 ; 13 W. R. 636.

An agent employed to buy goods, to be paid for at a future day, paid for them out of his own money, for the purpose of obtaining the discount allowed by the seller. The principal, with knowledge of these facts, directed the agent to clear the goods at the custom-house, which, in the ordinary course of business, would be done after payment of the price by the agent for his principal :—Held, a ratification or an adoption of the previous payment of the price, and that the agent might sue the principal for the price as money paid to his use at his request. *Sentance* v. *Hawley*, 13 C. B. (N.S.) 458 ; 7 L. T. 745 ; 11 W. R. 311.

The defendant employed R., as his agent, to agree with the plaintiff for the purchase of the plaintiff's interest in a leasehold house ; the plaintiff also held a stable under a demise distinct from that under which he held the house. The defendant did not authorise R. to purchase the stable, and R. represented to the defendant that he had purchased the lease of the house only ; but, in fact, R. had taken from the plaintiff an agreement in writing for the purchase of both. Afterwards, on the plaintiff stating to the defendant that such was the agreement, and requiring the defendant to take the stable, the defendant wrote and signed a letter to the plaintiff, stating that the defendant did not know what R. had agreed to, but must support him in all he had done for the defendant :—Held, that this was a ratification of R.'s agreement, whatever it might be, sufficient to constitute with it a signed memorandum, under s. 4 of the Statute of Frauds (29 Car. 2, c. 3), to charge the defendant with a contract to take the stable. Per Lord Campbell, C.J., Wightman and Erle, JJ., Crompton, J., not concurring. *Fitzmaurice* v. *Bayley*, 6 El. & Bl. 868 ; 26 L. J., Q. B. 114 ; 3 Jur. (N.S.) 264. Reversed on another ground in Ex. Ch., 8 El. & Bl. 664 ; 27 L. J., Q. B. 143 ; 4 Jur. (N.S.) 506 : the latter decision affirmed, 9 H. L. Cas. 78 ; 6 Jur. (N.S.) 1215 ; 8 W. R. 750.

A., who received the rents, and generally managed the property of B., in B.'s name, but without authority from her, signed a warrant to distrain the goods of C., a tenant, for rent in arrear, and after the goods had been distrained, informed B. thereof, who thereupon said that she should leave the matter in his hands :—Held, sufficient evidence that the distress was authorised or ratified and adopted by B. *Haseler* v. *Lemoyne*, 5 C. B. (N.S.) 530 ; 28 L. J., C. P. 103 ; 4 Jur. (N.S.) 1279 ; 7 W. R. 14.

An agent to receive rents and manage property having, without actual authority, agreed that his employer should take the stock of an outgoing tenant, at a valuation, and the valuation including the eatage of the fields in which the employer's cattle were afterwards placed by his servants, with his knowledge :—Held, a ratification of the whole valuation. *Rodwell* v. *Eden*, 1 F. & F. 542.

The plaintiffs, through D. & Co., who were

brokers, sold 682 bags of linseed, at a certain price per quarter, to H., and H. afterwards, through the same brokers, sold the linseed, at an increased price, to the defendant. The time for the defendant's payment of the purchase money was to arrive before the time fixed for H.'s payment. The defendant being in want of the linseed, to complete a contract he had made, sent one of his clerks to D. & Co., for the delivery order, with instructions to follow up the matter and get the order. The clerk was taken by D. & Co. to the plaintiffs, from whom he obtained the order only on his promising that the defendant would pay the plaintiffs for the seed, as the plaintiffs required to be paid before they parted with the order. On the following day the defendant sent a cheque to D. & Co. for 900*l.* on account of the linseed, which had not been measured at that time, so that the precise quantity of it was not then known. Upon its being measured, it was found that the plaintiffs were entitled, under their contract with H., to receive 971*l.* 15*s.* 6*d.* In an action by them against the defendant, to recover the difference between this amount and 900*l.*, the amount of the cheque:—Held, that there was no evidence to warrant a jury in finding a ratification by the defendant of the contract which the clerk had so made, it not being proved that the clerk had communicated to the defendant what had passed between him and the plaintiffs when he obtained the order. *Fitzgerald* v. *Dressler*, 7 C. B. (N.S.) 374; 29 L. J., C. P. 113; 5 Jur. (N.S.) 598.

By agreement made between J. S. and T. J. S. of the one part, and the plaintiff of the other part, J. S. and T. J. S. (father and son), as mortgagees with power of sale, agreed to sell to the plaintiff all their estate and interest in a piece of land adjoining other land of the plaintiff. This agreement was signed by the plaintiff, and by T. J. S. for himself and his father. The father and son, subsequently to the date of this agreement, sold the property to B., with notice of the agreement. Upon a bill filed by the plaintiff for specific performance:—Held (affirming 3 Sm. & G. 592; 4 Jur. (N.S.) 108; 6 W. R. 173), that, although the evidence was insufficient to show any antecedent authority in the son to bind the father, yet the latter had, by his subsequent conduct, ratified the contract. *Bigg* v. *Strong*, 4 Jur. (N.S.) 983; 6 W. R. 536.

A mortgagor, tenant for life, and a mortgagee having a charge on his interest, and also on the reversion, join in the appointment of receiver, who was to apply the rents partly in payment of other charges as well as those of the mortgagee, but chiefly in payment of the interest on his incumbrance; mortgagee dies, and then mortgagor:—Held, that receipt by executrix of the mortgagee of some payments from the receiver, after the death of the mortgagor, did not of itself constitute the receiver her agent, so as to make her responsible for his defaults, but that it was ground for inquiry, whether she had in fact adopted him as her agent. *Jones* v. *Smith*, 1 Hare, 43. Affirmed, 1 Ph. 245; 12 L. J., Ch. 381; 7 Jur. 431.

R. contracted with the assignees of Messrs. E. for the purchase of certain claims of the bankrupts against the estate of G. F. B. He represented that he acted on behalf of himself and M., who was clearly cognisant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. and M. This was submitted to M., who approved of it; and at that time he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, and refused to join in the purchase:—Held, that there was no evidence that M. had entered into any agreement, or that R. acted as his agent; and that the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognise it, though at one time it was apparent that he was willing to execute it, and the bill was dismissed against M. with costs; but as R. admitted the plaintiff's case, a decree was made against him, without costs. *Foligno* v. *Martin*, 22 L. J., Ch. 502.

In an action to recover the difference in the market value of certain shares in a railway sold, but not delivered to the plaintiff by the defendant, the plaintiff alleged a readiness on his part to comply with the conditions of the contract, and a tender of the money to the brokers from whom he had made the purchase:—Held, that inasmuch as the defendant, in a letter to the plaintiff's attorneys, in answer to one from them informing him that a tender had been made by the plaintiff to the brokers, had not repudiated the brokers as his agents, or denied their authority to receive the money, but evinced a wish to come into certain terms, such conduct amounted to a recognition by him that the brokers were authorised, and the tender was good and valid, and consequently that a verdict found for the plaintiff should not be disturbed. *Jackson* v. *Jacob*, 3 Bing. (N.C.) 869; 5 Scott, 79; 6 L. J., C. P. 315.

A merchant, being abroad, empowers persons in this country to receive moneys, adjust claims, and do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposit the deeds with the Hope Insurance Co. to secure 12,000*l.*, and covenant that he shall execute the mortgage; this 12,000*l.* was also secured by the bonds of sureties in sums corresponding to the shares of the partners. The power of attorney was not a sufficient authority; but the merchant, on his return, having sent a letter to the company requesting the loan of 6,000*l.*, "to be secured on his Essex property, which you now hold, in addition to the 12,000*l.* already advanced," and professing his readiness to execute the mortgage deed:—Held, that this was a confirmation of the security. *Munnings* v. *Bury*, 1 Tam. 147.

Some of the parties having paid the amount of the sums secured by them:—Held, that they had a lien on the property. *Ib.*

One of these sureties being a partner, held, that the sum paid by him was subjected to the partnership accounts. *Ib.*

A benefit building society which had never been incorporated, and had no power to borrow money, was allowed by its bankers to make large overdrafts, and the directors of the society signed a memorandum giving the bankers a lien upon all the society's deeds, to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance sheets, showing the amounts due to the bankers, were sent to all the members of the society, and adopted at the annual meetings. The society was afterwards ordered to be wound up, and as the over-

drafts were ultra vires, being a borrowing unauthorised by the rules, the official liquidator brought an action against the bankers to recover all moneys paid to them by the society :—Held, that there had been no ratification of the acts of the directors by all the members of the society, as such ratification could not be implied from merely seeing and not questioning the balance-sheet accounts which had been sent to them, and no ratification by the majority would bind the minority of the members. *Blackburn District Benefit Building Society* v. *Brooks*, 54 L. J., Ch. 1091 ; 29 Ch. D. 902 ; 53 L. T. 741—C. A.

As to ratification by company of acts of directors, *see further*, COMPANY.

B. AGENTS OF DIFFERENT KINDS.

General Agent — Authority of.] — When a general authority is given to an agent, this implies a right to do all subordinate acts incident to and necessary for the execution of that authority, and if notice is not given that the authority is specially limited, the principal is bound. *Collen* v. *Gardner*, 21 Beav. 540.

An agent employed generally to do an act is only authorised to do it in the usual way of business ; therefore, as stock is usually sold for money only, a principal is not bound by the acts of a broker employed by him, who sells it upon credit without a special authority, though acting bonâ fide and with a view to the benefit of the principal. *Wiltshire* v. *Sims*, 1 Camp. 258 ; 10 R. R. 673.

The appointment of a general agent for the sale of goods implies an authority to sell according to the ordinary course of trade. *Howell, Ex parte*, 12 L. T. 875.

A principal is bound by all the acts of his general agent ; but where he appoints an agent for a particular purpose, he is only bound to the extent of the authority given. *East India Co.* v. *Hensley*, 1 Esp. 112. And see *Attwood* v. *Munnings*, 7 B. & C. 278 ; 1 M. & Ry. 66 ; 6 L. J. (O.S.) K. B. 9 ; 31 R. R. 194.

When a person permits another to act as his general agent, he is bound by a contract made by the agent, although the latter declares himself as acting by procuration, and has received special instructions, which he exceeds. *Smith* v. *M'Guire*, 3 H. & N. 554 ; 27 L. J., Ex. 465 ; 6 W. R. 726.

Distinction between a general and special agent as to their powers to bind the principal. *Howard* v. *Braithwaite*, 1 Ves. & B. 209.

A contract in writing was made by A. on behalf of B., for the sale of lands to C., and the payment of the purchase money was to be made at a future day. Before that day arrived, A., the solicitor and general agent of B., applied to C. for part of the purchase money, which application C. complied with. Afterwards C. entered into a sub-contract for sale of the purchased lands to W., and sought to have paid him by W. that part of the purchase money which he had already paid to B.'s agent and solicitor in the transaction :—Held, that the general agency of A. on behalf of B. did not justify the payment to him by C. of part of the purchase money agreed to be paid originally by C., and that C. had no claim against W., nor any lien on the lands sold, for the amount paid by him to the agent of B. on the original purchase. The distinction between a particular and general authority explained. *Cotman* v. *Orton*, 1 Cr. & P. 304 ; 10 L. J., Ch. 18.

Agents permitted under circumstances to sign petition, principals being in the country. *Boldero, In re*, 1 Rose, 231.

—— **Evidence.**] — If a merchant constitutes any one his general agent for buying and selling in the market, either through a particular broker or otherwise, then, until revoked, the agency will continue, and the principal will be bound by his acts ; and the fact that such general agency once existed would be admissible as primâ facie evidence of its continuance, and the burden would be thrown on the principal to show that it had been determined ; but unless the agency was a general continuing agency to endure until revoked, the fact that there had been a separate agency in any number of previous cases would afford no evidence of agency in any subsequent transaction, however closely it might resemble all which might have gone before. *Pole* v. *Leask*, 33 L. J., Ch. 155 ; 9 Jur. (N.S.) 829 ; 8 L. T. 645—H. L. (E.)

Where an agent in London, who had been employed by a country tradesman to purchase goods on credit, bought goods and had them directed as usual, but intercepted them and had them appropriated to his own use :—Held, that the tradesman was liable, inasmuch as the agent must be deemed his general agent. *Gilman* v. *Robinson*, 1 Car. & P. 642 ; 1 R. & M. 226 ; 28 R. R. 795. S. P., *Todd* v. *Robinson*, 1 R. & M. 217.

Special Agent — Authority of.] — A special agent, under a limited authority, cannot bind his principal by any act beyond the scope of such limited authority. *Fenn* v. *Harrison*, 3 Term Rep. 757 ; 4 Term Rep. 177.

Where the holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged ; and B., finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A.'s telling him that he would indemnify him ; but the indorsee took it upon the credit of the names on the bill, without any knowledge of the real owner ; although such original owner afterwards promised to pay the bill, yet such promise cannot support an action against him by the indorsee, it being nudum pactum ; for, as A. was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. *Ib.*

Where a party dealing with others through an agent intrusts the agent with a written consent on his part to do a particular act, and privately instructs him not to give the consent except upon certain conditions not specified in it, and the agent gives the consent unconditionally, the principal cannot subsequently undo the effect of the consent so given, on the ground that the agent exceeded his authority, and it is the same, if the principal signed the consent at the suggestion of his agent without examining its contents, and supposing that the conditions were virtually, if not actually, comprehended within it. *Neeld* v. *Beaufort (Duke)*, 5 Jur. 1123. Affirmed, *Beaufort (Duke)* v. *Neeld*, 12 Cl. & F. 248 ; 9 Jur. 813—H. L. (E.)

Brokers.]—A person who, for brokerage and hire, negotiates and concludes bargains for stock,

is a broker in point of law. *Janssen* v. *Green*, 4 Burr. 2103.

A person who hires or procures for another, persons to be employed by him in the laying out and surveying of a line of railway, is not a broker. *Milford* v. *Hughes*, 16 M. & W. 174; 16 L. J., Ex. 40; 14 Jur. 990.

Bill Brokers.]—A bill broker is not a person known to the law with certain duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place. *Foster* v. *Pearson*, 1 C. M. & R. 849; 5 Tyr. 255; 4 L. J., Ex. 120.

A bill broker, who receives a bill from a customer merely for the purpose of procuring it to be discounted, has no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself; still less has he a right to deposit bills which are received merely for the purpose of discount as a security or part security for money previously due from him. *Haynes* v. *Foster*, 2 C. & M. 237; 4 Tyr. 65; 3 L. J., Ex. 153.

A bill broker who takes a forged bill to a money dealer to be discounted, although he does not indorse the bill, and is not cognisant of the forgery, is liable to repay the money received for the bill. *Gurney* v. *Womersley*, 4 El. & Bl. 133; 24 L. J., Q. B. 46; 1 Jur. (N.S.) 328. See also *Bishop, Ex parte*, *Fox, In re*, 50 L. J., Ch. 18; 15 Ch. D. 400; 43 L. T. 165; 29 W. R. 144—C. A.

London Brokers.]—A ship broker, or one who obtains on commission freight and passengers for vessels, is not a broker, within the statutes regulating the admission of brokers for the city of London. *Gibbons* v. *Rule*, 12 Moore, 539; 4 Bing. 301; 5 L. J. (O.S.) C. P. 176; 29 R. R. 570.

But a stock broker is, and must be admitted by the lord mayor and aldermen. *Clark* v. *Powell*, 1 N. & M. 492; 4 B. & Ad. 846; 2 L. J., K. B. 145.

An auctioneer is not. *Wilkes* v. *Ellis*, 2 H. Bl. 555.

—— **Need of Licence.**] — By an agreement between A. and B., who was a London colonial broker, made in January, 1865, it was agreed (for certain considerations) that on 1st January, 1866, B. should take A. into partnership for fourteen years. This agreement B. refused to fulfil, upon the ground that A. had not become a colonial broker, and that by 6 Anne, c. 16, and 57 Geo. 3, c. 60, it would have been a breach of the law to have allowed A. to act as a broker, not being admitted and licensed. On demurrer to a plea setting up these facts in answer to a declaration for not taking A. into partnership:—Held, that the plea was an answer to the action. *Hunter* v. *Wykes*, 15 L. T. 210; 15 W. R. 125.

See also *Cope* v. *Rowlands* and *Smith* v. *Lindo*, post, col. 954, and cases cols. 1005, 1006.

—— **Breach of Bond.**]—It is not a breach of the bond to employ a person who is not a sworn broker. *London Corporation* v. *Brandon*, Holt, N. P. 438; 2 Stark. 14.

Nor if he mistakes the quantity of goods he had bought, where he derived no advantage from such misstatement, though it was the cause of considerable loss to his principal. *Ib.*

A broker is authorised, from a previous course of dealing between himself and his principal, on an approval of a purchase by the latter, to make out a contract note in his own name, without inserting that of his principal; and, under such circumstances, does not violate the bond and oath imposed upon him by the regulations of the city of London, provided he makes an entry in his book in the name of his principal. *Kemble* v. *Atkins*, 1 Moore, 6; 7 Taunt. 260; Holt, N. P. 427; 17 R. R. 658.

—— **Liability to Discovery.**]—A sworn broker of the city of London is in the nature of a public agent; and, therefore, in an action against him for negligence in making a contract, the court will compel him to produce his books for the purpose of enabling the plaintiff to inspect them and take a copy of the contract. *Browning* v. *Aylwin*, 9 D. & R. 801; 7 B. & C. 204.

In one case it was held that a London broker might refuse to allow his employer to inspect his contract book, and it is no breach of his bond, if he at the same time adds it shall be produced at the proper time, and does produce it afterwards before a court of aldermen. *London Corporation* v. *Brandon*, Holt, 438; 2 Stark. 14.

A person who holds himself out as a broker of the city of London, and is employed by a person who believes him to be such, cannot, when sued by his principal for an account of his transactions as such broker on the principal's behalf, protect himself from discovery, in a suit in equity, on the ground that it may render him liable to penalties for having acted as a broker without having been duly admitted as such, imposed by 57 Geo. 3, c. lx. *Robinson* v. *Kitchin*, 8 De G. M. & G. 88; 25 L. J., Ch. 441; 2 Jur. (N.S.) 294; 4 W. R. 344—L.JJ.

A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. *Green* v. *Weaver*, 1 Sim. 404; 6 L. J. (O.S.) Ch. 1; 27 R. R. 214.

A stock broker is bound to produce his book, though it may criminate himself; because by 7 Geo. 2, c. 8, s. 9, every broker must keep a book and enter therein all purchases and sales made by him. *Rawlings* v. *Hall*, 1 Car. & P. 13.

—— **Priority of Creditors.**]—A stock and share broker of the city of London gave a bond to the corporation for due performance of his office. He appropriated to his own use large sums of money intrusted to him for investment. After his decease, upon a claim filed by a simple contract creditor:—Held, that the defrauded creditors had no priority by virtue of the bond, and that the amount due upon such bond was equitable assets for the benefit of all the creditors. *Naish* v. *Bryant*, 25 Beav. 533; 27 L. J., Ch. 748; 4 Jur. (N.S.) 550; 6 W. R. 573.

—— **Evidence of Acting as.**]—A witness stated that he took S. to an office in the city of London used by the defendant, and that upon that occasion four memoranda were made by the defendant, each of the sale by S. of 1,000*l.* stock to a person whose name did not transpire; that nothing was handed over at the time, and that he did not see any money pass:—Held, evidence of an acting by the defendant as a broker, within 6 Anne, c. 16 and 57 Geo. 3, c. lx. *Scott* v. *North*, L. R. 2 C. P. 270; 15 L. T. 508.

By 57 Geo. 3, c. lx. s. 2, it is provided, that anyone acting as a broker within the city of London without a licence shall be subject to a penalty of 100*l.* A. was an officer of a company formed for the purpose of carrying on the business of stock-broking, and in the course of business bought some stock for a customer, and signed the bought and sold notes, the principals not seeing one another, and no one else acting as broker in the transaction. A. had no licence to act as broker:—Held, that he was liable to the penalty. *Scott* v. *Cousins*, 38 L. J., C. P. 156; L. R. 4 C. P. 179; 20 L. T. 32; 17 W. R. 324.

The dealing in, or buying and selling for reward of, shares in English or foreign joint stock banks or companies, or the debts, stocks or securities of foreign governments, is an acting and assuming to act as broker, within 57 Geo. 3, c. lx. *Scott* v. *Jackson*, 19 C. B. (N.S.) 134.

Difference between Broker and Factor.]—The character of broker differs materially from that of factor; the former is not trusted with the possession of the goods, nor ought he to sell in his own name; but the latter, from its being usual for him to make advances upon the goods, has a special property in, as well as a general lien upon them; and may sell in his own name; and his principal will be bound by all the consequences of such sale, of which the right of setting off a debt due from the factor is one. *Baring* v. *Corrie*, 2 B. & Ald. 137; 20 R. R. 383.

Factor—Supercargo.]—If a supercargo is not to sell, nor receive a commission for the sale, he has not the proper distinguishing feature of a factor. *Matchless*, 1 Hag. 101.

Del credere Agents.]—A commission del credere is an absolute engagement to the principal from a broker, and makes him liable in the first instance, though the principal may resort to the person trusted as a collateral security. *Grove* v. *Dubois*, 1 Term Rep. 112; 16 R. R. 664, n. See *Bize* v. *Dickason*, 1 Term Rep. 285. *See* 4 R. R. 8.

An agreement by a factor to sell upon a del credere commission need not be in writing, not being a promise to answer for the debt, default, or miscarriage of another person, within the 4th section of the Statute of Frauds. *Couturier* v. *Hastie*, 8 Ex. 40; 22 L. J., Ex. 97. S. P., *Wickham* v. *Wickham*, 2 Kay & J. 478.

—— **Evidence of.**]—An agent who received annuities for his principal, sent him several accounts, in which he gave credit for instalments of annuities, but which he stated he had not yet received. He charged commission on them, as well as on the others which were received, and told his principal he might draw for the balance, which he did. In subsequent accounts no notice was taken of the instalments, which, in a previous account, were stated to be unpaid:—Held, sufficient evidence for a jury to infer a del credere commission, creating an agreement for the agent to be responsible to his principal for the annuities. *Shaw* v. *Woodcock*, 7 B. & C. 73; 9 D. & R. 889; 5 L. J. (O.S.) K. B. 294; 31 R. R. 158.

And see post *under special heads.*

Shipbrokers.]—*See* SHIPPING.

Stockbrokers.]—*See* STOCK AND STOCK EXCHANGE.

Insurance Brokers.]—*See* INSURANCE.

Auctioneers.]—*See* AUCTION AND AUCTIONEER.

C. DURATION OF AGENCY.

1. RETAINER FOR FIXED PERIOD.

No implied Condition that Business shall continue.]—When two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named. *Rhodes* v. *Forwood*, 47 L. J., Ex. 396; 1 App. Cas. 256; 34 L. T. 890; 24 W. R. 1078.

A. and B. agreed "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as A. should continue to carry on business at the town of Liverpool, A. should be the sole agent there for the sale of B.'s coals, and that B. would not employ any other agent there for that purpose. There were stipulations in the agreement that B. should have the entire control over the prices for which, and the credits at which, the coals were to be sold; and that if A. could not sell a certain amount per year, or B. could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, B. sold the colliery itself. In an action by A. for damages for breach of the agreement thereby occasioned:—Held, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to Liverpool. *Ib.*

A declaration stated that, by agreement in writing between B., since deceased, and the defendant, of the one part, and the plaintiff of the other part, B. and the defendant, who at the date of the agreement were carrying on business as stone merchants in co-partnership, appointed the plaintiff their sole London agent, for a period of four years and a half, and the plaintiff, in consideration of the premises, agreed to accept the appointment upon the terms that B. and the defendant should pay the plaintiff 2*l.* 10*s.* per cent. on all accounts received by them for stone sold by the plaintiff, or supplied by B. and the defendant to any person originally introduced to them by the plaintiff. Breach, that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, and did not nor would execute certain orders for stone procured by the plaintiff in his capacity of agent:—Held, that the parties contracted with reference to the existing partnership business, and that the contract was to employ the plaintiff for a period of four years and a half, subject to the implied condition that all parties so long lived. *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L. J., Ex. 207; 4 L. T. 19; 9 W. R. 476.

Auctioneer's Authority.]—Where an auctioneer filled up a memorandum on behalf of the purchaser, not at the sale, but several days afterwards, it was held that his authority had ceased, and that there was no memorandum in writing sufficient to satisfy the statute of frauds. *Bell* v. *Balls*, 66 L. J., Ch. 397; [1897] 1 Ch. 663; 76 L. T. 254; 45 W. R. 378.

2. DEATH OR BANKRUPTCY.

Death of Principal.]—A retainer under a contract to endeavour to sell goods on behalf of the

owner, on the terms of receiving a stipulated sum in the event of the sale, but nothing, in the case of failure, is revocable by the employer before sale, even after endeavours have been made, and is revoked in law by his death after such endeavours; so that even if his personal representative confirms the sale under such contract, he will not (unless he knows of, and confirms the terms of the contract) be liable to pay the stipulated sum. *Campanari* v. *Woodburn*, 15 C. B. 400; 3 C. L. R. 140; 24 L. J., C. P. 13; 1 Jur. (N.S.) 17; 3 W. R. 59.

Bankruptcy of Principal.]—In 1828 the plaintiff mortgaged freehold property to B., and in 1832, being about to reside abroad, he gave a full power of attorney to the defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the plaintiff settled accounts with the defendant, showing a large balance due to the defendant, which the plaintiff agreed to secure by a mortgage of his real estates when required. In 1845 the plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the defendant continued to receive the rents and profits. In 1849 the defendant took a transfer himself of B.'s mortgage, to which the plaintiff was not a party. In 1865 the defendant wrote a letter to the plaintiff expressing his readiness to settle all accounts. In 1877 the plaintiff's bankruptcy was annulled, and the plaintiff brought an action against the defendant claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The defendant pleaded the statute of limitations:—Held, that on the plaintiff's bankruptcy the defendant ceased to be the agent and attorney of the plaintiff, and did not become the agent of the assignee. *Markwick* v. *Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361—C. A.

Where authority had been given previous to an act of bankruptcy by the bankrupts to the defendant in the course of mutual dealings to receive the purchase money of their estate, and to place it to their account, and such authority had been acted upon before notice of an act of bankruptcy:—Held, that such authority was not revoked by the act of bankruptcy; that the payment thereof to the defendant was a rightful payment; that being so received it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy, and that the defendant was entitled to set off against it, in an action brought by the trustee in bankruptcy, the debt due from the bankrupts to him. *Elliott* v. *Turquand*, 51 L. J., P. C. 1; L. R. 7 App. Cas. 79; 45 L. T. 771; 30 W. R. 477.

Winding-up of Company—Proof in.]—An agent who has been engaged by a company for a fixed term, and who is to receive a commission on all orders obtained through him, as remuneration for his services, is entitled upon the determination of the agreement by the winding-up of the company, to claim compensation in respect of the commission which he might otherwise have earned during the unexpired portion of the term. *Patent Floor Cloth Co., In re, Dean and Gilbert's Claim*, 41 L. J., Ch. 476; 26 L. T. 467.

By articles of association of a company it was provided that, in case of the dismissal of the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the company, and he was appointed liquidator. He had paid 2,000*l.* on his shares, and received 400*l.* for remuneration as liquidator:—Held, that the winding-up was equivalent to his dismissal, and that he was entitled to prove in the winding-up for 2,000*l.*, subject to a set-off of the 400*l.* *Imperial Wine Co., In re, Shirreff's Case*, 42 L. J., Ch. 5; L. R. 14 Eq. 417; 20 W. R. 966.

A person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10*l.* per cent. on all business transacted. Before the five years were expired, the company was wound up voluntarily:—Held, that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years. *English and Scottish Marine Insurance Co., In re, Maclure, Ex parte*, 39 L. J., Ch. 685; L. R. 5 Ch. 737; 23 L. T. 685; 18 W. R. 1122.

By the articles of association of a company a manager was appointed; and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay to him a certain sum within one month from the time of his removal. The company was ordered to be wound up:—Held, that he was entitled to prove in the winding-up for the sum specified by the articles without any such deduction being made. *London and Scottish Bank, In re, Logan, Ex parte*, L. R. 9 Eq. 149; 21 L. T. 742; 18 W. R. 273.

3. Revocation.

When Possible.]—Mere advances made by a factor, whether at the time employed as such or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement that the authority shall not be revocable. *De Comas* v. *Prost*, 2 Moore, P. C. (N.S.) 158; 11 Jur. (N.S.) 417; 12 L. T. 682; 13 W. R. 595.

Whether such an agreement has been made or may be properly inferred, is a question upon the evidence for the jury. *Ib.*

A factor to whom goods have been consigned generally for sale, and who has subsequently made advances to his principal on the credit of the goods, has no right to sell them contrary to the orders of his principal, on the latter neglecting on request to repay the advances, inasmuch as his authority to sell does not become by reason of the unpaid advances irrevocable, as an authority coupled with an interest. *Smart* v. *Sanders*, 5 C. B. 895; 17 L. J., C. P. 258; 12 Jur. 751.

The mere fact of an agent being bound in honour to complete the contract which he is negotiating for his principal, where he, the agent, is under no legal liability if he refuses to complete, does not prevent the principal withdrawing his authority any time before the agreement is completed. *The Vindobala*, 58 L. J., P. 51; 14 P. D. 50; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. C. 376—C. A.

A declaration stated that defendant was a commission agent, and that the bankrupts before their bankruptcy delivered to him certain goods, which were not to be sold at less than their invoice prices. That at the time of the bankruptcy a

large quantity of these goods remained in defendant's hands unsold. That plaintiffs, being assignees of the bankrupts, directed the defendant not to sell at less than invoice prices until he had rendered an account to them of the goods, and plaintiffs had been enabled to judge, and had determined, and given defendant notice, whether they would redeem the goods without sale or not. Breach, that defendant, after the bankruptcy, and after he had rendered an account of the goods, sold them at less than the invoice prices, although defendant, after account rendered, and before sale, was required by plaintiffs and they gave him notice to send the goods to England, and that they would redeem them without sale. Defendant pleaded that after the bankrupts had caused the goods to be delivered to him, and before, and at, and after the bankruptcy, and whilst the goods remained unsold in his hands, the defendant, for advances made before the bankruptcy, had a lien upon the goods. That the bankrupts before the bankruptcy, and after delivery of the goods, in consideration of the advances by the defendant agreed with the defendant, that he should sell the goods at the best market prices, and realise thereon against his said advances. That the defendant, relying upon the authority to him to sell and realise against his said advances, permitted his advances to remain unpaid for a long time, to wit, until, and at, and after the bankruptcy. That after the bankruptcy, and after defendant had rendered an account of the goods, and whilst they were unsold, the plaintiffs did not offer to pay defendant his advances or lien, or to redeem the goods before defendant should part with them. That defendant, for the purpose of realising against his said advances, the goods being deteriorated and the market getting worse, after he was required to send the goods to London to be redeemed, sold them; and that after credit given for the price of the goods, the plaintiffs, as assignees, were indebted to defendant in a large sum for the advances made by him:—Held, first, that the breach which varied from the statement of the duty, by alleging that plaintiffs gave defendant notice to send the goods to England, did not render the count bad; secondly, that the plea was bad, as there was no consideration which precluded the bankrupts from countermanding their authority to the defendant to sell, and that the assignees had the same power. *Raleigh* v. *Atkinson*, 6 M. & W. 670; 9 L. J., Ex. 206.

Agreement to take Shares — Underwriting Contract—Authority to use Name.]—Where an agreement is entered into on a sufficient consideration whereby an authority is given which secures some benefit to the donee of the authority, such an authority being coupled with an interest, is irrevocable. *Hannan's Empress Gold-mining and Development Co., In re, Carmichael, Ex parte*, 65 L. J., Ch. 902; [1896] 2 Ch. 643; 75 L. T. 45—C. A.

In consideration of an agreed commission, the applicant entered into an underwriting contract to subscribe for a certain number of shares in a company, and agreed that the contract should be irrevocable, and by the same document authorised the person with whom he contracted to apply for shares in his name. The donee of the authority was a vendor of certain property to the company, and one of the objects of the contract was to provide funds for the purchase of the property. The applicant purported to revoke the authority previously to the allotment of shares:—Held, that the authority was irrevocable, and that the applicant was not entitled to have his name removed from the register of members of the company in respect of shares allotted to him in pursuance of an application made in his name by the donee of the authority. *Ib.*

Of Auctioneer's Authority.]—Quære, whether on a sale by auction under ordinary circumstances a person to whom a lot has been knocked down can revoke the authority conferred by him on the auctioneer to sign a memorandum on his behalf at the time. *Bell* v. *Balls*, 66 L. J., Ch. 397; [1897] 1 Ch. 663; 76 L. T. 254; 45 W. R. 378.

Auctioneers advanced a sum of money to S., who agreed to put a miscellaneous collection of property in their hands for sale, from the proceeds of which they were to retain the money advanced. A part only of the property was delivered and sold, but it realised less than the sum advanced; S. refused to part with the remainder of his collection:—Held, that the court would not compel the performance of the contract for an agency; that S., if he satisfied the claims of his agents, was at liberty to countermand the sale of his property, that the advance of the money to S. was not made on the security of the property mentioned in the contract, and that the claims of the agents must be determined in a court of law. *Chinnock* v. *Sainsbury*, 30 L. J., Ch. 409; 6 Jur. (N.S.) 1318; 3 L. T. 258; 9 W. R. 7.

When restrained by Court.]—A grant was made by Y., bishop of Ely, in 1801, to P. for his life of the ancient office of receiver of the rents of the lands belonging to the see of Ely. For a long series of years the receiver for the time being had not only received the rents, but had prepared leases, surrenders and counterparts of leases, had registered leases and assignments of leases in a register kept by the bishop, and had made searches in the muniment room in the residence of the bishop whenever requested by persons requiring information contained in the register and records belonging to the bishop, for all which duties he received fees. In 1836, A., immediately after his appointment as bishop, sent a notice to P. not to prepare any more leases, surrenders, or counterparts of leases, and not to receive any more rents. P. filed a bill against A., praying that it might be declared that P. was entitled to exercise all the duties and receive the perquisites hitherto exercised and received by the receiver, and that the bishop might be restrained from interfering with such exercise and enjoyment:—Held, that whatever might be the legal right of P. to the office and to its alleged appurtenances, no relief could be given to him in equity, on the grounds of the hardship of forcing the services of a stranger in an office of trust upon the bishop and the want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him compelling their specific performance. *Pickering* v. *Ely (Bishop)*, 2 Y. & Coll. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

The duties of an agent of a limited company being in the nature of personal services, and, as such, incapable of being enforced in equity, the court refused to restrain the directors from acting upon or enforcing the resignation of A., whose management and agency were made a

prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association. *Mair* v. *Himalaya Tea Co.*, L. R. 1 Eq. 411; 11 Jur. (N.S.) 1013; 14 W. R. 165.

In refusing to grant the injunction, the court put the directors upon an undertaking not to take advantage, in proceedings at law to recover the amount due on A.'s shares, of his resignation, which was alleged by him to have been wholly conditional on his being relieved from all liability in respect of shares. *Ib.*

Removal of Agent by Court.]—An agent imposed by will upon the devisee of an estate may be removed by this court if he conduct himself improperly. *Lawless* v. *Shaw*, Ll. & G. t. Sugd. 172.

Service of Crown.]—Semble, a contract of service with the crown for a fixed term of years is determinable at the pleasure of the crown. *De Dohse* v. *Reg.*, 66 L. J., Q. B. 422, n.—H. L. (E.)

D. RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT.

1. Duty of Agent Generally.

Amongst the most important duties of an agent are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of others. *Clarke* v. *Tipping*, 9 Beav. 384.

An agent cannot employ himself for a third person when he has agreed to give up the whole of his personal services to his principal. *Thompson* v. *Havelock*, 1 Camp. 527; 10 R. R. 744.

A traveller, about to set up in business on his own account, may solicit orders from his master's customers, provided the orders he takes at the time are for his master. *Nichol* v. *Martyn*, 2 Esp. 732; 5 R. R. 770.

Where an agent is authorised, from a previous course of dealing between himself and his principal, to do so, he may, on an approval of a purchase by the latter, make out a contract note in his own name, without inserting that of his principal, provided he makes an entry in his book in the name of his principal. *Kemble* v. *Atkins*, 1 Moore, 6; 7 Taunt. 260; Holt, N. P. 427; 17 R. R. 658.

The mere relation of principal and factor confers ordinarily an authority to sell at such times and at such prices as the factor may, in the exercise of his discretion, think best for his employer; but if he receives the goods subject to any special instructions, he is bound to obey them. *Smart* v. *Sanders*, 3 C. B. 380; 16 L. J., C. P. 39; 10 Jur. 841.

The court deals severely with any irregularities on the part of an agent, and requires him to act strictly in all matters relating to such agency, for the benefit of his principal. *Gray* v. *Haig*, 20 Beav. 219.

It is imperative upon an agent to preserve correct accounts of all his dealings and transactions; and the loss, and, still more, the destruction of such evidence by the agent, falls most heavily upon himself. *Ib.*

If an agent, by his own conduct, makes it impossible to ascertain the amount of profit realised, he will be disallowed the commission, which otherwise and according to the contract, he would be entitled to claim. *Ib.*

An agent is bound to act in the best manner he can for his principal, and in matters which are left to an agent's discretion he can only act for the benefit of his principal. *Pariente* v. *Lubbock*, 20 Beav. 588; 8 De G. M. & G. 5.

A foreign merchant directed his correspondent in England to treat any consignment as his son's (who was in England and superintended the sales and purchases), and to acknowledge him owner of the money, so that he might dispose thereof as if it was his own money. By the direction of the son, moneys in the hands of the correspondent, belonging to the father, were applied by him in paying a private debt of the son to the correspondent:—Held, that the transaction was valid. *Ib.*

Duty to Recognise Principal's Superior—Government Agent.] — An agent who had received his instructions from a local subordinate government is bound to recognise the authority of the supreme government, with respect to which his immediate principal is subordinate, in the subject-matter of the agency. *Spain (Queen)* v. *Parr*, 39 L. J., Ch. 73; 21 L. T. 555; 18 W. R. 110.

The London agent, who was also a member of a firm, who was commissioned to sell goods on behalf of the local government of a Spanish colony, was held to be justified in refusing to give them up to the Spanish consul-general in England till he had communicated, through his immediate principals, with the local government. *Ib.*

2. Delegation of Authority.

A broker cannot, without the assent of his principal, delegate his authority. *Henderson* v. *Barnewell*, 1 Y. & J. 387; 30 R. R. 799.

A., employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it without the privity of the defendant:—Held, that there was no privity between them, and therefore, that the plaintiff was not entitled to recover his charges, or those of his agents, from the defendant, although the latter had not paid the amount to A. *Schmaling* v. *Tomlinson*, 1 Marsh. 500; 6 Taunt. 147.

A factor has no right to send away goods to another person, when they have been consigned to him for sale at a particular place, though he is unable to sell them there. *Catlin* v. *Bell*, 4 Camp. 183.

A factor, who was a partner in a house abroad, to whom goods were consigned, made advances to the consignor, to be repaid out of the proceeds:—Held, that the consignees were not authorised to purchase bills for the account and risk of the consignor. *Lucas* v. *Groning*, 7 Taunt. 164; 2 Marsh. 460; 1 Stark. 391.

An agent employing a sub-agent, though with the knowledge of the principal, is nevertheless liable to the principal for moneys received by the sub-agent. *Skinner* v. *Weguelin*, 1 Cab. & E. 12.

By Statute—To Committee of Board.]—Where a board, constituted by act of parliament, are by it authorised to delegate any of their powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert, and it is not competent to the com-

mittee to apportion among themselves the duties so delegated to them; and one of them acting alone pursuant to such apportionment, cannot justify his acts under the statute. *Cook* v. *Ward*, 2 C. P. D. 255.

Implied Right of.]—When the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, by the law in force in Lower Canada, the party originally authorised as the agent may appoint a deputy. *Quebec and Richmond Ry.* v. *Quinn*, 12 Moore, P. C. 232.

Employment of Clerk.]—An authority given to A. to draw bill in the name of B. may be exercised by the clerk of A. *Sutton, Ex parte*, 2 Cox, 84.

Vendor is bound by signature of agent's clerk thus: "Witness, E. P., for Mr. S., agent for the seller," upon evidence of assent; but clerks in general have no authority to bind the principal. *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith, 233; 7 R. R. 167.

A., tenant for life, with a power to lease by deed, duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building, under an agreement for a lease evidenced only by the memorandum in writing entered in the book of A.'s authorised agent, signed not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business. A. dies, and on a bill for specific performance against the remainderman:—Held, first, no sufficient agreement in writing: second, the plaintiff not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement. *Blore* v. *Sutton*, 3 Mer. 237; 17 R. R. 74.

Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done. *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377.

Memorandum Filled in by Auctioneer's Clerk.]—On a sale by auction the auctioneer's clerk cannot in the absence of special authority from the purchaser fill up a memorandum on behalf of the purchaser so as to bind him, and the exigencies of the case do not require that the auctioneer should be held entitled to delegate to his clerk the authority which he himself has to bind the purchaser by writing down his name on a copy of the particulars and conditions of sale. *Bell* v. *Balls*, 66 L. J., Ch. 397; [1897] 1 Ch. 663; 76 L. T. 254; 45 W. R. 378.

3. Right of Agent to Commission and Remuneration.

a. Generally.

Conclusion of Bargain.]—In general, where a binding bargain has been procured by a commission agent and accepted by the party employing him to procure orders, the agent is entitled to his commission. *Lockwood* v. *Levick*, 8 C. B. (N.S.) 603; 29 L. J., C. P. 340; 7 Jur. (N.S.) 102; 2 L. T. 357; 8 W. R. 583.

Where such agent bargains with his employer to receive a commission "on all goods bought" by persons, orders from whom are obtained by him, and an order so obtained is accepted by the employer, who, however, is not able to execute the order, and derives no benefit from it, he is, nevertheless, liable for the commission. *Ib.*

Appointment as Sole Agent—Principal cannot effect Sales in Agent's District.]—The plaintiff was appointed sole agent for the defendants in a certain district at a fixed scale of commission and subject to certain restrictions as to discount, &c., to be offered by him, but was unable to transact any business owing to the defendants interfering in his district, behind his back, and underselling him. In an action to recover commission on all sales effected by the defendants in the plaintiff's district since his appointment:—Held, that the defendants were not entitled to appoint any other agent in the district, nor were they entitled to effect any sales in the district, except through the plaintiff's agency. *Snelgrove* v. *Ellringham Colliery Co.*, 45 J. P. 408.

Orders sent after Termination of Service.]—On a contract to pay a traveller commission without any express terms, there is no obligation to pay it on orders from customers originally obtained by the agent, but sent after he has ceased to be so. *Nayler* v. *Yearsley*, 2 F. & F. 41.

A contract of agency provided that the agent was to be paid a commission for work done or supplied in Ireland from the date of the contract at 6¼ per cent. on amount of orders; that the contract should be terminable on notice—neither party to be entitled to compensation, but the agent to receive (on the termination of the contract) such commission as should have been earned, and should be or become payable:—Held, that, on the terms of the agency contract, the plaintiff (the agent) was not entitled to be paid commission in respect of work, the order for which was obtained by his negotiation, but which was not done until after the agency had been determined. *Hilton* v. *Helliwell*, [1894] 2 Ir. R. 94.

Fulfilment of Contract.]—A. entered into a contract with B. to proceed to the coast of Africa, and there procure and ship, for B. in England, palm oil and other produce; A. to receive as a remuneration for his services a commission of 6*l.* per cent. on the net proceeds of the dry merchantable palm oil received by B.; the agreement further provided that A. should not be entitled to any commission on "any wet, dirty or unmerchantable palm oil" that might be received:—Held, that A. was entitled to no commission in respect of palm oil which was, in the understanding of the trade, "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price. *Warde* v. *Stuart*, 1 C. B. (N.S.) 88; 5 W. R. 6.

By an agreement between A. and B. it was stipulated that A. should for a term receive half the profits arising from the sales of an article called Russian black, manufactured by him from the produce of certain quarries of B.:—Held, that A. was not entitled to claim anything in respect of Russian black not sold as such, but used by B., in the proportion of about one-third, mixed with cement manufactured and sold by him. *Fullwood* v. *Akerman*, 11 C. B. (N.S.) 737.

Revocation.]—The defendant employed the plaintiff to negotiate a loan on some of the defendant's property, the plaintiff to be paid commission if he procured the loan, but none if he did not. Before the plaintiff had done anything in the matter, the defendant wrote to him, varying the terms on which he would accept the loan. The plaintiff endeavoured to obtain it on the latter terms, but, failing to do so, obtained an offer for a loan on the terms of the first authority, which the defendant refused to accept:—Held, that, as the first authority had been revoked, the plaintiff was not entitled to a commission for what he had done, neither was he entitled to claim for his services in endeavouring to procure the loan under the substituted terms, inasmuch as he did not obtain it under those terms. *Toppin* v. *Healey*, 11 W. R. 466.

Held, also, that the plaintiff might have treated the revocation of the first terms of his employment as a breach of contract, and have had an action thereon against the defendant. *Ib.*

Fraudulent Agreement for.]—The European society, through their paid and confidential agent, C., negotiated with the Etna company, through their paid and confidential agent, O., a transfer by the latter of a branch of their business to the former for 15,000*l.*; C. claimed from the Etna company, as a commission or a bonus for his services in the transaction, 2,000*l.*, which the latter having refused, he contrived that the purchase money to be paid by his employers should be increased to 17,000*l.*, out of which the Etna company secretly agreed to pay him the 2,000*l.* On the winding up of the affairs of the Etna company, O.—alleging that there was an agreement between C. and him that he should get half the commission or bonus—made a claim of 1,000*l.* against the latter company:—Held, that such a claim could not be allowed. *Etna Insurance Co., In re, Owens, In re*, Ir. R. 7 Eq. 235. Affirmed, Ir. R. 7 Eq. 424.

Proof of Terms.]—The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to its payment have been reduced into writing. *Whitfield* v. *Brand*, 16 M. & W. 282; 16 L. J., Ex. 103.

Right of Agent to Deduct from Moneys in his hands.]—A. employs B., as his factor, to sell; B. sells on credit, and, before the money is paid, dies indebted by specialty more than his assets will pay. This money shall be paid to A., and not to the administrator of B., as part of his assets, but thereout must be deducted what was due to B. for commission. A factor is in nature of a trustee only for his principal. *Burdett* v. *Willett*, 2 Vern. 638.

Administrator of a clothier brings an action against the factor for cloths sent by the clothier to the factor; the factor cannot in equity deduct, out of the value of the cloth, the money owing to him from the clothier. *Chapman* v. *Derby*, 2 Vern. 117.

b. Who may Recover.

Broker—Necessity for Licence.]—A broker cannot maintain an action for work and labour, and commission for buying and selling stock unless duly licensed by the mayor and aldermen of the city of London. *Cope* v. *Rowlands*, 2 M. & W. 149; 2 Gale, 231; 6 L. J., Ex. 63.

A dealer in London in shares in a public company (whether British or foreign) is a broker within 6 Anne, c. 16, and incapable of suing for his commissions unless duly licensed. *Smith* v. *Lindo*, 4 C. B. (N.S.) 395. Affirmed on appeal, 5 C. B. (N.S.) 587; 27 L. J., C. P. 335; 4 Jur. (N.S.) 974; 6 W. R. 748—Ex. Ch.

—— **Where also Mortgagee.**]—Where brokers are directed by the order of the court to take possession, for the purpose of selling property:—Held, that they were entitled to the ordinary remuneration, notwithstanding they happen to be mortgagees. *Arnold* v. *Garner*, 2 Ph. 231; 16 L. J., Ch. 329; 11 Jur. 339.

Managing Owner of Ship.]—The procuring of charters and freights is one of the ordinary duties incidental to the position of a managing owner of a ship; and in the absence of a special contract he is not entitled to retain, as against the ship, commissions on the charters or freights procured, whether he is acting as shipbroker himself or employing other brokers. *Williamson* v. *Hine*, 60 L. J., Ch. 123; [1891] 1 Ch. 390; 63 L. T. 682; 39 W. R. 239; 6 Asp. M. C. 559.

Executor.]—Agents, being also appointed executors of the principals, are not entitled to commission upon remittances from India by the testator, not received till after his death. *Hovey* v. *Blakeman*, 4 Ves. 596.

Co-Partners.]—In taking the accounts between three partnerships, the first of A. & B., the second of A. B. & C., the third of B. & C., the partnership of B. & C. cannot charge commission for collecting the debts of the other two partnerships. *Whittle* v. *M'Farlane*, 1 Knapp, 311.

Sub-Agent.]—If A. employs B. to procure him a loan on the usual terms, and B. employs C., who obtains it on other and different terms, A. will not be liable to C. either for commission or for remuneration, unless he ratifies these terms and recognises his employment. *Mason* v. *Clifton*, 3 F. & F. 899.

c. Who Liable for.

Debts contracted in Jamaica made payable in London. The expense of commission to agent remitting the money falls on debtor. *Cash* v. *Kennion*, 11 Ves. 314.

d. Business effected through Agent's Instrumentality.

When Agent entitled to.]—The defendants agreed with the plaintiff to remunerate him "in the event of their taking into partnership" one M., introduced by the plaintiff. The defendants afterwards entered into a written agreement with M., by which it was agreed that they should enter into partnership as and from a specified future day, when a formal deed of partnership should be executed, carrying out the terms of the agreement. This agreement recognised and adopted the agreement between the plaintiff and defendants. No partnership deed was ever executed, nor did M. ever in fact act as a partner of the defendants:—Held, that there was evi-

dence of a "taking into partnership" within the meaning of the agreement between the plaintiff and defendants, so as to entitle the plaintiff to his commission. *Harris* v. *Petherick*, 39 L. T. 543.

K. promised R. 2½ per cent. commission if he would find a purchaser of his land at 3,000*l*. R. introduced to K. a person who took a lease for 1,000 years at 150*l*. a year, with the option of purchasing for 3,000*l*. within twenty years:—Held, that K. had practically found a purchaser, and was entitled to his commission. *Rimmer* v. *Knowles*, 30 L. T. 496; 22 W. R. 574.

An auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of 2½ per cent. if the estate should be sold; and in case the estate should not be sold, he was to be paid 25*l*. as a compensation for his trouble and expense. Having put up the estate to auction, and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person without any further intervention of the agent, became the purchaser:—Held, that the sale having been effected through the means of the agent, he was entitled to the stipulated commission. *Green* v. *Bartlett*, 14 C. B. (N.S.) 681; 32 L. J., C. P. 261; 8 L. T. 503; 11 W. R. 834.

A. having a ship to sell told W. that if he was the means of introducing a purchaser, a commission on the purchase money would be paid to him. W. having an offer through B., A. agreed that, if successful, W. and B. should share the commission. That offer fell through, also a second offer from C. to B. After some interval C. wrote direct to A. introducing another person, who eventually bought the ship. The jury found that W. was authorised to find a purchaser, and that the purchaser was found through B.:—Held, that C., as agent of the purchaser, having acted on information received from B., W. was entitled to his commission, the chain of connection being sufficiently made out. *Wilkinson* v. *Alston*, 48 L. J., Q. B. 733; 41 L. T. 394; 44 J. P. 35—C. A.

B. was an auctioneer. C. put a ship into his hands for sale, and it was agreed that if it was not sold by auction, but if a subsequent sale were effected to any person, led to make an offer "in consequence of B.'s mention or publication for auction purposes," he was to be entitled to a commission. The ship was not sold by auction, but afterwards P., having been present at a conversation which led him to believe that S. would purchase the ship, wrote to B., "noting that he had the ship in his hands," to inquire the price, &c. P. then communicated with S., who ultimately became the purchaser, but not through the agency of P.:—Held, that there was evidence to go to the jury that the sale was effected in consequence of B.'s mention or publication, within the meaning of the agreement, and that B. was entitled to his commission. *Bailey* v. *Chadwick*, 39 L. T. 429—H. L.

The plaintiffs, house agents, were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on the plaintiffs' books, and they gave a few cards to view. U., who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at the plaintiffs' office and obtained a card to view the premises, the terms being written by the plaintiffs' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price (2,200*l*.) too high, and he went away. U. had no further communication with the plaintiffs; but he subsequently renewed his negotiation with a friend of the defendant's, and ultimately became the purchaser of the lease for 1,700*l*.:—Held, that there was evidence for a jury that U. had become the purchaser of the premises "through the plaintiffs' intervention," and consequently that they were entitled to the stipulated commission. *Mansell* v. *Clements*, L. R. 9 C. P. 139.

At the trial the judge put the following question to U.:—"Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house?" and, overruling an objection by the defendant's counsel, received his answer, which was, "I should think not":—Semble, that the answer was properly received. *Ib.*

A. was appointed agent of B. at a salary of 200*l*. per annum, and he was in addition to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B.'s estate. In an action by A. for commission for letting houses for B., the evidence was that the agreement for the letting was entered into with another agent, K., but that the tenants were introduced to K. by A.:—Held, that, under the terms of the agreement, A. was entitled to the commission. *Bray* v. *Chandler*, 18 C. B. 718.

On January 7th, 1887, an estate agent, in whose hands the debtor had placed certain property for sale, introduced to such debtor a person with a view to purchase, but no agreement could then be come to as to terms, and the debtor a few days afterwards presented his own petition in bankruptcy. On January 17th, 1887, further negotiations took place between the person so introduced and the trustee in the bankruptcy in respect of the property, and on January 24th, 1887, the purchase was completed, but a proof subsequently tendered by the estate agent for his commission was rejected by such trustee:—Held, that the sale was brought about in consequence of the introduction, and was traceable thereto. *Durrant, Ex parte, Beale, In re*, 5 Morrell, 37.

The plaintiffs were employed by the defendant to sell an estate for him upon the terms that they should be paid a commission on the amount of such sale. The estate was divided into lots, some of which were purchased by one A., and upon the completion of that purchase the plaintiffs received their commission. The defendant withdrew his authority to sell from the plaintiffs, and A. subsequently purchased the remainder from the defendant by private contract:—Held, that the jury were entitled to find that the ultimate sale was not due to any introduction of the plaintiffs, so that they could not recover their commission. *Lumley* v. *Nicholson*, 34 W. R. 716.

Plaintiff, a shipbroker, introduced one of the defendants to another broker, B. B. was also a merchant and shipowner, and through B. defendants were introduced to a third shipbroker, C., and through C. defendants' ship was chartered by S. The plaintiff sued defendants for commission in respect of that charter; the jury found for plaintiff:—Held, that it was a question

upon the evidence for the jury to decide, and the judge at the trial not having been dissatisfied with the verdict, the court refused to set it aside. *Kynaston* v. *Nicholson*, 8 L. T. 671.

—— **Where two Agents Employed.**]—A. and B., land agents, were severally employed to sell an estate for C. D. called on A. to inquire after another estate, and was told by A. that it was not in the market, but that C.'s estate was to be sold. D. took from A. a particular of the estate, and afterwards meeting B., the other agent, negotiated with him the terms of the purchase, which was afterwards completed. A. brought an action against C. for commission on the sale, which was proved to be according to the usage 2*l.* per cent., and payable to the agent who found the purchaser:—Held, first, that the question for the jury was, whether they thought that, in fact, A. had purchased; and, secondly, that if they thought he had, and gave their verdict for him, they were not bound to give him the full amount of the commission, though the fact of that commission being usually paid was some evidence to guide them in their decision. *Murray* v. *Currie*, 7 Car. & P. 584.

Business Proximate Result of Agency.]—In an action to recover for commission for the procuring of a loan it is not enough to prove that the loan has indirectly, as a remote and casual consequence, resulted from the intervention of the party who sues; but it must be proved that the loan was obtained by means of his agency, or by means of some sub-agent of his, from the parties to whom he applied; and if all that appears is that the party to whom he introduced the subject, declining the proposal, mentioned it to a third party, who, not at his suggestion, but of his own mere motion, knowing nothing of the plaintiff, negotiated the loan on his own account with the party sued, the commission is not due. *Antrobus* v. *Wickens*, 4 F. & F. 291.

A house agent can claim commission only on rent obtained as a proximate consequence of his act; this is to be generally ascertained from the agreement which he has himself prepared; an option to take on a house is not exercised if the tenancy is continued upon an agreement for a different rent obtained through the intervention of another house agent; and a trade custom to pay commission under such circumstances is irrational and bad. *Curtis* v. *Nixon*, 24 L. T. 706.

A shipbroker, introducing a seller and buyer of vessels, is only entitled to commission on the business resulting proximately from the introduction. *White* v. *Baxter*, 1 Cab. & E. 199. Reversed in C. A.

A shipbroker is only entitled to commission upon a charter-party where he has substantially procured the charter; and he cannot recover commission as upon a quantum meruit for his endeavours to procure the charter. *Cousens* v. *Mitcheson*, 1 N. R. 240.

—— **Contractual Relation between Introduction and Business.**]—In order to found a legal claim for commission on a sale, there must not only be a casual, but also a contractual relation between the introduction of a purchaser and the ultimate transaction of sale. *Toulmin* v. *Millar*, 58 L. T. 96—H. L. (E.)

Right to Recover on Quantum meruit.]—See *Green* v. *Mules*, 30 L. J., C. P. 343, post, col. 967.

e. Business Interrupted or Prevented by Principal.

Principal ceasing to carry on Business.]—The defendant, a shirt manufacturer, entered into an agreement in writing with the plaintiff whereby the defendant agreed to employ the plaintiff as agent for five years, and the plaintiff agreed to do his utmost to obtain orders for the various goods manufactured or sold by the defendant which might be submitted to him, the plaintiff to be paid by a commission. After two years the defendant's business premises were destroyed by fire, and he thereupon ceased to carry on business and discharged the plaintiff. In an action for wrongful dismissal:—Held, that there was an implied agreement to supply the plaintiff with goods to a reasonable extent, and that the performance of the agreement had not become impossible, and that the plaintiff was entitled to damages. *Turner* v. *Goldsmith*, 60 L. J., Q. B. 247; [1891] 1 Q. B. 544; 64 L. T. 301; 39 W. R. 547—C. A.

Company wound up.]—A company employed a broker to dispose of their shares, on the terms that he should be paid 100*l.* down, and 400*l.* in addition, upon the allotment of the whole of the shares of the company. The broker disposed of a considerable number of shares when the company was wound up:—Held, that the broker was prevented earning the 400*l.* by the act of the company, and was therefore entitled to recover a portion of 400*l.* *Inchbald* v. *Western Neilgherry Coffee, Tea and Cinchona Co.*, 17 C. B. (N.S.) 733; 34 L. J., C. P. 15; 10 Jur. (N.S.) 1128; 11 L. T. 345; 13 W. R. 95.

A company engaged a person to act as their agent for five years at a fixed salary, and also for a commission of 10 per cent. on the net profits in each year. The company was wound up before the termination of the five years:—Held, that he was not entitled to any compensation by way of damages for loss of commission during the unexpired part of the five years. *English and Scottish Marine Insurance Co., In re, Maclure's Claim*, 39 L. J., Ch. 685; L. R. 5 Ch. 737; 23 L. T. 685; 18 W. R. 1122. *See further Cases* ante, col. 948.

"Subject to Approval of Solicitor."]—The plaintiff's claim was for commission on the sale of a piece of land by A. to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's solicitor:—Held, that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him, as it was unreasonable for him to disapprove. *Clack* v. *Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

Refusal of Terms.]—The defendant employed the plaintiff to find a purchaser for some land, at a commission of 1*l.* 10*s.* per cent. on the purchase money if a sale was effected. The plaintiff found a purchaser, but the defendant refused to complete the sale:—Held, that he could sue on a quantum meruit for the work and labour done, as he had performed his part of the contract, and the defendant prevented its completion. *Prickett*

v. *Badger*, 1 C. B. (N.S.) 96; 26 L. J., C. P. 33; 3 Jur. (N.S.) 66; 5 W. R. 117.

The defendant agreed with the plaintiff in the following terms: "In the event of your procuring the 2,000*l.*, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff introduced the defendant to a building society who offered to advance him 1,620*l.* on certain terms. This offer the defendant accepted, but as he declined to accede to certain requirements of the society the arrangement fell through and no money was advanced:—Held, that the plaintiff was entitled to his commission on the sum which the society had agreed to advance. *Fisher* v. *Drewitt*, 48 L. J., Ex. 32; 39 L. T. 253; 27 W. R. 12—C. A.

Failure to Execute Order.]—Plaintiff, a commission agent, proposed to do business with defendant, a manufacturer, on terms expressed in a letter, the material part of which was as follows: "We expect to receive our commission on all goods bought by houses whose accounts are opened through us." The plaintiff introduced a customer to the defendant, who gave him an order for goods which he accepted but did not execute. The plaintiff then sued him for commission on the goods so ordered. The judge at the trial ruled that the words, "goods bought," applied to all goods ordered by customers introduced by the plaintiff, whether the order was executed by defendant or not:—Held, that this ruling was right, and the plaintiff entitled to recover. *Lockwood* v. *Levick*, 2 L. T. 357; 8 W. R. 583.

Revocation of Authority.]—Where the authority of an agent employed to sell on commission is revoked by the principal before a sale has been effected, the right of the agent to remuneration for what he has done in endeavouring to effect a sale depends on the terms on which he was employed. *Simpson* v. *Lamb*, 17 C. B. 603; 25 L. J., C. P. 113; 2 Jur. (N.S.) 91; 4 W. R. 328.

The plaintiffs, who were clerical agents, were employed by the defendant to sell an advowson, upon the terms that they should be paid a commission at the rate of 5*l.* per cent. upon the purchase money when the contract was completed. As the purchase money was likely to be large, the plaintiffs agreed to forego a claim of three guineas which they ordinarily made for entering such property on their books, and for the trouble of answering inquiries respecting it. The defendant having afterwards sold the advowson himself, and revoked the plaintiffs' authority to sell:—Held, that the plaintiffs were not entitled to recover anything, as they had not effected the sale, and there was no evidence of their having done more than was ordinarily covered by the charge of three guineas, which they had agreed to forego. *Ib.*

Agent not informed of unusual Terms.]—Where an agent employed to borrow money upon leasehold security finds a person able and willing to lend, but the negotiations go off by reason of such person discovering unusual covenants which the agent was not informed of, the agent is entitled to the whole of the agreed commission for procuring the loan. *Green* v. *Lucas*, 33 L. T. 584—C. A.

L. agreed to pay G. a commission of 2 per cent. "for procuring him on loan 20,000*l.* upon the security of certain leasehold property at Southwark," having three days before such agreement furnished G. with two valuations of the property, each of them stating the lease to be for a term of ninety-nine years, and settling the value at about 37,000*l.*, and one of them assuming that the lease "contained no arbitrary or restrictive clauses, but only the usual covenants." Upon the strength of these valuations, G. applied for a loan to a provident institution, the directors of which agreed to advance it, "subject to the title and all other questions proving to be satisfactory." Upon examination of the lease on behalf of the institution, it was discovered that the lease, instead of being a lease for ninety-nine years absolutely, contained a proviso for re-entry under certain conditions, which constituted a substantial deterioration of its value, whereupon the directors refused to make the advance:—Held, that G. was entitled to the whole of the agreed commission. *Ib.*

Half Commission—Business taken from Agent before Completion.]—An agent who has the business taken out of his hands before completion is by the custom of merchants entitled to half the commission which he would have earned by completing it. *Spain* (*Queen*) v. *Parr*, 39 L. J., Ch. 73; 21 L. T. 555; 18 W. R. 110.

Merchants at Manilla received instructions from the government there to undertake the transport and shipment of a quantity of tobacco to merchants in London, to effect the insurance, and to pay all the necessary charges and expenses in relation thereto. The merchants at Manilla were to be entitled to charge 2½ per cent. on the amount, valued at about 47,000*l.* The supreme government of Spain thinking the officer at Manilla had acted incautiously in this respect, refused to allow the amount of the ordinary commission in the account, having directed the tobacco to be sold by their own agents here:—Held, that the consignees were entitled to a moiety of the amount of the ordinary commission, being 1¼ per cent. instead of 2½ per cent. *Ib.*

Where nothing remained to be done by Agent—Measure of Damages.]—In an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commission which he would have earned. *Roberts* v. *Barnard*, 1 Cab. & E. 336.

Business Ineffectual or Useless.]—A shipbroker employed to sell a ship, which, when put up for sale, was bought in, is not entitled to a commission on the sale. *Mestaer* v. *Atkins*, 1 Marsh. 76; 5 Taunt. 381.

A shipbroker who has procured a bargain for the hire of a vessel, is by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise:—Held, that when a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against

the shipowner to recover the commission, or a compensation for his work and labour. *Read* v. *Rann*, 10 B. & C. 438; 8 L. J. (o.s.) K. B. 144.

Even where the contract is not completed by the act of the owner. *Broad* v. *Thomas*, 7 Bing. 99; 4 M. & P. 732; 4 Car. & P. 338; 9 L. J. (o.s.) C. P. 32.

f. Amount Payable.

On Bad Debts.]—By agreement an agent was to have a commission on sales effected, or orders executed, by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts:—Held, notwithstanding, that, under the terms of this agreement, he was entitled to commission on bad debts. *Bower* v. *Jones*, 8 Bing. 65; 1 M. & Scott, 140; 1 L. J., C. P. 31.

Construction of Contract.] — The following letter was addressed to an African captain and supercargo by his employers: "Your commissions are 6*l.* per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4*l.* per ton from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.*, when warehoused":—Held that the commission was payable only on the sums actually realised, after deducting bad debts as well as other charges. *Caine* v. *Horsfall*, 1 Ex. 519; 17 L. J., Ex. 25.

A., being possessed of a leasehold house and of building land held on lease, the former of which was subject to an annual rent of 75 guineas, and the latter to a rent of 50*l.*, and also to a covenant to lay out a certain sum in building, employed B., an estate agent, to dispose of the whole for him upon the terms of commission mentioned in a printed paper as follows:—"For the sale of property by private contract. On the first 100*l.*, 5*l.* per centum (and in no case less than 5*l.*); from 100*l.* to 5,000*l.*, two and-a-half per centum; from 5,000*l.* to 10,000*l.*, one-and-a-half per centum; on the sum exceeding 10,000*l.*, one per centum. For letting or disposal of the leases of estates or houses. Unfurnished, 5*l.* per centum on one year's rent, and 5*l.* per centum on the premium or sum obtained for fixtures, furniture, &c. on lease; 5*l.* per centum on the first year's rent, and two-and-a-half per centum on the second year's rent, and 5*l.* per centum on premium or sum obtained for fixtures, &c. On letting building land, one year's standing ground-rent. For large estates one-half year's ground-rent." B. having disposed of the premises to M. for 1,300*l.*, the two leases were assigned to M., subject to the covenants for payment of the rents:—Held, by Erle, C.J., Williams, J., and Willes, J., that B. was only entitled to a commission on the 1,300*l.*, under the first branch of the printed scale, namely, five per centum on the first 100*l.*, and two-and-a-half per centum on the remainder. *Biggs* v. *Gordon*, 8 C. B. (N.S.) 638.

Held, by Byles, J., that he was also entitled to a commission on the amount of the yearly rent under the second branch of the scale. *Ib.*

The defendant, being in want of additional capital in his business, on the 10th of June, 1873, wrote to the plaintiffs (accountants in London with whom he had been in correspondence on the subject) as follows:—"The premises of the B. works in this town are my property solely, but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." The plaintiffs succeeded in introducing W. to the defendant, who advanced him by way of loan 10,000*l.*, upon which they received the agreed commission. Some few months afterwards the defendant and W. entered into an agreement for a partnership, on which occasion W. made a further advance of 4,000*l.* by way of capital to the concern. The plaintiffs claimed commission upon this further advance; and, in an action brought to enforce their claim, they admitted that the advance of 4,000*l.* was not contemplated at the time of the advance of the 10,000*l.*, but that the 4,000*l.* was advanced solely in consequence of the negotiation for the partnership between the defendant and W.:—Held, that they were not entitled to commission on this second advance. *Tribe* v. *Taylor*, 1 C. P. D. 505.

By an agreement with the plaintiffs, the defendant was to receive a commission on the company's charge for messages sent by the defendant along their line:—Held, that, under this agreement, the defendant was not at liberty to pack several messages into one, charging for them separately, and yet, as between himself and the company, only treating it as a single message. *International Telegraph Co.* v. *Reuter*, 4 W. R. 510.

Percentage on Invoice Price — Proof of at Trial.] — Defendant, a merchant beyond seas, appointed plaintiffs his agents here. By agreement, defendant was not to consign any raisins for which plaintiffs might obtain orders to any one but plaintiffs, who were to receive as commission a percentage on the amount of the invoice price of the cargoes sent in pursuance of such orders. Defendant having, in breach of the agreement, consigned to another person:—Held, that it was not a condition precedent to plaintiffs recovering their commission that they should produce the invoices at the trial, but that they might show otherwise what the value was according to what the invoice price would be. *Plank* v. *Gavila*, 3 C. B. (N.S.) 807; 6 W. R. 210.

Agent refusing Principal's Offer — Services afterwards Performed.]—A., a supercargo, sailed to Calabar in charge of a ship called "The Magistrate," his commission being 5*l.* per cent. Some time after his departure, the principals dispatched another ship, "The Windermere," to Calabar, with instructions to A. to find a cargo for her, and to consider her "in one turn" with "The Magistrate," and offering him, in respect of this second ship, a commission of 2½ per cent. A. wrote to his principals rejecting the 2½ per cent. commission; but, notwithstanding this, he proceeded to load "The Windermere," that course being in his view the best for his principals:—Held, that, as he had acted on the instructions of his principals in loading "The Windermere," he was bound by their offer as to commission, and could not recover more than 2½ per cent. in respect of the cargo of that ship. *Moore* v. *Maxwell*, 2 Car. & K. 554.

Custom.]—See *Murray* v. *Currie*, supra, col. 957.

No Contract or Custom Proved.]—Where a custom-house agent entered into a custom-house bond with respect to goods consigned to him by the plaintiff, and claimed a percentage on the sum mentioned in the bond, and no contract or usage for the payment of such was proved:—Held, that the plaintiff was not entitled to any such percentage; and that, therefore, no question as to the reasonableness of the amount claimed could be put to a witness. *Hall* v. *Gurney*, 2 Car. & K. 644.

Discount allowed by Insurance Companies—To whom belonging.]—The 10 per cent. discount usually allowed by insurance companies on punctual payment of the premium belongs, in the absence of agreement to the contrary, not to the insurance agent, but to his principal. *Spain (Queen)* v. *Parr*, 39 L. J., Ch. 73; 21 L. T. 555; 18 W. R. 110.

When no Provision made.]—An auctioneer took an absolute assignment of chattels, &c., under a bill of sale by way of mortgage, and afterwards conducted the sale of them by auction under an agreement with another incumbrancer:—Held, that he was entitled to charge the usual commission on such sale, although no provision for a commission had been made either in the bill of sale or in the agreement. *Miller* v. *Beale*, 27 W. R. 403.

On Discounts.]—Reasonable commission, 2*s.* 6*d.* per cent., allowed to a country agent on discounts, though for a person resident in London, and paid through a banker there, if not colourable. *Jones, Ex parte*, 17 Ves. 332; 1 Rose, 29.

Expense of putting up to Sale.]—In an action by a spirit broker, it was held that he was entitled to half-a-crown per puncheon, for the expense of putting up to sale, though the property was bought in. *Stewart* v. *Kahle*, 3 Stark. 161.

To Executor for Collecting Debts.]—An executor in India is entitled to a commission of 5*l.* per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself, not given to him in the character of executor, and including moneys belonging to the testator, which were in the hands of a commercial house in which the executor was, and the testator had been, a partner. *Cockerell* v. *Barber*, 2 Russ. 585; 1 Sim. 23; 5 L. J. (O.S.) Ch. 77; 28 R. R. 181.

Charge for Extras.]—A. acted under a written agreement as the commission agent of B., in the sale of goods, and was paid a commission. B. was a contractor with the admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances in addition to his commission:—Held, that in giving these attendances A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that, if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately. *Marshall* v. *Parsons*, 9 Car. & P. 656.

g. When Payable.

Upon what Event.]—A., a clerical agent, was employed to sell an advowson for B., upon the terms contained in a circular, in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived at, or any particulars had been given by, or any communication whatsoever had been made from, A.'s office, however and whomsoever the negotiation might have been conducted and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission. A contract of sale having been arranged through A.'s agency, and duly executed, and a deposit paid on the 14th of October, 1862, the residue of the purchase-money being payable on the 31st of December:—Held, that A. was entitled to his commission at all events on the 31st of December, although the full purchase-money had not, for some unexplained reason, then been paid. *Lara* v. *Hill*, 15 C. B. (N.S.) 45.

A. negotiated for the exchange of certain advowsons between B. and C., and B. contracted to pay A. 100*l.* for commission, "one-third down and the remaining two-thirds when the abstract of conveyance is drawn out." B.'s abstract of title was delivered to C., but nothing further was done in the matter, in consequence of C. declining to proceed with the exchange. In an action for the recovery of the balance of the commission:—Held, that A. could not recover, as the event had not happened for which the commission was to be paid. *Alder* v. *Boyle*, 4 C. B. 635; 16 L. J., C. P. 232; 11 Jur. 591.

A surveyor was retained by the defendant to negotiate with the commissioners of woods and forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of 2*l.* per cent. "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a jury was empannelled, by whom the value of the property was assessed at 4,000*l.*; but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to him, but was placed in the hands of the accountant-general, to await the adjustment of the difference. The surveyor was not previously aware of the existence of this charge:—Held, that he was, nevertheless, not entitled to his commission until the money awarded was actually received by the defendant. *Bull* v. *Price*, 5 M. & P. 2; 7 Bing. 237; 9 L. J. (O.S.) C. P. 78.

In the Case of Del credere Commissions.]—An action lies to recover del credere commissions for guaranteeing sums insured upon policies; such commissions being due upon entering into the contract of guarantee. *Caruthers* v. *Graham*, 14 East, 578.

A plaintiff declared that the defendant was indebted to him for commission due for his

having guaranteed the payment of goods sold by him, as the factor of the defendant, to third persons, and at his request:—Held, good after verdict. *Solly* v. *Weiss*, 2 Moore, 420; 8 Taunt. 371.

h. Effect of Misconduct.

Loss of Commission.]—An agent cannot recover commission, or even a compensation for his trouble, if he executes his duties in such a manner that no benefit results therefrom. *Hamond* v. *Holiday*, 1 Car. & P. 384.

Nor is he entitled to commission where he has been guilty of gross misconduct in selling goods. *White* v. *Chapman*, 1 Stark. 113.

A broker purchased goods on commission at a month's credit, and paid duties on them, and sent them to the place of the purchaser's abode, consigned to his own order; the seller, being fearful of the purchaser's credit, procured the broker to delay the arrival of the goods till the month's credit expired, and to tender them to the buyer on payment of the price, whereupon they were refused:—Held, that the broker could neither recover the price, duties, nor commission. *Hurst* v. *Holding*, 3 Taunt. 32; 12 R. R. 587.

Where a broker is employed by a shipowner to procure a charterparty, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration; nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, and have been incurred in consequence of the shipowner's having urged him to extraordinary expedition in the matter. *Dalton* v. *Irwin*, 4 Car. & P. 289.

If an agent deal with the goods of his principal as his own, making a profit out of them not accounted for to the principal, and if the agent by his own conduct has made it impossible to ascertain what the amount of profit is which he realised, he shall not be allowed the commission which otherwise, and according to the contract he would be entitled to claim. *Gray* v. *Haig*, 20 Beav. 219.

A land agent misconducting himself in the management of property, although receiving and accounting for the rents, may be disallowed his fees on the sum received by him. *Palmer* v. *Goodwin*, 13 Ir. Ch. R. 171.

A confidential agent is in that character bound to keep regular accounts; having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, on the ground of gross neglect of duty, was not allowed a charge in respect of bills of costs for business done as a solicitor. *White* v. *Lincoln* (*Lady*) 8 Ves. 363; 7 R. R. 71.

Set-off in Action.]—H. shipped rice consigned to B. abroad, for sale on commission by B. for the benefit of H. B., according to agreement, made advances to H. upon the rice, and incurred expenses in connection therewith, and sold it, and claimed to have earned commission. The proceeds realised by the sale, however, were insufficient to reimburse B. the amounts so advanced and alleged to have been earned. To an action by B. to recover the balance, after crediting H. with the amount realised by the sale, of the amount of such advances and expenses, and for the commission so alleged by B. to have been earned, H. pleaded that B., by neglecting to take proper care of the rice, and by mismanaging the sale, had caused the proceeds to be insufficient to meet the amount due to B.:—Held, that it did not afford an answer, as it amounted to an attempt to set off a claim for unliquidated damages against a legal debt of a definite and an ascertained amount, and that such a plea could not be construed as a plea of never indebted, inasmuch as the general issue in this shape must deny the existence of a debt which the plea expressly admitted. *Best* v. *Hill*, 42 L. J., C. P. 10; L. R. 8 C. P. 10; 27 L. T. 490; 21 W. R. 147.

Semble, where an agent brings an action for his commission, &c., and has by collusion received more than he is entitled to, a court of law will in some cases allow a set-off by treating him as having received so much money for the use of his employers; but it must be a clear case. *Norris* v. *Day*, 10 L. J., Ex. Eq. 43; 4 Y. & C. 475.

Bribery of Agent—Liability to Refund.]—The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between the defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done:—Held, that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt. *Harrington* v. *Victoria Graving Dock Co.*, 47 L. J., Q. B. 594; 3 Q. B. D. 549; 39 L. T. 120; 26 W. R. 740.

—— **Recovery by Principal.**]—Commission received by an agent or a trustee of a purchaser from a vendor without the knowledge of his principal is a bribe; it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge. *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 457.

—— **Right of Principal to follow Money.**]—The defendant was employed by the plaintiffs as their foreman, and was intrusted by them with the purchase of materials used in their business. From one of the firms from which he had purchased, he had received commissions upon the amounts of the orders he had placed with them. In an action to recover the money so received, the plaintiffs moved, before the trial, for an injunction restraining the defendant from dealing with certain real estate bought with such money, and an order directing him to pay into court the residue of the money:—Held, that a debt was due from the defendant to the plaintiffs, but the money he had received was not the money of the plaintiffs in his hands as trustee

for them, and the order asked for could not be made. *Lister* v. *Stubbs*, 59 L. J., Ch. 570 ; 45 Ch. D. 1 ; 63 L. T. 75 ; 38 W. R. 548—C. A.

Semble (per Cotton, L.J.) that the plaintiffs would have a right to set aside the contract with the firm supplying the goods, and to sue such firm for the purchase-money paid to them. *Ib.*

—— **Usual Allowance — Knowledge of Principal.**]—A., a contractor for works on a railway, employed B., as his agent, to get a sub-contractor to do a portion of the works. B., as agent, accordingly entered into a contract with C. An allowance of 5*l.* per cent. was made by C. to B. After the work had been finished, A. filed a bill against B. and C. to recover back the commission : —Held, that the bill could not be sustained as against C., and it was also dismissed against B., without costs on the ground that such an allowance was usual, and that the plaintiff was proved to have acted on it, and must have known what had occurred. *Holden* v. *Webber*, 29 Beav. 117.

i. Action for.

Right of Principal to particulars of Moneys received by Agent.]—In an action by an agent against his principal for services, the latter cannot insist upon particulars giving credit for moneys received for him ; he is only entitled to ask for what balance the action is brought. *Penerase* or *Penprase* v. *Crease*, 1 M. & W. 36 ; 1 T. & G. 468 ; 4 D. P. C. 711 ; 5 L. J., Ex. 105.

Business not effected by Agent — Right to recover on Quantum meruit for work done.]—A defendant employed the plaintiffs to find a purchaser or mortgagee of an estate. Thereupon they went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took some journeys, and had communications about it, and ultimately, while negotiating with one N. upon the matter, the plaintiffs and the defendant agreed that a letter should be written by the plaintiffs to N., and that if such letter induced N. to become purchaser or mortgagee the plaintiffs should be paid 100*l.* N. ultimately became mortgagee, but denied that he was influenced in any way by the letter :—Held, that the plaintiffs could not recover on a quantum meruit for work and labour, with particulars claiming commission as agreed. *Green* v. *Mules*, 30 L. J., C. P. 343.

4. Liability of Agent for Negligence.

Voluntary Agents.]—A person is liable for negligence in procuring a policy of insurance, though he did it gratuitously. *Wilkinson* v. *Coverdale*, 1 Esp. 75.

If A., a general merchant, undertakes voluntarily, without reward, to enter a parcel of goods to B., together with a parcel of his own of the same sort, at the custom-house, for exportation, but makes the entry under a wrong denomination, whereby both parcels were seized ; and A., having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or an employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to B. *Shiells* v. *Blackburne*, 1 H. Bl. 158 ; 2 R. R. 750.

Acting on best Advice.]—An agent who acts upon the best advice he is able to get in the affairs of his principal, is not liable to damages arising from that act. *Miles* v. *Bernard*, Peake, Ad. C. 61. And see *Reece* v. *Rigby*, 4 B. & Ald. 202 ; 23 R. R. 251.

Law Agent.]—Where a law agent employed to prepare a bond departed from the form in which such bonds were usually drawn, and neglected a certain formality essential to its validity, in consequence of which the bond was invalid :—Held, that he was bound to make good the loss. *Stevenson* v. *Rowand*, 2 Dow & Cl., A. C. 104.

Secus, if he had made a mistake in a nice and difficult point of law. *Ib.*

When Action lies.]—A broker was employed by his principal to sell, and as selling broker he sold for him "to arrive" goods on the terms that they were "fair average quality in opinion of selling broker." The buyers having on arrival of such goods refused to take them, the broker went and inspected them and gave his opinion that they were not of fair average quality, according to the contract :—Held, that he was not liable to an action at the suit of his principals for not using due skill in order to form a correct opinion of the quality of the goods, as there was no contract by him, express or implied, to exercise any skill whatever in forming such opinion. *Pappa* v. *Rose*, 41 L. J., C. P. 11 ; L. R. 7 C. P. 32 ; 25 L. T. 468 ; 20 W. R. 62. Affirmed, 41 L. J., C. P. 187 ; L. R. 7 C. P. 525 ; 27 L. T. 348 ; 20 W. R. 784—Ex. Ch.

A house agent who charges commission to a landlord for letting his house is bound to use due and reasonable care in ascertaining the solvency of the tenant. *Hayes* v. *Tindall*, 1 B. & S. 296 ; 2 F. & F. 444 ; 30 L. J., Q. B. 362 ; 4 L. T. 403 ; 9 W. R. 664.

An agent for the purchase of a public-house is liable in damages to his employer for negligently conducting the purchase, although he advises his employer to go and examine the business for himself, and the employer does so. *Smith* v. *Barton*, 15 L. T. 294.

Brokers employed to sell goods are bound to do so in the usual way, and if it is usual to send the seller an estimate of value, in order that he may be enabled to fix a reserved price, they ought to do so. And whether it is so or not, they are bound, by their own guidance, to make a careful estimate of the value ; and if they sell, by public auction, at a price much below the fair value, not having made such an estimate, it will be evidence of negligence, and of a loss caused thereby, for which they will be liable. *Solomon* v. *Barker*, 2 F. & F. 726 ; 11 W. R. 375.

The defendants, merchants at B., who had acted there as brokers for the plaintiffs, who were merchants at L., wrote to the plaintiffs, proposing to them to purchase a quantity of scrap-iron of a specified quality. The plaintiffs desired to have an offer of cost of freight to Rotterdam. The defendants stated the price, but their inability to make an offer as to freight, as they had then no ship available. Before the plaintiffs had closed with the offer, the defendants proposed a ship for the conveyance of the iron. The plaintiffs accepted the purchase, but objected to the ship as too small to take the whole cargo, desiring the defendants to look out for another. Thereupon the defendants, as agents for both parties, entered into and accepted the contract of sale, and transmitted the same to the plaintiffs. They afterwards engaged a vessel

to convey the iron, receiving the same, and caused it to be shipped, assuring the plaintiffs that the cargo was considered a first-rate description of scrap-iron. The profit of the defendants was derived from commission from the seller and from the shipowner. In an action against them for not using proper and reasonable care, skill, and diligence in accepting and shipping the iron :—Held, that their employment as brokers and shipping agents did not raise a duty to examine the iron for the plaintiffs, there being no evidence of usage or contract that they should do so. *Zwilchenbart* v. *Alexander*, 1 B. & S. 234 ; 30 L. J., Q. B. 254 ; 7 Jur. (N.S.) 1157 ; 4 L. T. 412 ; 9 W. R. 670—Ex. Ch.

The plaintiff and his two partners employed the defendants as accountants for hire, to make out the accounts of the firm, and of the separate balance of each partner. The defendants made out the plaintiff's separate balance so erroneously and negligently, that, relying on their statement, he was a considerable loser thereby :—Held, that the plaintiff might sue alone for this misfeasance, and that it was no variance to allege that he had employed the defendants. *Storey* v. *Richardson*, 6 Bing. (N.C.) 123 ; 8 Scott, 291 ; 9 L. J., C. P. 43 ; 4 Jur. 26.

An action for breach of duty, but not trover, lies against a broker who is authorised to sell goods for a certain price, but sells them at an inferior price. *Dufresne* v. *Hutchinson*, 3 Taunt. 117.

Trover does not lie against a person who takes out goods to India for the vendor under an agreement to sell them for what he could get, and retain what he could get above a certain price, but who left them to a third person to be disposed of, on quitting India. *Bromley* v. *Coxwell*, 2 Bos. & P. 438 ; 5 R. R. 648.

No action is maintainable. *Ib.*

The object of the transmission of a bill of exchange from principal to agent being to obtain acceptance and payment of the bill, or, if not accepted, to guard the rights of the principal against the drawer, the duty of the agent must be measured by these considerations, and the agent ought not to press unduly for acceptance, provided he obtains acceptance or refusal within the time which will preserve the rights of the principal against the drawer. *Bank of Van Diemen's Land* v. *Bank of Victoria*, 40 L. J., P. C. 28 ; L. R. 3 P. C. 526 ; 19 W. R. 857.

—— **Employment of Agent to bet on Account of Principal.**]—The plaintiff having employed the defendant to bet on commission, and the defendant having failed to make certain bets pursuant to the plaintiff's instructions, the plaintiff sued the defendant for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by the defendant, had the bets in question been made, after deducting the amount of his commission :—Held, that as by statute 8 & 9 Vict. c. 109, s. 18, the bets would not have been recoverable at law, the plaintiff could not maintain the action. *Cohen* v. *Kittell*, 58 L. J., Q. B. 241 ; 22 Q. B. D. 680 ; 60 L. T. 932 ; 37 W. R. 400 ; 53 J. P. 469.

Receiving Payment by Cheque.]—An agent has no authority to receive payment on behalf of his principal in any other mode than in cash, in the absence of any usage to the contrary. *Pape* v. *Westacott*, 63 L. J., Q. B. 222 ; [1894] 1 Q. B. 272 ; 9 R. 55 ; 70 L. T. 18 ; 42 W. R. 131—C. A.

A lease contained a proviso that the tenant should not assign it without the landlord's licence. The landlord instructed the defendant to prepare the licence, but not to hand it to the tenant until the latter paid certain arrears of rent. The defendant, however, parted with the licence to the tenant on receiving a cheque for the arrears. On the cheque being dishonoured :—Held, that the landlord was entitled to recover from the defendant the damage he had sustained by the defendant's negligence—i.e. the amount of rent in arrear. *Bridges* v. *Garrett* (L. R. 5 C. P. 451) distinguished. *Ib.*

—— **Measure of Damages.**]—The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. The defendants upon such orders purchased and shipped to the plaintiff opium which they erroneously supposed to be of the description ordered, but which was really of an inferior description. The plaintiff sought to recover as damages in an action against the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendants, on the ground that the relation between the defendants as commission agents and himself was that of vendor and vendee of the opium :—Held, that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered. *Cassaboglou* v. *Gibbs*, 51 L. J., Q. B. 593 ; 9 Q. B. D. 220 ; 47 L. T. 98 ; 46 J. P. 568. Affirmed, 52 L. J., Q. B. 538 ; 11 Q. B. D. 797 ; 48 L. T. 850 ; 32 W. R. 138—C. A.

A., in Holland, commissioned B. in London to purchase and ship tobacco of the best quality. B. employed C. as his broker for that purpose, who accordingly made a purchase from D. On the arrival of the tobacco in Holland, it turned out to be of very bad quality, when A. brought an action and recovered against B. :—Held, that B. was entitled to recover from C. the whole of the damages he had sustained in the action brought against him by A., although he had received a bought-note from C. in which the tobacco was not described as of the best quality. *Mainwaring* v. *Brandon*, 2 Moore, 125 ; 19 R. R. 497.

A party employing another to present a bill for acceptance is entitled to recover nominal damages against such agent if he fails to present it ; although no real damage whatever is occasioned by the neglect, the bill and costs having been paid by other persons liable on it. *Van Wart* v. *Wooley*, M. & M. 520.

Merchants in London received from a mere stranger abroad a bill of lading in a letter, requesting them to effect an insurance ; they declined doing so, but bonâ fide indorsed the bill of lading to a friend of his, who failed :—Held, that the merchants were liable to the consignor for the amount. *Corlett* v. *Gordon*, 3 Camp. 472 ; 14 R. R. 813.

An agent who applies money remitted to him to his own use is liable for interest, but not if he suffers it to lie dead in his hands. *Rogers* v. *Boehm*, 2 Esp. 704.

The London agent of the plaintiff, a Parsee

merchant at Bombay, having a claim against him, partly for a debt, not disputed, and partly for a liquidated demand on a guarantee, which was disputed, wrongfully transferred to himself certain shares of the plaintiff's, under a power of attorney, in satisfaction of his supposed claim. The plaintiff sued him for the improper transfer:—Held, that he was entitled to recover the full value of the shares. *Dantra* v. *Stiebel*, 3 F. & F. 951.

A., a merchant at Seville, wrote to B., his agent at Liverpool, desiring him to insure a cargo of fruit to that place. B., acting bonâ fide, instructed C., a person who had occasionally acted as A.'s agent in London, to get a policy effected there. C. for that purpose employed D., an insurance broker, who effected the insurance in his own name, and afterwards received the amount of a loss from the underwriters, but retained it, claiming a lien for a debt due to him from C., in respect of premiums and commission in former transactions. In an action by A. against B. for negligently omitting to effect a good and available insurance upon the cargo, and neglecting to take steps to get the money, and for money had and received, the judge, treating it as immaterial whether the letter of instructions from B. or C. had been shewn to D. or not, ruled that B. had violated his duty as agent by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received from the underwriters by D.:—Held, that this was not the true measure of damages; for that, if B.'s letter of instructions had been shewn to D. at the time he was employed to effect the policy, he could acquire no lien upon the proceeds for the debt due to him from C., and his unlawful detention of the money could not give A. a right of action against B. for the whole amount so received by D., though B. might be liable for some nominal damages in respect of the breach of his duty as agent; and therefore that fact ought to have been ascertained. *Cahill* v. *Dawson*, 3 C. B. (N.S.) 106; 26 L. J., C. P. 253; 3 Jur. (N.S.) 1128.

5. Duties arising from Fiduciary Relationship.

Agent a Trustee—Defence of Statute of Limitations.]—An agent who is empowered to retain in his own hands his principal's money, for the purpose of investment, is a trustee for his principal. *Burdick* v. *Garrick*, 39 L. J., Ch. 369; L. R. 5 Ch. 233; 18 W. R. 387.

A gentleman resident in America by power of attorney authorised two people in England, one of whom was a solicitor, to get in and sell his property here and reinvest the proceeds, and generally deal with it for his benefit; he died intestate in 1859, whereupon the agents paid the moneys which they had then received under the power, and which had not been reinvested, into a bank to the account of the firm of which the solicitor was a member; in 1867 letters of administration were taken out to the intestate by his widow, who filed a bill against the agents for an account:—Held, that the agents were trustees for their principal, and could not set up the Statute of Limitations against his personal representative. *Ib.*

Where two agents conspired to defraud their principal, the estates of both the agents will be liable in equity to the estate of the principal, in respect of the fraud so committed. *Walsham* v. *Stainton*, 12 W. R. 63.

In such a case an agent is considered as a trustee for his principal, and lapse of time is no bar. *Ib.*

Deception.]—Factor or correspondent pretending to insure as directed, charged as if he had insured. But such equity does not extend to an agent employed by him (ignorant of such deception). *Tickel* v. *Short*, 2 Ves. 239.

Agent to let Land or House.]—An agent to let lands is bound to let them to the best advantage; but upon the mere ground of undervalue, a bonâ fide letting, which would be binding on the principal himself, will be equally binding on him when he acts through an agent, if the agent has acted fairly and honestly. *Dyas* v. *Cruise*, 2 Jo. & Lat. 460; 8 Ir. Eq. R. 407.

Where a house-agent is employed to let a house, and charges 5 per cent. commission on letting it, it is a question for the jury whether he undertakes to use reasonable care to ascertain that the person to whom he lets it is in solvent circumstances. *Keys* v. *Tindall*, 1 B. & S. 296; 30 L. J., Q. B. 362; 4 L. T. 403; 9 W. R. 664. *S. C.*, at Nisi Prius, 2 F. & F. 444.

Possession of Agent—Acquisition of Title to Real Estate by.]—The possession of an agent is the possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. *Williams* v. *Pott*, 40 L. J., Ch. 775; L. R. 12 Eq. 149.

A person claiming, without any real title, to be entitled to land is a person wrongfully claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property. *Ib.*

An agent or a servant who is allowed to occupy premises belonging to his principal for the convenient performance of his duties, acquires no estate therein, although he is also allowed to use the premises for carrying on therein an independent business of his own. *White* v. *Bayley*, 10 C. B. (N.S.) 227; 30 L. J., C. P. 253; 7 Jur. (N.S.) 948.

Receipt of Rent by Agents barring Statute of Limitations.]—So long as an agent is in receipt of the rent of land, the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 3, will not run against his employer; and if a person commences to receive rents as the agent for another, and afterwards continues to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shewn. *Smith* v. *Bennett*, 30 L. T. 100.

Disclosure of Interest by Agent.]—An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry. *Dunne* v. *English*, L. R. 18 Eq. 524; 31 L. T. 75.

In such a case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing

that he did so, if his evidence is contradicted by the principal and not corroborated. *Ib.*

A director of a company as the company's agent purchased for the company a property in which, before he became director, he had acquired an interest. The company had gone into liquidation, and a shareholder, whose shares were fully paid up, took out a summons under s. 165 of the Companies Act, 1862, and sought to make the director liable for misfeasance or breach of trust on the ground that the director had allowed the company to make the purchase without disclosing his own interest, and at a price far exceeding the value:—Held, that the application must be dismissed, the evidence adduced by the applicant failing to shew either that the director had not disclosed his interest or that the purchase-price was above the value. *Cavendish-Bentinck* v. *Fenn*, 57 L. J., Ch. 552; 12 App. Cas. 652; 57 L. T. 773; 36 W. R. 641; —H. L. (E.)

Right of Agent to Receive Benefit where Principal suffers no Loss.]—A., an agent, held funds belonging to B., his principal, but had accepted bills drawn by B. to the full amount of them. B. paid away the bills to his creditors, who, to relieve A. from liability, and without the knowledge of B., accepted from A. a composition of 10*s.* in the pound, and gave him up the bills, A. then holding funds belonging to B. to the full amount of the bills. B. afterwards became bankrupt, and his assignees brought an action against A. for the difference between the amount of the bills and the composition:—Held, that as B. had been benefited to the full amount of the bills, the payment of the composition was, as between him and A., a full payment of the bills, and therefore that the action was not maintainable. *Stonehouse* v. *Read*, 5 D. & R. 603; 3 B. & C. 669.

Agent dealing with Principal.]—An agent cannot turn himself into a principal and deal with his real employers or principals on that footing without full and fair disclosure. *Williamson* v. *Barbour*, 50 L. J., Ch. 147; 9 Ch. D. 529; 37 L. T. 698.

An agent, employed to sell land, sold it to a company in which he was interested as a shareholder and a director:—Held, that he was entitled to no commission from his employer in respect of the sale. *Salomons* v. *Pender*, 3 H. & C. 639; 34 L. J., Ex. 95; 11 Jur. (N.S.) 432; 12 L. T. 267; 13 W. R. 637.

An agent employed to purchase cannot buy his own goods for his principal, neither can an agent, employed to sell, purchase for himself his principal's goods. Principals may either repudiate such transactions altogether, or adopt and take the benefit of them. *Bentley* v. *Craven*, 18 Beav. 75.

Although a confidential relation subsists between the beneficial owner and an agent employed by the trustee for the management of the trust property, yet there is no actual incapacity in the agent to purchase from the beneficial owner, even though the latter has not had the advantage of independent professional advice; in such a case, however, it is not sufficient for the agent to shew that he gave the full value; he must go further, and shew that he dealt with the beneficial owner at arm's length, and after a full disclosure of all that he knew with respect to the property. *King* v. *Anderson*, Ir. R. 8 Eq. 147. Reversed, Ir. R. 8 Eq. 625—Ch. Ap.

Although a person who as principal employs a broker to transact business for him in a particular market, is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to inquire what the usage may be, or whether there is any particular usage affecting the market in which he proposes to deal. *Robinson* v. *Mollett*, 44 L. J., C. P. 362; L. R. 7 H. L. 802; 33 L. T. 544. Reversing 20 W. R. 544—Ex. Ch.

A Liverpool merchant employed brokers of London to buy tallow for him in the London tallow market. They having other orders, bought in their own name a quantity sufficient to cover all their orders, and by letter they informed the merchant that they had bought on his account so many tons; but they did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but they did not allude to any third party as the seller. He acknowledged the receipt of these notices without observation. There is a custom on the London tallow market for brokers when they receive orders to contract in their own names, and if their principals refuse to accept or deliver, to buy or sell against them, and charge them with the loss. The merchant was ignorant of this custom. On becoming aware of it, and of the mode in which his order had been executed, tallow having in the meantime fallen, he refused to take the tallow:—Held, that as the brokers were employed to act as brokers only, the custom which converted them into principals was inconsistent with the employment, and as the merchant was ignorant of it when he gave his orders, he was not bound by the custom. *Ib.*

Held, also, as the first notice sent by the brokers was that they had bought on his account, he was not thereby put on inquiry as to the custom or as to the name of the seller, and he was not bound to accept when it turned out that his own brokers might in fact be the vendors, or to pay them the difference between the price at which they bought and that at which they sold in consequence of his having refused the contract. *Ib.*

The bankrupt was employed as broker by petitioner, and sold goods for him nominally to A., as appeared by sold-note, but really to A. and himself on a joint account, as appeared by bought-note, and became bankrupt:—Held, a fraud, and sale void, and so much of the goods as then remained in his hands were ordered to be specifically delivered up to petitioner. *Huth, Ex parte, Pemberton, In re*, Mont. & C. 667; 4 Deac. 294.

Manager obtaining Accommodation from Bank —Duty to Disclose.]—C. was appointed manager

of a bank in London, with permission to carry on his separate trade as a merchant. In that character he dealt with the bank of which he was manager on the terms usual between banker and customer. Upon one transaction in his separate trading, being possessed of certain bills for his own benefit, drawn and accepted by two firms reputed to be in good credit, he deposited them with the bank (not indorsing them), and obtained an advance upon them. The transaction was therefore not a discount but a loan. The drawers and acceptors of the bills subsequently became bankrupt :—Held, that C. was liable to make good the loss. *Gwatkin* v. *Campbell*, 1 Jur. (N.S.) 131.

A manager of a bank is not entitled to grant himself the same accommodation in respect of his separate trade which he might obtain from an independent banker; and it would be necessary for him, in order to sustain any such transaction, to shew that he had brought the whole circumstances most fully and fairly before the directors. It is not enough to shew merely that he had not concealed anything. If he could shew that he had so brought the circumstances to their knowledge, or that the directors had sanctioned the proceeding subsequently, such a proceeding might, however, be permitted to stand. *Ib.*

Agent purchasing Property intended to be purchased by Principal.]—A., who was in treaty for the purchase of a house, consulted B., a surveyor, as to the expense of certain alterations; A. not having paid his deposit by a certain time the treaty went off :—Held, that there was no such fiduciary relation between A. and B. as to prevent B. from purchasing the house, although he made the bargain on the very day that A.'s treaty was put an end to. *Shaw* v. *Davis*, 3 L. T. 135.

But in a suit to set aside the purchase, B. had to bear his own costs. *Ib.*

If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees* v. *Nuttall*, 2 Myl. & K. 819. Affirming 1 Russ. & M. 53; Taml. 282.

Using Materials gained in course of Employment.]—Agents are not entitled to use the materials gained or collected by them in the course of their employment to the detriment of their principal. *Reuter's Telegram Co.* v. *Byron*, (43 L. J., Ch. 661) doubted. *Lamb* v. *Evans*, 62 L. J., Ch. 404; [1893] 1 Ch. 218; 2 R. 189; 68 L. T. 131; 41 W. R. 405—C. A.

Action by Agent for Goods Sold.]—In the absence of evidence of custom otherwise, a broker may not treat himself as principal, and sue his employer as for goods bargained and sold. *White* v. *Benekendorff*, 29 L. T. 475.

The plaintiffs, as brokers, bought for the defendant upon the 6th January five tons of india-rubber at 2*s.* 11½*d.* per pound, and sent him a bought-note in which the india-rubber was set out as deliverable "during the month of January." A corresponding sold-note was sent to the sellers, at whose instance the plaintiffs struck out "during the month of January," and wrote "forthwith," but did not communicate the alteration to the defendant. On the 7th January, the defendant decided to throw up the contract, and sent an order to the plaintiffs to sell at 3*s.* The plaintiffs could only sell at 2*s.* 10*d.*, and having paid the sellers at the rate of 2*s.* 11½*d.* sued the defendant for the difference :—Held, that the alteration was material—that the plaintiffs could not treat themselves as principals and recover for goods bargained and sold; and that the alteration being material the plaintiffs had paid to the sellers what the defendant was not bound to pay, and consequently could not recover for money paid to the defendant's use. *Ib.*

A prior contract (at the same price) having been made by the plaintiffs, with other sellers, and cancelled at the instance of such sellers :—Held, per Brett, J., that in making such prior contract, the plaintiffs had exhausted their authority, and had no power to make another. *Ib.*

S. employed T. & Co., who were cotton brokers in London, to buy 500 bales of cotton for him, telling them to buy gradually at 8¼*d.*, if they could not do better. Cotton could not then have been bought at 8¼*d.* They shortly afterwards passed to S. a bought-note, "Bought on your account 500 bales, &c., at 8¼*d.*" This was signed by T. & Co., as brokers, and at the bottom of the note, a charge of ½ per cent. was made for brokerage. Before delivery of the cotton, S. became aware that they had not, at the time of their passing this bought-note, made any contract for him for the purchase of cotton, but that they had subsequently bought the 500 bales, in their own name, to enable them to make delivery to him, partly at 8$\frac{1}{16}$*d.* and partly at 7$\frac{15}{16}$*d.* per pound. S. would not have accepted the bought-note from them if he had known that they were thus acting as principals in the transaction. On becoming aware of the state of circumstances, S. refused to accept the cotton, and an action was brought to recover damages for such non-acceptance. It was proved that there was a custom in the London cotton market that, if a broker bought for his employer of an undisclosed principal, he was liable himself upon the contract :—Held, that the action was not maintainable, as no contract of sale had been made between T. & Co. and S. *Tetley* v. *Shand*, 25 L. T. 658; 20 W. R. 206.

T. & Co., before the expiration of the time for the delivery of the cotton, tendered marks of cotton not in accordance with the terms of the contract, but on S. rejecting the same, they, before the expiration of the time fixed for delivery, tendered marks of cotton in accordance with the contract :—Held, that they had not, by the first delivery, broken the contract, so as to justify S. in refusing to accept the cotton subsequently tendered. *Ib.*

Moneys held in a Fiduciary Character—Advances for Particular Purpose misappropriated by Agent.]—The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows: F. occupied the malting premises, and took out the necessary licences. It was his duty to buy barley in his own name as principal for cash, to send in to the defendants certain periodical accounts of the barley so bought from time to time and the prices of the same, to submit samples to the defendants, and if the barley was approved of by them to malt it and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewer, and not the malting agent, provides

the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shewn by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt on credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000*l.*, and malt to the value of about 35,000*l.*, upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. The defendants seized the barley and malt so left on F.'s premises, and F. having been adjudicated bankrupt, the trustee in bankruptcy sued the defendants for the value of the same:—Held, that the moneys advanced by the defendants to provide for the purchase of the barley, were impressed with a trust; that even if the barley and malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants, but in F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of trust moneys, or in substitution for the barley, in payment for which F. ought to have applied such trust moneys; that F. could not have set up his own breach of trust or have been heard to allege that the barley and malt was bought otherwise than according to the authority given to him; that the trustee in bankruptcy could not in this respect stand in a better position than F.; that the barley and malt were not in the order and disposition of F. as reputed owner thereof, it being notorious that "malting agents" are not usually the owners of the barley and malt on their maltings; and that consequently the plaintiff could not recover. *Harris* v. *Truman*, 51 L. J., Q. B. 338; 9 Q. B. D. 264; 46 L. T. 844; 30 W.R. 533—C. A.

Letters addressed to Agent at Principal's Office—Rights as to, after Dismissal.]—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. After this dismissal, he went about among the customers, making oral statements, reflecting on the solvency of L., and advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from giving notice to the post-office, to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the defendant had no right to give a notice to the post-office, the effect of which would be to hand over to him letters, of which it was probable that the greater part related to L.'s business, and a mandatory injunction was granted to compel the defendant to withdraw his notice, the plaintiff undertaking to open the letters at stated times, with liberty for the defendant to be present at the opening. *Herman Loog* v. *Bean*, 53 L. J., Ch. 1128; 26 Ch. D. 306; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708—C. A.

Production of Documents by Agent to Persons appointed by Principal.]—A firm of merchants residing abroad brought an action against their agent in this country claiming production of the documents relating to their business to a person appointed by them for that purpose. The defendant put in a defence stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The plaintiffs moved, under Ord. XXV. r. 4, to strike out the defence:—Held, that although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he cannot insist on their being produced to an improper person; and therefore the defence disclosed a reasonable answer to the claim. Whether an action for the sole purpose of enforcing the production of documents to a particular person will lie, quære. *Dadswell* v. *Jacobs*, 56 L. J., Ch. 233; 34 Ch. D. 278; 55 L. T. 857; 35 W. R. 261—C. A.

6. Liability to Account.

a. Of Agent.

i. *Persons Liable.*

Land Agent.]—A landowner may maintain a suit in equity against the agent and manager of his estates, if the object of such suit is either to obtain an account (and in that case allegations of fraud or special circumstances are unnecessary), or to obtain the delivery up by the agent of documents in his hands belonging to the landowner. *Makepeace* v. *Rogers*, 4 De G. J. & S. 649; 34 L. J., Ch. 396; 11 Jur. (N.S.) 314; 12 L. T. 221; 13 W. R. 566.

Upon a bill filed against the executors of a land steward and paid agent, it was held, that his estate was liable to make good such sums as, but for his wilful neglect and default, he might have received. *Salisbury* v. *Morrice*, 11 L. J. Ch. 114.

Co-Factor.]—A surviving factor must account both for himself and his co-factor, though admitted that the executrix of the deceased factor was compellable, and that among merchants the jus accrescendi has no place. *Holtscomb* v. *Rivers*, 1 Ch. Ca. 127.

Infant.]—Infant cannot be made to account as factor. *Smally* v. *Smally*, 1 Eq. Abr. 6.

Administrator of Apprentice.]—If a merchant employs his apprentice as a factor beyond sea, and he dies, his administrator shall account. *Lee* v. *Bowler*, Rep. t. Finch, 125.

Agent also Solicitor.]—It is no objection to a claim or bill filed for an account against a confidential agent that he has been also employed as a solicitor in respect of the same matter. *Oddy* v. *Secker*, 2 Sm. & G. 193.

Agent Incapable.]—The nature of the employment of a confidential steward or agent imposes upon him the duty of keeping and rendering proper accounts of all his dealings and transactions with his employer; and where no regular settlement of accounts has taken place between the employer and such steward or agent, there is a right to have the accounts taken under a decree of the court; but a bill by an administrator for such an account was dismissed, with costs, it appearing that the defendant had not undertaken the duty of keeping accounts, and that his education and capacity, as well as the course of dealing between him and his employer, were inconsistent with the notice of his keeping regular accounts. *Tindall* v. *Powell*, 4 Jur. (N.S.) 944; 6 W. R. 850.

Agent who has already Accounted.] — A receiver to the guardian of an infant, who has his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Clavering's Case*, Pre. Ch. 535.

A trustee empowered S. to manage a trust estate. S. accounted to him. The trustee died, yet S. was decreed to account again to cestui que trust. *Pollard* v. *Downes*, 2 Ch. Ca. 121.

On suspicious circumstances in the answer a general account was decreed against a steward, notwithstanding a receipt in full, which was allowed only as proof of the particular payment, not of a general release or discharge upon an account stated; though under circumstances it might have that effect, as upon proof that the principal never would give any vouchers, and an account kept by the steward. *Middleditch* v. *Sharland*, 5 Ves. 87.

A man swears he received money as a menial servant, and paid it over to his master. He shall not account for it again. *Anon.*, 1 Vern. 136. S. P., *Potts* v. *Potts*, *Id.* 207. But see *Id.* 95.

Agreement between Agent and Third Party—Gross Sum in Lieu of all Claims.]—A. had long employed B. as his steward, professional adviser, and general confidential agent; disputes having arisen between them, an agreement was entered into between B., and a clergyman acting on behalf of A., by which a gross sum was to be paid to B., in lieu of all his claims; but no accounts or vouchers were rendered or produced by A., nor any bill of costs delivered; that agreement will not protect B. from rendering an account to his principal. *Jenkins* v. *Gould*, 3 Russ. 385.

Disputes existing between A. and his solicitor, receiver and confidential agent, B., which involved long and intricate matters of account, an authority was given by A. to a third person, to settle any account in which he, A., had an interest, and to compromise any claims which he might have; such an authority will not empower that third person to make an agreement without the production or examination of any account, that a gross sum should be paid to B. in lieu of all his demands on A. *Ib.*

Banker.]—A bill for account will lie against a banker by his customers. *Bowles* v. *Orr*, 1 Y. & Coll. 464.

Person in Unauthorised Occupation of Premises.]—A. had a title to some houses which, on going abroad, he committed to the care of his brother, who afterwards becoming a prisoner, defendant entered and enjoyed several years:—Decreed, he should account to A. *Lister* v. *Lister*, Ca. t. Finch, 285.

Sub-Agent.]—Bill for an account by a principal against his agent and a person employed by the latter as his sub-agent dismissed as against both, notwithstanding the sub-agent had had the entire management of the principal's affairs, and had communicated with him directly on the subject of them. *Lockwood* v. *Abdy*, 14 Sim. 437; 9 Jur. 267.

ii. *Property Originally Intrusted.*

Goods Sold.]—If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to deliver the residue unsold on demand; but an action does not lie against him for not accounting till after a demand made for an account. *Topham* v. *Braddick*, 1 Taunt. 572; 10 R. R. 610.

If a declaration in an action to recover the price of goods sent for sale on commission alleges that the defendant sold but did not account to the plaintiff, he must prove that a sale actually took place: and it will not be presumed, even at a distance of twelve months after the delivery of the goods. *Elbourn* v. *Upjohn*, 1 Car. & P. 572.

Stock Sold to meet Bill of Principal.]—Defendant had stock in the East India funds, in trust for plaintiff, and a bond in his own name from the company, but in trust for plaintiff. Plaintiff being abroad drew a bill on defendant, and promised to send him effects to pay it; defendant accepted the bill; but before it was due, plaintiff failed. Defendant thereupon sold the stock and bond to pay the bill, at a great discount, though at the current price. Two years afterwards the stock and bond having risen in value, plaintiff went to defendant, and desired him to sell and reimburse himself. On a bill by plaintiff for an account:—Held, that the want of effects was sufficient to justify defendant in the sale without orders, for as much as would pay the bill; but it appearing that the produce of the stock alone was sufficient to answer the bill, defendant was decreed to account for the bond according to the value at the time plaintiff gave directions for the sale. *Henriques* v. *Franchise*, Pre. Ch. 205.

Freight Forfeited by Nonpayment of Custom Duty.]—If a factor evades the custom of goods due to a foreign prince, and thereby incurs the punishment of a felon, and the forfeiture of the whole freight, he shall have the benefit, for he ran the risk. *Smith* v. *Oxenden*, 1 Ch. Ca. 25. S. P., *Knipe* v. *Jesson*, 1 Ch. Ca. 76.

Semble, if the factor evades the custom due to the King of England, for that is a fraud. *Borr* or *Borre* v. *Vandall* or *Vande*, 1 Ch. Ca. 30; Nel. 87.

Injunction Restraining Transfer of Stock bought by Agent.]—Injunction until answer, restraining a transfer of stock standing in the name of a steward, on strong evidence, by affidavit, that it was the produce of his master's property, viz., rents, &c., received for many years without account; refused, as to money at his banker's in his name. *Chedworth* (*Lord*) v. *Edwards*, 8 Ves. 46; 6 R. R. 212.

iii. *For Profits.*

In what Cases.]—It is an inflexible rule of a court of equity that no agent can be allowed, in the matter of his agency, to make any profit for himself without the knowledge and consent of his principal, and the fact that the principal did not suffer any injury by reason of the dealing of the agent, cannot be taken into consideration in the application of the rule. *Parker* v. *McKenna*, 44 L. J., Ch. 425; L. R. 10 Ch. 96; 31 L. T. 738; 23 W. R. 271.

An agent who was to have an emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal, on his own account, of timber purchased for a colliery: before it was applied to the use of the colliery, some of the owners retired, and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those who remained, against the vendor on account of that sale. *Massey* v. *Davies*, 2 Ves. J. 317; 2 R. R. 218.

A person employed, on behalf of himself and co-partners, in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew; and subsequently, another partner assigned a share in the stock, and in his proportion of the claim, to persons then admitted into the concern:—Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; 4 L. J. (O.S.) Ch. 64; 8 L. J. (O.S.) Ch. 50.

The plaintiff, in 1868, consigned a ship to G. & Co., in China, for sale, fixing a minimum price of 90,000 dols., and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for 90,000 dols., and about the same time resold her to a Japanese prince for 160,000 dols., payable as to 75,000 dols. in cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The defendant paid 90,000 dols. to G. & Co., who remitted it to the plaintiff, and eventually obtained the whole amount of 160,000 dols. from the Japanese prince. In 1873 the plaintiff filed a bill in chancery to compel the defendant to account for the profit made by him in the resale of ship:—Held, first, that the relation of agent and principal was established between the defendant and the plaintiff, and existed at the time of the purchase and resale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by him in the transaction. *De Bussche* v. *Alt*, 47 L. J., Ch. 381; 8 Ch. D. 286; 38 L. T. 370—C. A.

A covenanted servant of the East India Company, being a senior merchant, and acting as agent of the company (as resident or chief at one of their factories), is incapable of forming any contract whatsoever, in which the company is interested; so as to derive profit to himself, or any otherwise however than for the profit and advantage of the company. And if any such contract be actually made between him as a merchant dealing for himself, and the company board of trade in India, in which contract undue advantage is taken by him, by means of his knowledge and influence as resident at the factory, he cannot demur generally on ground of want of equity, to bill for discovery and relief by company. *Henchman* v. *East India Co.*, 8 Bro. P. C. 85; 1 Ves. J. 289.

Servant taking by collusion more than belongs to his office must account; so must a stranger upon a bargain with a servant, which is a fraud on the master. *Ib.*

The captain of a ship dies leaving money on board, the mate becomes captain, and improves the money, he shall on allowance made him for his care in the management of the money, account for the profits and not the interest only. *Brown* v. *Litton*, 1 P. Wms. 140.

Differences.]—B. having bought shares in a company at 2*l.* per share, and knowing that K. was desirous to buy such shares, represented that he knew of some shares which were to be had for 3*l.* or less, and requested K. to give him authority to buy at that price. K. gave him authority, but told B. to do his best for him and to get them for less if possible. B. transferred his shares to K. at 3*l.* per share, pretending that another person was the vendor:—Held, that B. must account to K. for the difference between the price at which he bought and the price at which he sold the shares to K. *Kimber* v. *Barber*, L. R. 8 Ch. 56; 27 L. T. 526; 21 W. R. 65.

Fees.]—A. appoints B. his deputy in the execution of an office, and by articles it is agreed, that B. shall account with A. for all fees, &c., according to the table of fees belonging to the office, and pay him three-fourth parts thereof, and retain the other fourth part for his trouble. Certain fees are received by B., which he insists upon being solely entitled to, because not contained in the table:—Held, that B. should account with A. for all fees ascertained by the table, according to the table, and for all fees not mentioned therein according to his receipts, and pay over three-fourths of the whole to A. *Machen* v. *Stanyon*, 1 Bro. P. C. 133.

Discounts.]—In the absence of a special agreement an agent is entitled to no more than his commission, and is bound to account to his principal for all profits made and all discounts or other abatements received. If the agent does not so account the principal may dismiss him summarily. *Bulfield* v. *Fournier*, 15 R. 176. Affirmed in C. A.

The defendant, being an accoutrement maker, East India and general agent, was instructed to provide a cavalry outfit for the plaintiff's son. The defendant obtained very large discounts from the tradesmen supplying the goods, but charged in his accounts with the plaintiff the full prices as if actually paid by him:—Held, that, although the defendant did not charge any general commission as agent, the amount of the trade discounts must be disallowed. *Turnbull* v. *Garden*, 20 L. T. 218.

Bonuses.]—The managing director was before the formation of the plaintiff company a shareholder in two other companies, and in consequence of employing them to supply ice to the plaintiff company's ships, and to take away the fish from them, he received from those companies certain bonuses paid out of surplus profits after payment of dividends at a fixed rate. Under an agreement with the company he was allowed to engage in any other business or venture not prejudicial to the interests of the company, and the articles provided that the directors might enter into contracts, and do business with the company:—Held, that he must account to the plaintiff company for the bonuses, though the plaintiff company could not have obtained them from the other companies. *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339; 59 L. T. 345—C. A.

Acquiescence or Laches, Effect of.]—Held, secondly, that there had been no such acquiescence or laches on the part of the plaintiff as to disentitle him to relief. *De Bussche* v. *Alt*, supra.

Where Rule does not Apply.]—The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent. *Great Western Insurance Co. of New York* v. *Cunliffe*, 43 L. J., Ch. 741; L. R. 9 Ch. 525; 30 L. T. 661.

A marine insurance company in New York employed merchants in this country as their agents to settle claims and grant insurances, and also to effect reinsurances. A percentage was paid by the company on the first two classes of business, but the agents were remunerated as to the reinsurances by the brokerage allowed to them by the underwriters. They charged the company the full amount of the premiums, but were allowed by the underwriters, first, 5 per cent. on the premiums; and, secondly, 12 per cent. on the balance (if any) payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the 5 per cent.), and debiting losses. This was according to the usual custom on the credit system as between brokers and underwriters, but the 12 per cent. allowance was for some time unknown to the company:—Held, that the agents were entitled to both the percentages. *Ib.*

—— **Consignment of Goods for Sale on Commission.**]—The plaintiff, a merchant at Manchester, from time to time consigned, for shipment and sale abroad, goods to the defendants, a firm of traders at Manchester, who, with another person, were merchants in India. The defendants shipped their own and the plaintiff's goods to India, where they were sold by the member of the firm there, who purchased with the proceeds of sale other goods, which he remitted to the defendants at Manchester. He also sent to the defendants at Manchester an account, in which the plaintiff's goods sold in India were placed to his credit, and certain bills of exchange for the amount of proceeds of sale, less commission, were debited. These bills, in fact, never existed, but the defendants, in their statements of account with the plaintiff, placed the amount of the imaginary bills to his credit, debiting him with the cash advances made to him on the goods, and paying him the balance:—Held, that the plaintiff was not entitled to an account of the profits on the goods purchased in India with the proceeds of the plaintiff's goods, the defendants being commission agents only. *Kirkham* v. *Peel*, 44 L. T. 195—C. A. Affirming 28 W. R. 941.

Claim for Damages against Agent, not included.]—A claim against an agent in the nature of damages for neglect of duty cannot be passed as an item in taking an account between principal and agent, but must be enforced in an action at law. *Great Western Insurance Co. of New York* v. *Cunliffe*, supra.

Sale on Del credere Commission—Concealment of Buyer's Name.]—In 1879, the plaintiffs, timber merchants, purchased through the defendants, timber brokers, timber to the value of about 70,000*l.*, and placed it in the hands of the defendants for sale on a del credere commission, and received 2,000*l.* as the net profit on the whole transaction. The defendants had sold the timber to M., who was their debtor for large sums, and the plaintiffs alleged that M. was insolvent and that the sale was made under an arrangement that he should become the purchaser of the timber, but that the defendants should again sell the timber, as for M., and receive all the proceeds thereof, and that out of the profits to be realised by the transaction they should repay themselves the debt due to them from M., and that the defendants thereby recouped themselves to the amount of about 15,000*l.* That sum the plaintiffs claimed as profit due to them under the agency contract existing between them and the defendants. M.'s name, as the purchaser of the timber, was not disclosed by the defendants. The defendants alleged that they had acted in the ordinary way of business; that the plaintiffs and M. both happened to be customers of theirs; that the comparatively large profit made on behalf of M. was due to accidental causes; that the 15,000*l.* was, in the ordinary course of business, placed to the credit account of M., and subsequently, at his request, placed against his debit account; that they had never concealed M.'s name from the plaintiffs, but (as they proved) that it was not according to the usual course of business to state the buyer's name in the sold note supplied to the purchaser. The plaintiffs contended that the circumstance of M.'s indebtedness was calculated to bias the defendant's judgment in fixing the price at which M. should buy;

that the question in all such cases was whether the agent had a personal interest in the purchase being carried out, in which case the agent was bound, in discharge of his duty, to disclose such personal interest to his principal:—Held, that the defendants had acted honestly throughout these transactions, and in good faith, and had given the plaintiffs the best advice in their power; that a mere expectation on the part of the defendants that the timber would be dealt with according to the course of business with M. in former transactions, was not such dealing on the part of the defendants as the court considered unfair to the plaintiffs. *Guy* v. *Churchill*, 62 L. T. 132—C. A.

Duty to Pay over Profits.]—Besides the duty, enforceable in equity, on the part of an agent to account to his principal or employer for all profits made by him in the course of his employment or service, there is also a legal duty incumbent upon him whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the money as money absolutely belonging to his employer. *Morrison* v. *Thompson*, 43 L. J., Q. B. 215; L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.

Money so received by an agent and not handed over to his principal may be recovered by the latter as money had and received to his use. *Ib.*

The defendant having been authorised by the plaintiff to purchase on his behalf a particular ship as cheaply as she could be got, made an arrangement, without the plaintiff's knowledge, with the vendors' broker, who had a right to retain the excess of the purchase-money over 8,500*l.*, by which the defendant purchased the ship for 9,250*l.*, and retained for his own use 225*l.*, part of the excess:—Held, that the plaintiff was entitled to the amount so retained by the defendant, inasmuch as it was a profit acquired by an agent in connection with his agency, without the sanction of his principal, and that it could be recovered as for money had and received. *Ib.*

iv. *Interest.*

Agent not Ready with Accounts.]—The first duty of an agent on receipt of money for his principal is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Pearse* v. *Green*, 1 Jac. & W. 135; 20 R. R. 258.

Agent keeping Money in his hands.]—Agent by the desire of his principal keeping large sums in his hands, for which he was to be responsible from time to time, and duly accounting, not liable to interest even supposing he employed it. *Chedworth* (*Lord*) v. *Edwards*, 8 Ves. 48; 6 R. R. 212.

An agent had the entire management of the affairs of his principal for several years, during which he was never called upon to account; errors were then discovered in some accounts furnished by him, and he paid a small sum admitted to be due, alleging that this was a final settlement, and that only a small sum, if anything more, was due. On a bill being filed, and the accounts being taken, a large sum was found due from him:—Held, that, under the circumstances, fraud not being proved, he was not chargeable with interest on the balances in his hands until the date of the certificate. *Turner* v. *Burkinshaw*, L. R. 2 Ch. 488; 15 W. R. 753.

To a bill against an agent for an account and payment of balance due, the defendant answered, that he had paid over more than he had received, and he claimed a balance due to him. It being proved that the balance was against him:—Held, that the defendant was chargeable with interest at 5*l.* per cent. from the filing of the bill. *Fry* v. *Fry*, 10 Jur. (N.S.) 983.

Promise to put Money out at Interest.]—Scrivener, &c., receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest; balance of an account stated by such scrivener, &c., will carry interest. *Barwell* v. *Parker*, 2 Ves. 364.

Agent of an administrator keeping money of the intestate's in his hands, which he had proposed to his principal to lay out in the funds, ordered to pay interest with annual rests. *Brown* v. *Southhouse*, 3 Bro. C. C. 107.

Interest earned by Agent.]—Public accountants must account for interest made by them on any considerable balances in their hands of money, being the proceeds of public property sold by them pursuant to appointment, although they have necessary payments to make in course of their duty, if their instructions direct payment of proceeds into bank, and point out course of supplying themselves for such necessary payments. *Craufurd* v. *Att.-Gen.*, 7 Price, 2.

Where not charged on previous Balances.]—An agent had for several years stated accounts with his principals, in which he was not charged with interest on the balances in his hands, but in the last account, settled previous to his discharge, was debited with interest on several half-yearly balances; on his discharge he furnished an account not charging himself with interest; but on a bill filed to enforce payment of the balance then due, interest was given on it. *Batemans* v. *M'Elligott*, 7 Ir. Eq. R. 471.

Receiver of a public trust, having a salary, making interest of balances in his hands, is accountable to the trustees for interest made ultra, notwithstanding prior accounts settled without demanding it. *Lonsdale* (*Earl*) v. *Church*, 3 Bro. C. C. 4. *See* 7 Price, 45.

v. *Sufficiency of Accounts.*

Account between principal and agent settled from loose papers, the agent having kept no regular books; after his death, liberty was given to surcharge and falsify upon allegation of errors since discovered. *Hardwicke* (*Lord*) v. *Vernon*, 4 Ves. 411; 4 R. R. 244.

Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and in this instance, the case of a breach of the terms upon which the court dissolved an injunction, the inquiry was directed with costs. The court refused in such a case a prospective direction to admit books, not legal evidence, though usual in a fair case, as where from want of notice of an adverse claim a strict account cannot be given; merely giving liberty to apply upon any question of evidence. *Lupton* v. *White*, 15 Ves. 432; 10 R. R. 94.

Agent acting gratuitously charged with loss

arising from failure of his bankers, having paid in the moneys to his own account. Agent depositing money with a banker to his own account cannot relieve himself from liability, by informing his principal of the payment, without a correct specification of the particulars. *Massey* v. *Banner*, 1 Jac. & Walk. 241 ; 21 R. R. 150. Affirming 4 Madd. 413 ; 20 R. R. 317.

The plaintiff was the commercial agent of the East India Company at Amboyna. It was his duty to send his account to Jones, the company's agent at Banda, to examine and transmit to the governor of Madras. On the plaintiff's accounts there appeared a balance of 1,325 dollars against him ; but on reference to the accounts kept by Jones of the same transactions, instead of a deficiency, 4,771 dollars appeared due to the plaintiff. The company then allowed the 1,325 only :—Held, that this was not a sufficient admission and recognition of the correctness of Jones's accounts as to entitle the plaintiff, without further evidence, to the 4,771 dollars. *Farquhar* v. *East India Co.*, 8 Beav. 260.

The defendant, in a suit instituted against him as agent for an account, moved that certain accounts alleged in the bill to contain false entries might be produced, on an affidavit that the vouchers were lost, and that he could not otherwise put in a sufficient answer :—The motion was refused with costs. *Turner* v. *Burkinshaw*, 4 Giff. 399 ; 2 N. R. 414 ; 8 L. T. 569 ; 11 W. R. 851.

If a decree in any original suit merely directs a common account against an agent, a decree charging him with what he might without wilful default have received cannot be made in a supplemental suit. *Connor* v. *Reeves*, 16 Ir. Ch. R. 398.

An agent employed by a testator to collect rents, and continued in that employment by his trustees after his death, furnished accounts showing only the sums received and the names of the tenants who paid them :—Held, that the trustees were entitled to require such an account as would identify the particular properties from which the rents arose. *Finch* v. *Burden*, 12 L. T. 302.

vi. *Proceedings.*

In Equity.]—Bill for account will lie by principal against agent. *Mackenzie* v. *Johnston*, 4 Madd. 373. *See* S. P., *Id.* 417.

Where the relation between a principal and an agent partakes of a fiduciary character, the court has jurisdiction, and will direct an account, though the receipts and payments are all on one side. *Hemmings* v. *Pugh*, 4 Giff. 456 ; 9 Jur. (N.S.) 1124 ; 9 L. T. 283 ; 12 W. R. 44.

Demurrer to a bill alleging that the defendant had received sums of money as agent for the plaintiff, the particulars and amount of which were unknown to the plaintiff, and praying for an account and full discovery of every sum of money received by the defendant for the plaintiff, allowed. *Ib.*

When a bill against an agent for an account alleges certain specific questions that have arisen as the ground for taking the account, and these questions are decided against the plaintiff, the bill will be dismissed. *Great Western Insurance Co. of New York* v. *Cunliffe*, 43 L. J., Ch. 741 ; L. R. 9 Ch. 525 ; 31 L. T. 661.

To sustain bill for account there must be mutual demands. The case of dower stands on its own specialities ; so the case of a steward, &c. *Dinwiddie* v. *Bailey*, 6 Ves. 141.

—— **Where Legal Remedy.**]—The bare relation of principal and agent does not entitle the principal to come into equity for an account, if the matter can be fairly tried at law. *Barry* v. *Stevens*, 31 Beav. 258 ; 31 L. J., Ch. 785 ; 6 L. T. 568 ; 10 W. R. 822.

The bare relation of principal and agent is not sufficient to entitle the former to relief in equity if the account can be fairly tried at law. *King* v. *Rossett*, 2 Y. & J. 33. *And see* 1 G. & J. 574.

A servant and agent had been in the habit of rendering accounts from time to time of his receipts and expenses, which were duly entered in the books of his principals. Having left their service, he brought an action against them for salary. They thereupon filed a bill for an account, claiming also damages, and denying that the salary was due :—Held, that the accounts could not be opened, that the question of damages and salary was a legal question, and that the bill could not be maintained. *Hunter* v. *Belcher*, 2 De G. J. & S. 194 ; 10 Jur. (N.S.) 663 ; 12 W. R. 782.

A principal is not estopped from obtaining relief in equity against his agent, on the ground that he has remedy at law. *Williams* v. *Trye*, 23 L. J., Ch. 860 ; 18 Jur. 442 ; 2 W. R. 314.

The illegality of a transaction between principal and agent is not necessarily a bar to a suit in equity seeking for an account of such transactions. *Ib.*

And see *Navulshaw* v. *Brownrigg*, infra.

Intricacy of Accounts.]—A mere general charge that accounts are intricate, and cannot be taken without the assistance of a court of equity, is not sufficient to sustain a bill for an account, unless the bill states circumstances from which it may fairly be presumed that the charge is true. *Bowles* v. *Orr*, 1 Y. & Coll. 464.

An account between a banker and his customer consisting of three items only, and interest :—Held, not to be a proper subject for a bill in equity. *Foley* v. *Hill*, 1 Ph. 399 ; 13 L. J., Ch. 182 ; 8 Jur. 347.

A bill for an account, by a principal against his agent, is not sustainable where the transaction to which it relates is a single transaction not tainted with fraud, and the plaintiff has a remedy at law. *Navulshaw* v. *Brownrigg*, 1 Sim. (N.S.) 573 ; 21 L. J., Ch. 57 ; 15 Jur. 985. Affirmed, 2 De G. M. & G. 241 ; 21 L. J., Ch. 908 ; 16 Jur. 979.

The plaintiff, a merchant in India, consigned goods to A., of Liverpool, to sell on his account, and drew bills against the goods, which A. accepted. A. then placed the goods in the hands of B., his correspondent in London, with instructions to sell them or cause them to be sold, and drew a bill upon B. for 1,680*l.*, which B. accepted on the security of the goods, but with notice that the plaintiff had consigned the goods to A. for sale on his account. A. became insolvent, leaving the bills drawn by the plaintiff unpaid. B. paid the bill for 1,680*l.*, and then sold the goods for 1,300*l.* A bill filed by the plaintiff against A. and B. for an account and payment, by B., of the proceeds of the goods, was dismissed with costs. *Ib.*

The plaintiff, a solicitor, employed the defendant for some years as an occasional clerk and to collect rents, without having fixed the terms of his remuneration ; and it appeared that there were mutual receipts and payments of money. Upon motion for injunction to restrain the defen-

dant's action at law :—Held, that the plaintiff was not entitled to an injunction. The mere fact of mutual receipts and payments cannot be said to give the right to an account in equity. The account must be not merely from the number of items, but from its own nature, so complicated that it could not be taken in a court of law. *Fluker* v. *Taylor*, 3 Drew. 183.

By Party jointly interested with Principal.]—A. having admitted B. to an interest in an adventure, B. makes remittances to the agent of the concern in London, which he directs to be carried to the account of A., and he also remits money to A., for A. to remit to the agent on his account; the agent kept the account with A. only :—Held, that B. could not sustain a bill for an account against the agent. *Maxwell* v. *Greg*, 6 L. J. (O.S.) Ch. 128.

Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this primâ facie imposes upon the agent the necessity of accounting with such other person for his share of the adventure; but this obligation ceases to exist if the transaction shows that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter. *Killock* v. *Greg*, 4 Russ. 285; 28 R. R. 92.

Inclusion of Solicitor's Bills.]—In a suit by a principal against his steward and agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits, and timber money received by the defendant on the plaintiff's account; and also directed the master, in taking the accounts, to make the parties all just allowances. The defendant was a solicitor, and had acted as such for the plaintiff, during his stewardship, and bills of course were due to him from plaintiff. The master, at the plaintiff's request, taxed the bills, and in taking the accounts under the decree, included the reduced amounts of them amongst the just allowances to which defendant was entitled. The plaintiff excepted to the report on that account and the court allowed the exceptions. *Jolliffe* v. *Hector*, 12 Sim. 398.

Evidence of Overcharge.]—It is the duty of a sworn broker of the city of London to charge his principal only the cost price of articles purchased for him, in addition to his commission, and the principal having averred in an action that the broker had charged him a greater price than the cost price which the plaintiff had paid :—Held, that it was sufficient proof of such averment to produce a running unsettled account between the parties, by which it appeared that the principal had paid more than the amount of the overcharges, although on the whole account, and when the balance, at a subsequent period, was struck, the principal was indebted to the broker in a sum far exceeding such overcharges. *Procter* v. *Brain*, 2 M. & P. 284; 3 Car. & P. 536; 7 L. J. (O.S.) C. P. 66.

Liability to Discovery—London Brokers.]—*See* ante, col. 942.

Suit for Account or Action for Negligence.]—A. placed moneys in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the moneys out on insufficient securities, misrepresenting to her their character :—Held, that as against him, if living, it would have been, and as against his estate after his death, it was not a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charges for disbursements on the insufficient securities. *Smith* v. *Pococke*, 2 Drew. 197; 23 L. J., Ch. 545; 18 Jur. 478; 2 Eq. R. 308; 2 W. R. 285.

Costs.]—If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken, and it will not be any excuse for him that he offered to pay on account a gross sum, which it turns out would have covered all that was due from him. *Collyer* v. *Dudley*, Turn. & R. 421; 2 L. J. (O.S.) Ch. 15.

An account was directed against the collector, not disturbing accounts settled with the predecessors, with liberty to surcharge, and the defendant, who resisted the account, was ordered to pay the costs to the hearing. *Ib.*

To a bill against an agent for an account and payment of balance due the defendant answered, that he had paid over more than he had received, and claimed a balance due to him. It being proved that the balance was against him :—Held, that he must pay, in addition to the balance due from him, the costs of suit. *Fry* v. *Fry*, 10 Jur. (N.S.) 983.

vii. *Period.*

Agent a Trustee.]—An agent who is empowered to retain in his own hands his principal's money, for the purpose of investment, is a trustee for his principal, and cannot set up the Statute of Limitations as a bar to a suit for an account. *Burdick* v. *Garrick*, 39 L. J., Ch. 369; L. R. 5 Ch. 233; 18 W. R. 387.

Where Fraud.]—Interest and costs decreed against a steward upon fraud, wilful concealment, &c., and in such cases generally there is no limitation of time. *Hardwicke* (*Earl*) v. *Vernon*, 14 Ves. 504; 9 R. R. 329.

Incorrect Entries.]—If a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not, after the decease of the agent, precluded by lapse of time, or by certain shareholders omitting, against opposition, to press for explanations previously asked, from showing that such entries are not only erroneous but fraudulent. *Stainton* v. *Carron Co.*, 24 Beav. 346; 27 L. J., Ch. 89; 3 Jur. (N.S.) 1235.

Where the accounts of an agent acting for a company have been improperly kept, or mystified, and not duly rendered and explained when asked for, the court will direct them to be taken through a period of twenty-five years, though accounts sent in had been acted on, and though shareholders who asked for further information and explanation on such accounts did not persevere to obtain them. *Ib.*

A large shareholder was the manager of the affairs of a company. He rendered accounts regularly from 1826 to his death in 1851. These accounts were not challenged in his life, but after his death items exceeding 2,000*l.* a year were questioned by the company, for which no vouchers could be produced and no satisfactory explanation given. The account was opened for the whole period of twenty-five

years, and it was directed to be taken with special directions. *Ib.*

Distinction between the cases where the business of a company is conducted by a mere agent and where it is managed by a shareholder who is a quasi co-partner. *Ib.*

A decree was made in a suit for taking and adjusting a complicated series of accounts. The decree was limited to 1825, under the impression that all previous accounts were correct. Upon discovery that errors existed in the earlier accounts, another suit was instituted, and after proceedings had been taken a compromise was made, under which a sum of 220,000*l.* was paid by the plaintiffs. On motion for an injunction to restrain proceedings in Scotland, a question was made, whether the order for compromise precluded the taking of accounts prior to 1825, or whether that order included all the accounts between the parties. Romilly, M.R., decided that the earlier accounts must be taken, and for that purpose he set aside the compromise. On appeal:—Held, that the compromise was binding from 1825, and the defendants electing to so consider it, the court varied the order of Romilly, M.R., by directing the accounts prior to 1825 only to be taken. *Stainton* v. *Carron Co.*, 30 L. J., Ch. 713; 7 Jur. (N.S.) 645; 4 L. T. 659—L.JJ.

Request for Special Account.]—A. filed a bill against B., who had been his commercial traveller, charging misconduct and asking for an account during the term of service and payment by way of damages, and stating that in 1861 he had written to B., directing him to send him a special account. B., who denied the misconduct, stated that he had always given A. a general account:—Held, that A. was only entitled to an account since the date of the letter requiring B. to keep an account prospectively. *Hunter* v. *Belcher*, 10 Jur. (N.S.) 663; 9 L. T. 501; 12 W. R. 121.

Held, also, that even if any particular damage or misconduct had been proved, the court had no jurisdiction over such a matter. *Ib.*

Other Cases.]—An account decreed against a land agent for twenty-seven years previous to the filing of the bill under the circumstances, but refused as to certain gratuities received from tenants by the agent with the knowledge of his principal, which were charged to be extortionate, but by the exorbitance of which the principal was not proved to have been a loser, except so far as they were taken as fines. *Palmer* v. *Browne*, Beat. 540.

Account against a confidential agent in possession of estates since 1780, without giving any account to his principal, residing in Ireland, and an inquiry into the circumstances of a lease granted under his direction, and in which he took an interest. *Ormond (Lady)* v. *Hutchinson*, 13 Ves. 47. Affirmed, 16 Ves. 94.

viii. *Opening Accounts.*

See *Hunter* v. *Belcher*, col. 988.

Fraud of Agent.]—A firm of merchants, formerly carrying on business at Calcutta, sued a firm at Manchester, who had acted as their agents on commission for the purchase and shipping to India of Manchester goods, to have the settled accounts between the parties, extending back for a period of nearly twenty years, opened; and to obtain repayment of certain alleged overcharges made by the defendants in their accounts with the plaintiffs. The defendants were charged with having bought goods at one price and invoiced them to the plaintiffs at an increased price; that having been instructed to buy white goods, they purchased grey goods and got them bleached, charging the plaintiffs more than the price of the grey goods plus the cost of bleaching; that they had not credited the plaintiffs with the discounts allowed to themselves; that they had charged for insurances that they had never effected; that they had sold their own goods to the plaintiffs at a profit; and that they had overcharged the plaintiffs in other ways. The main defences raised were, that the plaintiffs knew of the charges, and that they were in accordance with the custom of the Manchester trade, and that as regarded the insurances which had been charged for but not effected, the defendants had themselves insured:—Held, that the plaintiffs did not know of the overcharges, and that there was no custom of the Manchester trade to make such overcharges. *Williamson* v. *Barbour*, 50 L. J., Ch. 147; 9 Ch. D. 529; 37 L. T. 698.

Held, also, that in a case between principals and agents, one case of proved fraudulent overcharge is sufficient to open the accounts between the parties, and that in the present case far more than enough had been proved to induce the court to open the accounts, and that the usual decree for that purpose must be made. *Ib.*

Account opened, and general account decreed against an agent who was also tenant to his principal, in respect of fraud; and laches in landlord under the circumstances, not an objection. *Beaumont* v. *Boultbee*, 7 Ves. 599; 5 Ves. 485.

Fraudulent accounts between a principal and factor opened from the beginning, the court holding that the relief ought not, under such circumstances, to be limited to a right to surcharge and falsify. *Clarke* v. *Tipping*, 9 Beav. 282.

A broker or agent being employed by a customer to sell foreign stock, on a day specified by him in a letter of instructions, purchased the stock in the name of his partners, a firm in Paris, at the market price of the day. Being also employed to purchase foreign stock and bonds for his customer, according to his, the agent's, recommendation, he transmitted accounts of the transactions to his employer, with broker's notes, &c., as if he had purchased the stock of third persons. In fact, no stock or bonds were purchased, no transfers were made, no broker's notes passed; but the sales were nominal of stock and bonds remaining in the hands of the agent and his partners, and not set apart to nor appropriated to the customer. In order to effect these purchases, loans of money were made by the agent to the customer, upon agreement that the stock and bonds should remain as a deposit in the hands of the agent, to secure the repayment of money advanced. The stock and bonds were afterwards sold at a loss under the advice of the agent. In 1819 an account of these transactions was rendered, and settled between the customer and the agent; and great loss having been incurred upon the transactions, a large balance was paid by the customer to the agent. Upon bill filed in 1824 all the transactions were set aside, and an account decreed against the agent. *Rothschild* v. *Brookman*, 5 Bli. (N.S.) 165; 2 Dow & Cl. 188. Affirming 3 Sim. 153; 7 L. J. (O.S.) Ch. 163; 30 R. R. 147.

In Favour of Agent.]—An agent's account in which he charges himself with sums received, is

not conclusive against him, as to the fact of those receipts. The account may be opened to let in the fact of the sums not having been received in either of the following cases: If the account on the face of it discloses that the money has not been actually received; if the principal shows by his conduct that he knows the money has not been actually received; or if the principal does not express his dissent to a subsequent correction of the account by the agent, in which correction he relieves himself from the sum with which he had previously charged himself. *Shaw* v. *Dartnall*, 6 B. & C. 56; 9 D. & R. 55; 5 L. J. (O.S.) K. B. 35; 30 R. R. 246.

A. sends B. as a factor abroad, and commissions him to draw on a foreign merchant, which he does, and so states in the account furnished. A. gives credit for the bills drawn as cash; but the bills are not accepted, by the contrivance of A. B. shall not be concluded by that account, but be paid. *Ward* v. *Praed*, Colles's P. C. 57.

b. Of Principal.

Proceedings in Equity.]—It does not follow that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal, for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. *Padwick* v. *Stanley*, 9 Hare, 627; 16 Jur. 586.

—— **Where Account Necessary to Determine Remuneration of Agent.**]—Where a salary is payable to a servant in proportion to the profits of his employers, the question whether the servant has a right to come into equity for an account and payment, in lieu of suing at law, depends upon whether the accounts are of a too complicated nature to be gone into by a jury. *Harrington* v. *Churchward*, 29 L. J., Ch. 521; 6 Jur. (N.S.) 576; 8 W. R. 302.

An agent entitled to receive a commission on business done for his principal cannot, on those grounds alone, maintain a bill for an account against the principal. *Smith* v. *Leveaux*, 2 De G. J. & S. 1; 3 N. R. 18; 33 L. J., Ch. 167; 9 Jur. (N.S.) 1140; 9 L. T. 313; 12 W. R. 31.

A trading firm agreed to give to an agent a commission on orders obtained by himself, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him:—Held, that the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at law. *Ib.*

A., by his bill, alleged that he was employed by the defendants to obtain orders for goods on commission; that orders had been given to the defendants in consequence of his introduction, the commission on which they refused to pay; and he prayed for discovery and an account:—A demurrer, on the ground that an account might be taken at law, and that the court had no jurisdiction, was overruled with costs. *Shepard* v. *Brown*, 9 Jur. (N.S.) 195; 7 L. T. 499; 11 W. R. 162.

—— **Separate Contract with Agent.**]—If A. is employed by B. as his agent at a fixed salary, A. may nevertheless enter into a contract, apart from his ordinary duties, to perform works for B., and may come to the court for an account of moneys received by B., to which he considers himself entitled under the contracts. *Waters* v. *Shaftesbury (Earl)*, 12 Jur. (N.S.) 311; 14 L. T. 184; 14 W. R. 572.

Two deeds were executed between a company, a landowner, and the agent or steward of the latter, the effect of which would have been to constitute the agent contractor for the execution of improvements upon the land, which were about to be effected, for a certain sum of money, to be advanced by the company to the landowner for the purpose. The works having been completed under the agent's superintendence for a less sum, the agent filed a bill against the landowner, claiming as contractor's profit the difference between the actual cost and the sum actually advanced to the landowner by the company:—Held, on appeal, that it was competent to the defendant to show that the intention of the parties, when the deeds were executed, was that the plaintiff should be only nominally the contractor, and the evidence establishing this, that he was not entitled to the profit he claimed. *S. C.*, 15 L. T. 489; 15 W. R. 289.

—— **Mutual Dealings.**]—An action at law being brought to recover the produce of some foreign specie remitted by a merchant abroad to an agent in London, the agent filed his bill, alleging generally that there were mutual dealings and transactions between the parties, and praying that an account might be taken of them, and for an injunction:—A demurrer was allowed. *Frietas* v. *Dos Santos*, 1 Y. & J. 574. *See also* 2 Y. & J. 33.

For Cost Price of Goods.]—Plaintiff, a factor abroad, having exceeded the price limited for the purchase of hemp, the defendant, who objected to the contract, but afterwards re-shipped and disposed of some of it on a risk, was ordered to account for the cost price. *Cornwall* v. *Wilson*, 1 Ves. 509.

Factor exceeds orders on one part, saves on another, the principal to take the whole. *Ib.*

For Interest.]—The defendant wrote to his receiver and professional agent as follows:—"If you will remit the 400*l.*, I can give you a note for it when you come to London." The money was advanced, but no note signed:—Held, that a special contract must be inferred, and that interest was payable by the defendant. *Rhoades* v. *Selsey (Lord)*, 2 Beav. 359.

An agent, who managed the money matters and investments of his principal, rendered accounts charging interest on the mortgages as received, and representing that there were no arrears. He also paid over the balances appearing due on such accounts:—Held, that the agent could not, on the death of the principal, charge his estate with the interest, on the plea that it had not been actually received from the mortgagors, but had been advanced by the agent to the principal for his accommodation. He was, however, allowed to use the name of the representatives of the principal to recover what might be due from the mortgagors on giving an indemnity. *Owens* v. *Kirby*, 30 Beav. 31.

Agent Establishing Title to Estate—Liability of Principal for Mesne Profits—Estoppel.]—Where an agent had permitted his principal to expend money on an estate, which the agent

afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the court granted an injunction to restrain an action brought by the agent's representative for some profits. *Cawdor (Lord)* v. *Lewis*, 1 Y. & Coll. 427.

See further PRACTICE — ACCOUNTS AND INQUIRIES.

7. INABILITY OF AGENT TO DISPUTE PRINCIPAL'S TITLE.

General Rule.]—An agent cannot dispute the title of his principal; and, therefore, where a ship originally belonging to one of two part owners, had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums, and, on a loss happening, received the money from the underwriters:—Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner to whom the ship originally belonged. *Dixon* v. *Hammond*, 2 B. & Ald. 310.

Where a merchant in Newcastle, who was in the habit of consigning goods to his agents in London, for sale, and of drawing upon them to certain amounts, had overdrawn his account and advised his agents that he would ship them twenty tons of alkali to cover his draft, and did accordingly ship the alkali on board a ship of the defendants, who were wharfingers between Newcastle and London, and received from the defendants' servant (the captain of the ship) a boat receipt, to the effect, that the goods were to be delivered to the plaintiffs:—Held, that the defendants were estopped from denying the plaintiffs' title to the goods upon their arrival in London. *Evans* v. *Nichol*, 4 Scott (N.R.) 43; 3 Man. & G. 614; 11 L. J., C. P. 6; 5 Jur. 1110.

An agent cannot get an adverse title, unless he can distinctly show that the acts on which he relies are in respect of title, and not in respect of agency. *Att.-Gen.* v. *London Corporation*, 2 Macn. & G. 247; 2 Hall & Tw. 1; 19 L. J., Ch. 314; 14 Jur. 205.

In a case where A. had agreed to remit certain consignments to B., and B. had agreed to account with A. for the proceeds of such consignments:—Held, that it was not competent at any time afterwards for B. to assert a paramount title to the proceeds of such consignments. *Zulueta* v. *Vinent*, 1 De G. M. & G. 315.

A mining company in Cuba had for some time been accustomed to consign its ore to Z., in London, who furnished the money for the necessary supplies. A considerable debt having thus become due from the company to Z., the ore was suddenly consigned to Z. in the name of V., who brought an action against Z. for the proceeds. Z. thereupon filed his bill against the company and V., alleging that the last consignments were the property of the company, and though made in the name of V., were made by the company, and on their account, and for their benefit, and placed to their account; and seeking to restrain the action and have the account taken:—The court held, that the bill stated a sufficient equity, and overruled a demurrer of V. to the bill. *S. C.*, 13 Beav. 215.

M., the manager of E.'s business, was allowed by him to send out bills to the customers in his (M.'s) own name alone. M. afterwards locked E. out of the business premises, and E. several times had to break the lock to get in. M. made an assignment of the premises and stock in trade to P., and P. advertised them for sale. E. filed a bill against M. and P. to restrain the exclusion and the sale. The defendants demurred for want of equity, and the demurrer was overruled with costs. *Euchus* v. *Moss*, 14 W. R. 327.

And see ESTOPPEL.

Defence of Jus tertii.]—A contract establishing between the contracting parties the relation of principal and agent, is made absolute in law by the latter acting under it; and an insurance broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject-matter of the insurance; their claims would be a question between the assured and the persons so claiming to be interested. *Roberts* v. *Ogilby*, 9 Price, 269; 23 R. R. 671.

The plaintiff, the elder brother and creditor of an intestate, being in possession of the goods of the intestate, under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, and he employed the defendant as auctioneer to sell the goods. After the sale by the defendant, the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff, but to retain the money until all the creditors came in, that it might be divided rateably amongst them. No letters of administration were taken out:—Held, that the defendant was primâ facie bound to account to the plaintiff, from whom he had received the goods; and even if he would have been at liberty to set up the jus tertii, and show as a defence against the plaintiff, that he was bound to account to a third person, still that he was liable, no title being shown by him in any third person. *Crosskey* v. *Mills*, 1 C. M. & R. 298; 3 L. J., Ex. 297. See *Dickenson* v. *Naul*, 4 B. & Ad. 638; 1 N. & M. 721.

A wharfinger had malt deposited with him, on account of B., and B., as a security for money advanced by the plaintiff, made a sale of the goods to him, with a condition annexed for repurchase by B., at such an advanced price as to make the transaction usurious. The wharfinger, on notice of the sale, transferred the malt in his books from B. to the plaintiff, and held it at the disposal of the plaintiff. B. afterwards became bankrupt; his assignees claimed the malt on the ground that the transaction with the plaintiff was usurious, and that the property had never passed; but they eventually compromised with the plaintiff:—Held, afterwards, in an action against the wharfinger for the proceeds of the malt, as money had and received to the use of the plaintiff, that he could not set up the jus tertii in the assignees, which they themselves had abandoned. *Betteley* v. *Reed*, 3 G. & D. 561; 4 Q. B. 511; 12 L. J., Q. B. 172; 7 Jur. 507.

The plaintiff seized goods belonging to R. under a distress for rent of a house alleged to have been demised by him to R., and having seized them he delivered them to the defendant, an auctioneer, for the purpose of selling them. When the sale was about to begin, R. gave notice to the defendant that he must not sell the goods, or if he did sell them, that he must retain the proceeds for him, R., as the distress was void, and as the relation of landlord and tenant did not exist between himself and the plaintiff. This was true, and the distress was void altogether,

The defendant did sell the goods, but kept the proceeds for R. :—Held, that he was entitled to set up the jus tertii, and had a good defence to an action by the plaintiff. *Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J., Q. B. 137; 11 Jur. (N.S.) 425; 12 L. T. 178; 13 W. R. 561.

A wharfinger received notice that goods deposited at his wharf were marked with a fraudulent imitation of a trade mark, and that the owner of the trade mark was about to apply to the court of chancery for an injunction to prevent the sale of the goods; after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner:—Held, that he was justified in equity in such refusal, and that the owner of the goods would be restrained from suing him at law, for a wrongful conversion of the goods. *Hunt* v. *Maniere*, 5 N. R. 181; 33 Beav. 157; 34 L. J., Ch. 142; 11 Jur. (N.S.) 28, 73; 11 L. T. 723; 13 W. R. 363.

And see BAILMENT.

Delivery to Third Person.]—Where a consignor had purchased goods on account of and at the risk of his correspondent, and delivered them to the carrier:—Held, that he could not afterwards, on any disagreement, depart from his duty, and deliver them to another person; and the latter taking the goods with knowledge of the circumstances would do so subject to the rights of the correspondent. *Green* v. *Maitland*, 4 Beav. 524.

An agent in this country for a foreign principal having in his possession goods which by the act of the principal have been so appropriated as to be in equity the property of a third person in this country, and having notice of the rights of the third person, cannot resist the demand of that third person for the goods on the ground that they are held by the agent in his capacity of agent, or impose on the third person, the rightful owner, unreasonable conditions as the price of their delivery to him, because the foreign principal has directed him so to do. Application of this principle in the case of disputed rights as to cargoes of timber and the bills of lading representing them. *Dresser* v. *Hoare*, 26 L. J., Ch. 51; 2 Jur. (N.S.) 1151—L.JJ.

8. ON SALE OR PURCHASE OF GOODS.

Liability for Price—In what Cases.]—An agent who sells goods on credit is not liable to his principal until he is paid by the vendee, unless the delay in payment was occasioned by his own neglect. *Varden* v. *Parker*, 2 Esp. 710.

If an agent discloses the name of the vendee, he is not liable for the price to his principal, unless he acts under a del credere commission. *Alsop* v. *Sylvester*, 1 Car. & P. 107.

Goods were consigned to two for sale by commission; upon a dissolution of partnership, the commission to sell was assumed by one:—Held, that, having sold, he was rightly sued for money had and received, which action could not have been maintained against both, although an action for not accounting would have laid against him. *Wells* v. *Ross*, 7 Taunt. 403.

Where booksellers undertook to manage the sale of a library, to prepare and be at the expense of printing catalogues and advertising the sales, and settling with the auctioneers, for a commission of 12½ per cent., to include every expense except king's duty and the removal of the books from the country; and also engaged "to be responsible, together with the auctioneers, for the proceeds of the sales":—Held, first, that the employment of certain auctioneers to sell some of the books at the particular desire of the owner of the library, did not release the booksellers from their responsibility, in conjunction with those auctioneers. *Cholmondeley* v. *Payne*, 8 Car. & P. 482.

Held, secondly, that the booksellers were not released from such responsibility by the circumstance of the attorney of the owner of the library taking the promissory notes of those auctioneers, instead of requiring certain bills of the purchasers, which they ought to have given, unless he tied up his hands from proceeding against the auctioneers until those bills become due, without first obtaining the consent of the booksellers who were to be responsible together with them. *Ib.*

The plaintiff employed the defendant, who was a corn factor, to sell a cargo of corn, which he accordingly sold to C. on the 15th May. Information was afterwards received that before this sale the corn had already been sold, on the 24th April, by the captain of the vessel chartered by the plaintiff. This was not known at the time to either of the parties. C. subsequently gave notice to the defendant that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. The plaintiff sought to recover the price of the cargo from the defendant, who was a factor, on a del credere commission:—Held, that the defendant was not liable for the amount, as it was the sale of a cargo which did not exist at the time. *Couturier* v. *Hastie*, 5 H. L. Cas. 673; 25 L. J., Ex. 253; 2 Jur. (N.S.) 1241.

A commission to sell and transfer stock "when the funds should be at 85 per cent., or above that price," is a particular commission under which an agent is bound to sell when the funds reach 85, and he has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price than 85. *Bertram* v. *Godfray*, 1 Knapp, P. C. 381.

A mercantile house that had accepted such a commission and had not sold when the funds reached 85:—Held, therefore, in equity to have made the stock their own from that time, and ordered to account to their employer for the price of it, with interest; he in return accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price. *Ib.*

If a broker, being employed to sell goods, sells them for a bill at a given date, and draws on the buyer for the amount, he is answerable on the bill to his principal. *Le Fevvre* v. *Lloyd*, 1 Marsh. 318; 5 Taunt. 749; 15 R. R. 644.

Guarantee against Loss.]—A broker, when he bought goods for his principal, agreed for half per cent. to indemnify him from any loss on the resale:—Held, that this undertaking was discharged when the principal had a fair opportunity of selling to advantage, and neglected it, though he was afterwards obliged to sell at a loss. *Curry* v. *Edensor*, 3 Term Rep. 524.

Indorsing Bills.]—An agent purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal on his indorsement, however small the commission which he gets upon the purchase. *Goupy* v.

Harden, 2 Marsh. 454; 7 Taunt. 159; Holt, N. P. 342; 17 R. R. 478.

Neglect of Instructions—Power to repudiate Acts.]—The plaintiff instructed the defendants, cotton brokers, to purchase for him fifty bales of cotton. The defendants, being also employed by other principals, made a contract in their own names for the purchase of 500 bales, and having informed the plaintiff that they had purchased fifty for him, he paid them part of the purchase-money:—Held, that the plaintiff was entitled to recover back the money, as upon a failure of consideration, since the defendants had never made the contract which he had authorised them to make. *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L. J., Ex. 142; 11 Jur. (N.S.) 586; 11 L. T. 577; 13 W. R. 970.

—— **Delay in signifying Dissent.**]—A. consigned and shipped goods to India for sale, and in his letter of instructions to his agent B., directed him to invest the proceeds in specified articles of merchandise or in bills at the exchange of the day, and remit them to England. B., instead of complying with this order, invested the proceeds in a commodity not specified in his letter of instructions, and informed A. of the purchase by letter, and transmitted a bill of lading for the goods, which reached A. on the 29th May, who notified to an agent of B., on the 7th August, his dissent from what had been done, the goods having in the meantime been lost at sea:—Held, that the laches of A., in delaying his notice of dissent so long, discharged B.'s liability; and that the jury was warranted in finding that A. had assented to the purchase made by B. *Prince* v. *Clark*, 2 D. & R. 266; 1 B. & C. 186; 1 L. J. (O.S.) K. B. 69; 25 R. R. 352.

Sale without Assent of Principal—Misrepresentation—Liability for Charges.]—The plaintiffs, who were cotton spinners, employed a commission agent to sell their goods, and the course of business was for the agent to obtain the assent of the plaintiffs to each sale. The agent transmitted to the plaintiffs the particulars of certain sales, which he represented as having been made to specified purchasers, and afterwards rendered accounts, debiting himself with the purchase moneys, but not paying the balance. He afterwards executed an assignment for the benefit of his creditors, when it appeared that his representations as to his disposal of the goods were untrue, and that he had in fact consigned the goods for sale as and with goods of his own to factors in India, and that the accounts had been settled between him and the factors on the footing of debiting each cargo only with the advances and charges made in respect of that cargo, but that on the whole account there was a balance coming from the factors:—Held, first, that the plaintiffs were entitled to have the proceeds marshalled, and the advances and charges thrown entirely on the agent's own goods. *Broadbent* v. *Barlow*, 3 De G. F. & J. 570; 30 L. J., Ch. 569; 7 Jur. (N.S.) 479; 4 L. T. 193.

Held, secondly, that this right was not excluded by the settlement of accounts between the plaintiffs and the agent, or by the former having had upon the agent's books the means of discovering the fraud before a meeting took place of his creditors, at which the plaintiffs attended, and at which the deeds of assignment were agreed to, but at which neither the fraud, nor the claim founded on it, was brought forward; the principle being, that means of knowledge to affect a person with constructive notice must be such as a prudent man might be expected to avail himself of. *Ib.*

Held, thirdly, that the right was not excluded by the mode in which the factors had rendered their accounts to the agent, nor by their not having themselves set up any claim to marshal the proceeds of the consignment. *Ib.*

Held, fourthly, that the enforcement of this right did not preclude the plaintiffs from proving under the deed of assignment for the deficiency. *Ib.*

Power of Agent to compel Principal to Refund.]—If a factor takes a security, payable to himself, from a purchaser of goods, and gives his own security to his principal, without giving the name of the purchaser, the factor cannot compel his principal to refund the money paid him, on failure of the purchaser. *Simpson* v. *Swan*, 3 Camp. 291; 13 R. R. 805.

If an agent, in anticipation of the receipt of the amount of sales for his principal, remit such amount, and the purchasers fail to pay, it is not the loss of the agent, but of the principal; contra, if the agent sells on a del credere commission. *McLarty* v. *Middleton*, 6 W. R. 379, 853.

Selling for Credit instead of Ready Money.]—A declaration stated that the defendant was retained by the plaintiffs as their broker, to sell goods, and deliver the same, according to the terms of the contract, to such person as should become the purchaser. It then alleged that he sold the goods to P., and P. purchased at certain times of delivery, the amount to be paid on delivery:—Held, that this amounted to an express contract by the defendant with the plaintiffs to deliver what he sold for ready money only. *Boorman* v. *Brown*, 2 G. & D. 793; 3 Q. B. 511; 11 L. J., Ex. 437; 11 Cl. & F. 1.

Held, also, that an action of tort was maintainable against the defendant for delivering without the price being paid. *Ib.*

If consignees abroad, on a del credere commission, specially indorse bills to one of their partners in London for the proceeds of goods, they having advanced money on the goods to the consignor, the consignees must bear the loss on the bills being dishonoured while in the partner's hands. *Lucas* v. *Groning*, 1 Stark. 391; 2 Marsh. 460; 7 Taunt. 164.

A declaration stated that, in consideration that the plaintiff would employ the defendant as a coal factor to sell coals on account of the plaintiff, the defendant promised the plaintiff that he would not sell the coals otherwise than for ready money, and alleged for breach that the defendant sold the coals otherwise than for ready money, to wit, at two months' credit:—Held, that the action was not sustained by the production of the following letter of instructions given by the plaintiff to the defendant, and by proof of a sale of the coals at 15*s.* 6*d.* per ton, at a credit of two months: "Please sell for me 250 tons of anthracite coal at such a price as will realise me not less than 15*s.* per ton, net cash, less your commission for such sale." *Boden* v. *French*, 10 C. B. 886.

A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by auction, subject to the following condition: "Payment to be made on the delivery of bills of parcels, by

good bills on London, to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B. bought accordingly. Before the sale began the auctioneer stated that payment by known buyers was to be on the usual credit, two and two months; B., as a known buyer, received the goods without giving bills, and forwarded them to C. in London, with an invoice, stating that payment was to be equal to cash at four months; and a few days afterwards B. drew on C. for the amount, at four months from the day of sale, which bill C. accepted, and paid at maturity. Within two months from the sale B. failed, never having given bills to A. for the price of the goods; and A., finding that C. was B.'s principal, sued him for the value:—Held, that he could not recover, as C. would naturally be induced by A.'s catalogue to suppose that B. had given bills for the goods at the time of the delivery, and therefore accepted B.'s draft under a mistake occasioned by A.; and, per Parke, J., the broker B. had not any authority from C. to make a contract for goods to be paid at two and two months, and consequently C. was not bound by it. *Horsfall* v. *Fauntleroy*, 10 B. & C. 755; 8 L. J. (O.S.) K. B. 259.

Directory or Discretionary Instructions.]—The plaintiffs, who were London merchants, sent to the defendants, who were commission agents in China, goods, to be sold by the latter, on the terms contained in the following letter: "If tea is not obtainable at our limits you may invest one-half of the whole proceeds in silk, at prices not exceeding, &c. If silk is obtainable much below these prices you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion":—Held, that, on looking at the whole of the letter, the words, "you may invest," were to be construed as directory, and not as giving the defendants a discretionary power. *Entwistle* v. *Dent*, 1 Ex. 812; 18 L. J., Ex. 138.

Selling Goods bought for Principal.]—In an action against an agent by his employer for selling goods bought by his principal, a custom allowed as a defence that, in case of default by the principal, the agent might (being personally liable on the purchase) sell on his own account. *Lienard* v. *Dresslar*, 3 F. & F. 212.

9. On Receipt of Money.

Duty to Account—Interest from Date of Refusal.]—The first duty of an agent is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Pearse* v. *Green*, 1 Jac. & W. 135; 20 R. R. 258.

A person who has received money as agent is bound not only to account for the same, but also to pay it over to the principal when requested so to do; and, in an action for money had and received, is chargeable with interest on the amount so received from the date of the refusal to pay it over. *Pearse* v. *Green* (supra) followed. *Harsant* v. *Blaine*, 56 L. J., Q. B. 511—C. A.

Agent giving Security—Whether Discharged.]—A. having directed his agent B. to invest for him 1,850*l.* at 5 per cent., so that he might call in 1,100*l.* of it ready at any time, and B. having, after A.'s death, brought forward a mortgage security to himself for 2,500*l.*, and a deed poll executed by himself, declaring 1,850*l.* of it to be the money of A.:—Held, not to discharge him, and that he must pay the money into court. *Every* v. *Mould*, 1 L. J., Ch. 23.

Upon Defeasible Contract.]—Money received by an agent under a defeasible contract ceases to be received to the use of the principal when the contract is defeated; and the agent may show this as a defence against the principal, though the fraud was entirely his, and the principal was innocent of it. *Murray* v. *Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

Through Fraud of Principal.]—Money had and received by an agent, in pursuance of a contract founded on false statements made by his principal, is money had and received to the use of the persons paying the same and not to the use of the principal: and the agent may shew this as a defence against the principal, the fraud being his, and the agent being innocent of it. *Stevens* v. *Legh* or *Lee*, 2 C. L. R. 251; 2 W. R. 16.

Agent Betting for Principal—Wagering.]—The plaintiff employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the person with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received:—Held, that 8 & 9 Vict. c. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between the plaintiff and defendant, and that, therefore, notwithstanding that statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant. *Beyer* v. *Adams* (26 L. J., Ch. 841) overruled. *Bridger* v. *Savage*, 54 L. J., Q. B. 464; 15 Q. B. D. 363; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725—C. A.

Illegal Disbursements.]—Money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them. *Bayntun* v. *Cattle*, 1 M. & Rob. 265.

Paid under False Pretences.]—There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation that he had entered into a contract for his principal, which alleged contract had in fact no existence. *Wilson* v. *Short*, 6 Hare, 366; 17 L. J., Ch. 289; 12 Jur. 301.

Wrongful Sale or Pledge of Goods.]—When a factor has raised money by a wrongful pledge of the goods of his principal, it is competent to the latter, in taking the account between himself and the factor, to abandon the goods and treat the money raised thereon as money had and received to his own use. *Bonzi* v. *Stewart*, 4 Man. & G. 295; 5 Scott (N.R.) 1; 11 L. J., C. P. 228.

—— Where Agent has Appropriated Sums as Payment.]—A factor in London purchased from time to time silk for R., and paid for the same. Remittances were made by R. generally, and not

on account of any particular purchase. A general account current was kept by the factor, and then rendered to and checked by R., and the next account began with the balance of the preceding one. After the purchase of a certain lot of silk by the factor (which R. sold shortly afterwards to the plaintiff), two such accounts were delivered and balances struck in favour of R., showing that the factor had, subsequently to the purchase of this silk, received remittances from R. amply sufficient to cover both its price, and also the preceding items of the account against him. Subsequently, the balance being much against R., the factor sold this lot of silk to recoup himself:—Held, that the accounts showed an election by the factor to appropriate the remittances about the time of the purchase of this lot of silk in payment of the advance on account thereof, and that he was therefore not entitled to sell it, as against the plaintiff, to recoup himself. *Siebel* v. *Springfield*, 9 L. T. 324; 12 W. R. 73.

Form of Receipt.] — A., being a stranger, deposited for a particular purpose in the hands of B., a country banker at J., 800*l.* in local bank notes, 635*l.* of which had been issued by C. at D.; B. transmitted the whole of the notes immediately to C., and was credited with the amount in account by the latter, who reissued the notes and stopped payment:—Held, that A. was entitled to recover the whole amount of the notes from B. as cash received by the latter to his use. *Gillard* v. *Wise*, 7 D. & R. 523; 5 B. & C. 134; 4 L. J. (o.s.) K. B. 88; 29 R. R. 190. And see *Price* v. *Holbeck*, 2 Doug. 654.

The plaintiff, a merchant in London, consigned cottons to the defendant and his partners, commission agents at Bombay, with directions to sell the same, and remit the proceeds to the plaintiff in good bills on London. The goods were accordingly sold by the defendant and his partners in Bombay, and produced eight rupees and upwards per piece, but no remittance either in money or bills having been made to the plaintiff, an action was commenced against the defendant, who had come over to England:—Held, that the plaintiff was not prevented from recovering in an action for money had and received by reason of the proceeds having been received, not in English, but in foreign money. *Ehrensperger* v. *Anderson*, 3 Ex. 148; 18 L. J., Ex. 132.

When an agent who receives money for a party pays it to another agent of that party, he is bound to pay it in cash, and not merely settle it in an account between that agent and himself, unless he can show an authority from his principal, and that there was an account between the principal and that agent, with a balance in favour of the agent. *Hanley* v. *Cassan*, 11 Jur. 1088.

When a person is employed to receive money for another, and he employs a third person to receive it for him, an action for money had and received will not lie against the first without evidence that the money came to the hands of such third person. *Matthews* v. *Haydon*, 2 Esp. 509.

Remitting Money received to Principal.] — A defendant being employed to procure payment of a bill, and to remit the produce direct to the plaintiff, remitted it to a third person, whereby it got into the hands of the plaintiff's creditors:—Held, that the defendant was not liable for money had and received. *Duncan* v. *Skipwith*, 2 Camp. 68.

A defendant is not liable for a loss where he had collected some debts for the plaintiff, and sent them by the post, according to his direction. *Warwicke* v. *Noakes*, 1 Peake, 98; 3 R. R. 653.

Agent employed to Collect Bill—Payment subject to Condition—Cancellation without Authority.] — Where an agent is employed by the holder of a bill to receive payment of it from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition. *Bank of Scotland* v. *Dominion Bank*, [1891] A. C. 592—H. L. (Sc.)

Loss caused by Sub-agents.]—M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment, and wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co., of London, and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed:—Held, that R. & Co. were the agents of M. to obtain payment of the bill; that, payment having been actually made, they became ipso facto liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, between whom and himself no privity existed. *Mackersy* v. *Ramsays*, 9 Cl. & F. 818.

Loss caused by Principal.] — The defendant, the salaried manager of a bank, was appointed treasurer without salary to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the orders were cashed like cheques payable to order. A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders, he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank. In an action by the guardians against the defendant it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared for their signature:—Held, first, that the negligent drawing of the orders disentitled the guardians to complain of the payment of the excess. *Halifax Union* v. *Wheelwright*, 44 L. J., Ex. 121; L. R. 10 Ex. 183; 32 L. T. 802; 23 W. R. 704.

Held, secondly, that, as to the payment on forged indorsements, the account at the bank was in effect the account of the guardians; that the bank was protected by 16 & 17 Vict. c. 59, s. 19;

and that as by the act and direction of the guardians the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and also that if the account at the bank was regarded as the defendant's account, still, being so kept by the order of the guardians, they could not make any claim against him which he could not enforce against the bank. *Ib.*

10. AGENTS MAKING PAYMENTS FOR PRINCIPAL.

Direction to Pay—Whether Irrevocable.]—A direction to an agent to pay over the proceeds of a sale is not revocable, if founded upon a valuable consideration. *Metcalfe* v. *Clough*, 2 M. & Ry. 178; 6 L. J. (O.S.) K. B. 281.

Where a customer directed his bankers to hold a certain sum of money from his private account at the disposal of S., and the bankers accepted the order, but the customer countermanded it before any actual appropriation or payment made:—Held, that such order was revocable, and the bankers, having paid the money to S., after such countermand, were liable to the customer. *Gibson* v. *Minet*, 9 Moore, 31; 2 Bing. 7; 1 Car. & P. 247; R. & M. 68; 2 L. J. (O.S.) C. P. 99.

Although where an agent has money in his hands belonging to his principal, who orders him to pay it over to a third person, but before payment the principal countermands such order, and the agent afterwards pays it over, he does so in his own wrong, yet, where advances were made under an agreement amounting to the appropriation of the proceeds of a specified cargo by a particular ship, which the agent remitted accordingly:—Held, that he was not responsible for such payment, although his principal had countermanded the order subsequently to the agreement under which the advances were made. *Fisher* v. *Miller*, 7 Moore, 527; 1 Bing. 150.

Deductions.]—A. consigned goods to B., with directions to pay over the net proceeds to C. B. employed D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight, &c., as B., who was the owner of the ship in which the goods were brought, might have made. *Blackburn* v. *Kymer*, 1 Marsh. 223; 5 Taunt. 584.

In general an agent is not warranted in paying a debt due from his principal without a previous authority, or a subsequent assent. But where a person fills the character of agent to two parties and receives from one a sum on account of the other, which sum he carries to the account, semble, that he may make any deductions afterwards from that sum which the person who paid it would have had a right to make in the form of set-off. *Wemys* v. *Greenwood*, 5 L. J. (O.S.) K. B. 257.

Recovery of Money paid—Broker acting Without Licence.]—To a declaration for money paid and on accounts stated, a plea that the causes of action accrued to the plaintiff, as a broker in the city of London, about the purchasing and selling for the defendant, in the city of London, of shares, and that he was not duly licensed, is a bad plea, inasmuch as the 6 Anne, c. 16, does not prevent an unlicensed broker from recovering money paid at the request of his employer, or for money due on accounts stated with his employer. *Jessopp* v. *Lutwyche*, 10 Ex. 614; 3 C. L. R. 359; 24 L. J., Ex. 65. S. P., *Smith* v. *Lindo*, 4 C. B. (N.S.) 395; 27 L. J., C. P. 196. Affirmed on appeal 5 C. B. (N.S.) 587; 27 L. J., C. P. 335; 4 Jur. (N.S.) 974; 6 W. R. 748.

To a declaration on two bills by drawer against acceptor, a plea that he retained the plaintiff to act as his broker in the city of London, and to enter into contracts in the city of London for the defendant in the purchase of stock and shares, and to pay, in and about completing such contracts and purchases, moneys, and that, in pursuance of such retainer, the plaintiff entered into contracts for the purchase of shares; and as incidental thereto paid for the defendant, in and about completing such contracts and purchases, moneys; that the plaintiff was not, at the time of the retainer and employment, and making such contracts and purchasing such shares, or paying such moneys, a broker duly licensed within the city of London; and that the bills were accepted by the defendant and received by the plaintiff on account of money due from the defendant to the plaintiff for his having entered into the contracts, and paid such moneys, is bad on general demurrer, on the ground that, as the words incidental thereto were ambiguous, it did not appear by the plea that the payment of the moneys was a necessary part of the plaintiff's duty as broker, and forasmuch as the contract in such case was not void; and although the plaintiff could not recover any recompense for his services, yet he was entitled to recover the money he had paid at the defendant's request. *Pidgeon* v. *Burslem*, 3 Ex. 465; 18 L. J., Ex. 193.

—— **In Effecting Illegal Contract.**]—If an agent effect an illegal contract, he cannot recover from his principal the sum he has paid in effecting it, though he proves an express promise by the principal to pay him. *Bailey* v. *Rawlins*, 7 L. J. (O.S.) K. B. 208.

—— **Agents opening Joint Account—Cheques Signed by One only—Joint Action.**]—Two of the electors of a borough went to a banker there, and said they wished to draw cheques upon the bank. The banker promised to honour any cheques they might draw. The cheques drawn were signed by one only, but the account in the banker's books was opened in the joint names:—Held, that they might maintain a joint action against the candidate, in whose interest they were, if he adopted the payments made. *Brembridge* v. *Roberts*, 5 Car. & P. 186.

11. RIGHT OF AGENT TO INDEMNITY AGAINST LOSS.

Loss due to Agent's Negligence—Damages.]—Commission agents were authorised by principals to sell on their account certain oats; the agents sold the same with a warranty, but without disclosing the names of their principals; the oats not answering the warranty, the agents were compelled to make a reduction in the price:—Held, that they could not recover the damage they thus sustained from their principals, as they had chosen to sell in their own names, and as there was no privity of contract between them and their principals which would create a guarantee that the oats were of a specific quality. *Johnson* v. *Osborne*, 3 P. & D. 236; 11 A. & E. 549; 1 Jur. 943.

Expenses incurred by Agent.]—An agent employed to buy goods to be paid for at a future day paid for them out of his own money, for the purpose of obtaining the discount allowed by the seller. The principal, with knowledge of these facts, directed the agent to clear the goods at the custom-house, which, in the ordinary course of business, would be done after payment of the price by the agent for his principal:—Held, an adoption of the previous payment of the price, and that the agent might sue the principal for the price as money paid to his use at his request. *Sentance* v. *Hawley*, 13 C. B. (N.S.) 458; 7 L. T. 745; 11 W. R. 311.

A charge made by an agent for the sale of goods against his principal, for an allowance in respect of warehousemen's salaries, disallowed, no such claim having been made in the accounts for fourteen years. *Gray* v. *Haig*, 20 Beav. 219.

Claim by the agent for expenses on account of the principal which, from the conduct of the agent undertaking the business without authority or agreement, could not be ascertained, disallowed. *Beaumont* v. *Boultbee*, 11 Ves. 358.

A foreign agent upon whom the entire management of a ship devolves, under circumstances of great distress, and who acts bonâ fide, is entitled to be equitably supported. *The Tartar*, 1 Hag. Adm. 1.

In conducting Litigation.]—Where an agent has a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges, and commission, the costs of an action, with a reference thereof, against a wrong-doer, who withholds the possession of the goods, bonâ fide incurred for the recovery of the goods, are legal charges upon the goods, and may be set off by the agent in an action brought against him by his principal for the balance of the proceeds of the goods. *Curtis* v. *Barclay*, 7 D. & R. 539; 5 B. & C. 141; 4 L. J. (O.S.) K. B. 82.

A principal is liable to reimburse his agent for the amount of damages incurred by him in defending an action on behalf of his principal, if the agent can show that the loss arose from the fact of his agency, that he was acting within the scope of his authority, that if he exceeded his instructions in the contract he entered into, such excess has been waived and the contract ratified by the principal, and that the loss was not attributable to any fault or laches on his own part. *Frixione* v. *Tagliaferro*, 4 W. R. 373—P. C.

The indemnity due from a principal to his agent covers solicitor and client's costs incurred by the agent, and it makes no difference whether the contract of indemnity is expressed or implied. *Wells and Croft, In re, Official Receiver, Ex parte*, 15 R. 169; 72 L. T. 359; 2 Manson, 41.

A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for breach of the contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff:—Held, that A. was entitled to recover the costs. *Broom* v. *Hall*, 7 C. B. (N.S.) 503.

Agent to buy Shares—Recovery of Difference paid.]—If a party authorises a broker to buy shares for him in a particular market, where the usage is that, when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell, and charge him with the difference, and the broker, acting under the authority, buys at such market in his own name, such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. *Pollock* v. *Stables*, 12 Q. B. 765; 5 Railw. Cas. 352; 17 L. J., Q. B. 352. S. P., *Bayliffe* v. *Butterworth*, 1 Ex. 425; *Bayley* v. *Williams*, 7 C. B. 886; 18 L. J., C. P. 273.

Stockbrokers and members of the London Stock Exchange, on the 28th of August, 1856, at the request of A., bought for him twenty shares in a bank, to be paid for on the settlement day, which was on the 15th of September, and duly forwarded to him the usual brokers' contract note. The bank stopped payment on the 3rd of September, and ultimately became bankrupt on the 11th. A. repudiated the transaction, and gave the brokers notice not to pay the price on his account. They having been compelled according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent A. the certificates and transfers, and upon his declining to accept them, sued him for money paid:—Held, that they were entitled to recover, notwithstanding the stoppage of the bank, and the refusal of the directors to consent to a transfer of the shares. *Taylor* v. *Stray*, 2 C. B. (N.S.) 175; 3 Jur. (N.S.) 540. Affirmed 2 C. B. (N.S.) 197; 26 L. J., C. P. 287; 3 Jur. (N.S.) 964; 5 W. R. 761—Ex. Ch.

In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal. *Lacey* v. *Hill, Crowley's Claim*, 43 L. J., Ch. 551; L. R. 18 Eq. 182; 30 L. T. 484; 22 W. R. 586.

C., broker for H., entered into contracts for purchase of stock for the next settling day (15th of July, 1870). The contracts were in the usual form, subject to the rules and usages of the Stock Exchange, and the broker's notes from time to time sent to H. also had these words. When that day arrived C., by request of H., and relying on a promise of H. to settle on that day the amount then due to C. for brokerage and losses, continued the contracts till next settling day. H. did not settle his account on the 15th. On the 16th the Norwich Bank, in which he was partner, stopped payment, and H. became in fact insolvent. C. was thereupon declared a defaulter on the Exchange. According to the rules, all his transactions were immediately closed. No loss accrued to the principal by the closing of the transactions before the next settling day. Subsequently C. was readmitted to the Stock Exchange, on payment of a composition, but not the full amount of his debts. After such readmission, members of the Stock Exchange were in effect forbidden by the rules of the Exchange to sue him for the balance of previous losses without the leave of the committee, which was rarely, if ever, granted, but no legal release was given to him. In a creditors'

suit instituted for administering the estate of H., C. claimed for the whole amount shown to be due to him for brokerage and losses, by an account made up on the footing of all transactions being closed on the day of the insolvency of H., the amount of claim being calculated on the full amount of the liabilities of C. in respect of the contracts for stocks, and not the amount that he had actually paid on those contracts:—Held, first, that on the insolvency of H. the transactions might be closed according to the rules of the Stock Exchange, without affecting the right of C. to an indemnity from H. *Ib.*

Held, secondly, that C. not having had a legal release from claims under the contracts, but being still liable in law for the full amount, was entitled to claim against the estate of H. for the full amount of losses on the contract, including not only what he had actually paid, but also the amount for which he was legally liable. *Ib.*

The defendant employed the plaintiff, a broker on the Stock Exchange, to purchase shares, which he accordingly did. Before the settling-day the plaintiff became a defaulter on the Stock Exchange through inability to meet his engagements, and, in accordance with the rules of the Stock Exchange, the accounts which he had opened were closed as between himself and the jobbers at the then current prices as fixed by the official assignee of the Stock Exchange. The account in respect of the shares bought for the defendant when closed, as above-mentioned, showed a balance in favour of the jobbers against the plaintiff. According to the practice of the Stock Exchange such closing of the account does not affect the client if he, nevertheless, desires to have the contract completed, and is not in default to the defaulting broker; and the jobber in that case is bound to complete on the settling-day. The plaintiff, on the same day when he was declared a defaulter and his accounts closed, subsequently informed the defendant that he could either have the contract completed as above-mentioned, or he might accept the official prices. The defendant said he would do the latter:—Held, that the defendant having ratified the closing of the account before the settling-day, was liable to indemnify the plaintiff against the amount for which the plaintiff was liable to the jobbers on such closing. *Duncan* v. *Hill* (L. R. 8 Ex. 242) distinguished. *Hartas* v. *Ribbons*, 58 L. J., Q. B. 187; 22 Q. B. D. 254; 37 W. R. 278—C. A.

—— **Continuing Contract.**]—A broker is not entitled to recover from his principal differences on stock which he purports to carry over on his behalf when there is no existing contract between such broker and any third party available for the principal at the time when such differences arise. *Skelton* v. *Wood*, 15 R. 130; 71 L. T. 616.

—— **Agent omitting to do something made necessary by Statute.**]—The defendant employed the plaintiffs, who were stockbrokers on the Corn Exchange, to buy shares in a joint stock banking company. He had on many previous occasions employed the plaintiffs to buy similar shares, and on none of those occasions did the contract or advice note forwarded to him specify the distinguishing numbers of the shares purchased. The plaintiffs purchased the shares from a jobber on the Stock Exchange in the usual way, and forwarded to the defendant a contract note in the usual form, stating that the contract was made subject to the rules and regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, nor did the contract note specify any numbers. It is not the practice on the Stock Exchange to specify the numbers of the shares in dealing in bank shares. The defendant before the settling-day wrote to the plaintiffs repudiating the contract, on the ground that the numbers of the shares were not specified pursuant to 30 & 31 Vict. c. 29. s. 1. Notwithstanding such repudiation, the plaintiffs completed the contract and paid for the shares. By the rules of the Stock Exchange the committee only recognise the members of the Stock Exchange as the parties to contracts, and if a member does not carry out a contract he may be declared a defaulter and expelled from the Stock Exchange, and "no application, which has for its object to annul any bargain on the Stock Exchange, shall be entertained by the committee unless upon an allegation of fraud or wilful misrepresentation." The plaintiffs sued the defendant to recover the price of the shares paid by them:—Held, that the plaintiffs were entitled to recover. *Seymour* v. *Bridge*, 54 L. J., Q. B. 347; 14 Q. B. D. 460.

The defendant instructed the plaintiffs, stockbrokers of Bristol, to purchase for him shares in a joint stock banking company on the London Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the London Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, without having in the contract distinguishing numbers of the shares, it not being the practice on the London Stock Exchange to specify the numbers or otherwise comply with 30 & 31 Vict. c. 29 (Leeman's Act), s. 1. By the rules of such Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be expelled from the Stock Exchange, and that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud, or wilful misrepresentation. Before the settling day the defendant repudiated the contract, but the committee of the Stock Exchange refused to annul the contract, and therefore the plaintiffs completed it, and paid the price of the shares. The defendant was ignorant of the usage of the London Stock Exchange with regard to dealings in shares of banking companies, and did not know that the purchasing broker was by such usage bound to perform a contract for the purchase of banking shares, though void at law under Leeman's Act:—Held, that the plaintiffs were not entitled to recover from the defendant the money paid by them as the price of the shares, since the usage of the Stock Exchange to disregard Leeman's Act, and to recognise as valid a contract which was made contrary to that act, was unreasonable as against strangers who did not know it, and therefore was not binding on the defendant. *Perry* v. *Barnett*, 54 L. J., Q. B. 466; 15 Q. B. D. 388; 53 L. T. 585—C. A.

A. having instructed his brokers, B. & Co., to purchase shares in the O. Bank, received from them a bought-note stating the purchase of shares from C. (a jobber), but according to the usual practice on the Stock Exchange, not specifying the registered numbers of the purchased shares.

Between the date of purchase and the settling day the bank stopped payment, and proceedings were taken to wind it up. A.'s solicitors thereupon wrote B. & Co. repudiating the contract for purchase contained in the bought-note, on the ground that the contract was illegal and void, being in contravention of 30 Vict. c. 29, and giving notice that if they completed it, it would be at their own risk. On the same day A. wrote a private letter to B. calling attention to the formal letter, "and I wish you clearly to understand that whatever position you may have to assume with regard to them (the shares), I consider myself fully bound to support you." The name of A., as the purchaser of the shares, was returned to C. by B. & Co., and on receiving a transfer and the share certificates, the money was paid by them to the transferor's brokers. A. refused to execute the transfer, and returned it to B. & Co., in whose possession it remained, without, for some time, any intimation to the vendor that A. repudiated the transaction :—Held, that as the liability of C. (the jobber) in respect of the shares had ceased on the acceptance of the transfer by B. & Co., it followed that A., though he had not executed the transfer, had in the circumstances, and not by definitely repudiating the authority given to B. & Co. as his agents, become equitable owner of the shares, and bound to indemnify the vendor against all loss and liability in respect of them. *Loring* v. *Davis*, 55 L. J., Ch. 725; 32 Ch. D. 625; 54 L. T. 899; 34 W. R. 701.

Authority to Sell Shares on Stock Exchange.]—A person who employs a broker to sell shares on the Stock Exchange authorises such broker to make a contract of sale in accordance with the rules and regulations there in force, and undertakes to indemnify the broker against any liability incurred by him under those rules, unless the rules relied on by the broker are either illegal or unreasonable and not known by the principal. *Harker* v. *Edwards*, 57 L. J., Q. B. 147—C. A.

Turf Agent—Repudiation of Bet before Payment.]—The plaintiff, a turf commission agent, was employed by the defendant to make bets for him in the plaintiff's name. After the plaintiff had so made some debts, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day, the plaintiff, who was a member of Tattersall's, paid the bets, as, if he had been a defaulter, he would have been subject to certain disqualifications in connection with racing matters, and he then sued the defendant for the amount so paid :—Held (Brett, M.R., dissenting), that he was entitled to recover the amount. *Read* v. *Anderson*, 53 L. J., Q. B. 532; 13 Q. B. D. 779; 51 L. T. 55; 32 W. R. 950; 49 J. P. 4—C. A.

Acceptance of Bill by Agent.]—Quære, whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill drawn by the principal and accepted by such agent. *Hood* v. *Stallybrass*, 3 App. Cas. 880; 38 L. T. 826; 27 W. R. 1—P. C.

If a broker advances money, and gives his acceptances on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity; and giving his counter-acceptances, or those of any other person, to the amount of those given by the trader, and becoming payable at the same time, is not a sufficient indemnity. *Pulteney* v. *Keymer*, 3 Esp. 182.

12. Agent's Lien.

For General Balance.]—A factor has a lien on his principal's goods for the general balance due to him. *Godin* v. *London Assurance Co.*, 1 W. Bl. 104.

If A. deposits goods with B. for sale, and B. promises to pay the proceeds to A. when sold, B. has no lien on them (if not sold) for the balance of his general account arising upon other articles. *Walker* v. *Birch*, 6 Term Rep. 258.

On Bills.]—Bills remitted to a factor or a banker, while unpaid, are in the nature of goods unsold, and, on failure of the factor, must be returned to the principal, subject to such lien as the factor may have thereon. *Zinck* v. *Walker*, 2 W. Bl. 1154.

Goods must be in Possession.]—A factor has no lien on goods for a general balance, unless they come into his actual possession. *Kinloch* v. *Craig*, 3 Term Rep. 119, 783; 4 Bro. P. C. 47; 1 R. R. 664.

A factor can only claim a lien for his general balance upon goods which come to his hands as factor. *Dixon* v. *Stansfield*, 10 C. B. 399.

Factor gains a lien on goods consigned to him from his correspondent for the balance of his account, as well as for the duties, &c., and may retain for such balance; but if he parts with the possession of the goods to the owner, he loses the lien for the balance of accounts. *Kruger* v. *Wilcox*, Ambl. 252; Dick. 269; 1 Ken. 32.

Where the defendants, as brokers, contracted for a quantity of stones, to remain on the premises of the vendor, rent free, for one month, and after that at a certain rent, to be paid by their principal, who subsequently gave orders for the removal of part, and directed that the residue should not be removed until further orders from him :—Held, that, never having in fact been in the possession or control of the brokers, they had no lien upon the goods for their general balance. *Taylor* v. *Robinson*, 8 Taunt. 648; 2 Moore, 730.

On Policy of Insurance.]—A. & Co., who carried on business at Hull as merchants, factors, ship and insurance brokers and general agents, had had various dealings as factors with B. & Co., of London. Whilst these dealings were going on between them, B. & Co. wrote to A. & Co. requesting them to get a policy of insurance effected for them on a ship, for a voyage from the Downs to South America, and thence to the West Indies. A. & Co. procured the insurance to be effected. B. & Co. remitted them the premiums, the policy remaining in the hands of A. & Co. :—Held, that A. & Co. were not entitled to hold the policy as a lien for the general balance due to them as factors from B. & Co. *Dixon* v. *Stansfield*, 10 C. B. 399.

As a Surety.]—A factor who becomes surety for his principal, has a lien on the goods sold by him for his principal, to the amount of the sum for which he has so become surety. *Drinkwater* v. *Goodwin*, Cowp. 251.

If a broker advances money, and gives his acceptances on the credit of goods lodged in his hands, he has a lien on them, and may retain them until the owner gives him a full indemnity. *Pulteney* v. *Keymer*, 3 Esp. 182.

For Sums due in futuro.]—A principal gave notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence drew bills on him, which the factor accepted: and then the principal died, and his executors directed the captain of the ship to follow his former orders; who, thereupon, delivered the ship into the possession of the factor, who sold the same:—Held, that the factor had a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammonds* v. *Barclay*, 2 East, 227.

Not Transferable.]—The right of lien being personal cannot be transferred by any tortious act of the broker. *M'Combie* v. *Davies*, 7 East, 5; 3 Smith, 3; 8 R. R. 534.

Effect of Special Agreement.]—An agreement by a broker that he will sell goods for his principal, and pay over the whole proceeds without setting off a debt then due to him from his principal, is not binding upon the broker so as to deprive him of his legal right of lien. *M'Gillivray* v. *Simpson*, 9 D. & R. 35; 2 Car. & P. 320; 5 L. J. (O.S.) K. B. 53.

Factor's lien both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So in various trades. *Cowell* v. *Simpson*, 16 Ves. 280; 10 R. R. 181.

A. agreed to sell goods to B. to be accounted for in part of a debt to B.; C., with notice, agreeing to sell the goods as factor, not allowed to retain for a debt to him from A. *Weymouth* v. *Boyer*, 1 Ves. J. 416.

Special Instructions.] — An agent who is entrusted with the possession of goods for the purpose of sale does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price, and to sell in the principal's name. *Stevens* v. *Biller*, 53 L. J., Ch. 249; 25 Ch. D. 31; 50 L. T. 36; 32 W. R. 419—C. A.

Right of Crown conflicting.]—Goods in the hands of a factor, on which he had a lien for advances, were seized by the crown under an extent:—Held, that the lien of the crown overrode that of the factor. *Att.-Gen.* v. *Trueman*, 11 M. & W. 694: 13 L. J., Ex. 70. See *Att.-Gen.* v. *Walmsley*, 12 M. & W. 179; 13 L. J., Ex. 66.

Of Wharfinger.]—Goods consigned to a factor for sale, and by him deposited in the warehouse of a wharfinger, cannot be held by the latter to answer his general demand against the factor. *Mellish* v. *Cattley*, 5 L. J. (O.S.) K. B. 74.

Personal Remedy as well as Lien—In What Cases.]—Where a factor makes advances he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a del credere commission, except that when the factor having a del credere commission has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission. *Graham* v. *Ackroyd*, 10 Hare, 192; 22 L. J., Ch. 1046; 17 Jur. 657; 1 W. R. 197.

Where the owner of goods was indebted to a factor in a sum exceeding their value, and consigned them to him for sale; and the factor, being indebted to S. in more than their worth, sold them to him, and afterwards became bankrupt; and on a settlement of accounts between S. and the assignees of the factor, the former allowed credit to them for the price of the goods, and then proved the residue of his claim against the estate:—Held, that, as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees was a good answer to an action against the vendee for the price of the goods, brought either by, or on the account of, the original owner. *Hudson* v. *Granger*, 5 B. & Ald. 27; 24 R. R. 268.

In Case of Bankruptcy.]—W. was appointed agent of a company for the sale of goods manufactured by them. Part of the arrangement was that the company should draw on W. against the goods assigned to him as agent. W. accepted a bill for 200*l.* at four months' date; before the bill arrived at maturity the company was ordered to be wound up, and the goods then in possession of W. were taken by the liquidators and sold by them. W. honoured the bill when it arrived at maturity:—Held, that W. had a lien on the goods to the extent of the payment by him in respect of the bill, and that he was entitled to be repaid the amount paid by him, out of the proceeds of the sale of the goods. *Pavy's Patent Felted Fabric Co., In re*, 45 L. J., Ch. 318; 1 Ch. D. 631; 24 W. R. 507.

S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business henceforth as their agent at a remuneration by way of a share of profits. The business was henceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co., and afterwards S. filed liquidation petitions. Before S.'s liquidation F. & Co.'s trustee demanded the timber in his hands, which was refused:—Held, that to the extent of the current bills S.'s estate had a lien on the timber. *Fawcus, In re, Buck, Ex parte*, 3 Ch. D. 795; 34 L. T. 807.

A business, the property of A., was carried on with his capital and for his profit by B., his agent, in the name of the latter, at a fixed salary. A. having become bankrupt, B. filed his bill, stating that by reason of the use of his name he had become liable to a heavy amount for the concern, which was insolvent, notwithstanding the bankruptcy of A., and praying for an injunction to restrain the assignees from in any way intermeddling with the concern:—Held, that B. had a lien on the business, to the extent of his liabilities, and an injunction was granted. *Foxcraft* v. *Wood*, 4 Russ. 487; 28 R. R. 161.

Where agents abroad are in disburse for their principal, and upon being doubtful of his circumstances, make bills of lading to their own order indorsed in blank, notwithstanding these

bills of lading come to the principal's hands; yet, if the agents' partner in London writes them word that their principal is become bankrupt and desires them to send the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for himself and company against the assignees under the commission till paid and reimbursed so much as the partnership is in advance. *Snee* v. *Prescot*, 1 Atk. 245.

13. Bankruptcy of Agent.

Rights of Principal—To Goods.]—If a factor becomes bankrupt and the merchant's goods are not mixed with his, the assignees shall not have them. *Paul* v. *Birch*, 2 Atk. 621.

Merchant's goods in hand of factor are not liable to debts of a superior nature; otherwise of money. *Whitecomb* v. *Jacob*, 1 Salk. 160.

Where goods consigned to a factor continue in specie, and are found in his hands at the time of the bankruptcy, the principal is entitled to them and not the creditors at large. *Dumas, Ex parte*, 1 Atk. 234; 2 Ves. 582. *Godfrey* v. *Furzo*, 3 P. Wms. 186. *Mace* v. *Cadell*, Cowp. 233.

—— **To Bills and Notes.**]—Also, if notes and not money be taken for the goods, they shall belong to the principal. *Ib.*

Bill sent by a correspondent to a merchant to be applied to a particular use; if merchant becomes bankrupt before the money is received, the correspondent has a special lien and shall be preferred to the general creditors; aliter, where bills are sent on a general account. *Oursell, Ex parte*, Ambl. 297.

A custom of exchanging acceptances existed between the bankrupt and the other houses through the agency of B., notes were sent by the petitioner to B., but never exchanged as bankruptcy intervened and they were stolen from B., and never formed any item in any settlement of accounts between B. and the assignees:—Held, the petitioner could not recover the value of the notes from the assignees. *Watson, Ex parte, Maberly, In re*, 1 Mont. & Ayr. 685.

E. Rights and Liabilities of Principals and Third Parties.

1. Rights of Principal Against Third Party.

a. Action on Contract of Agent.

When Principals Undisclosed.]—When a contract is entered into by an agent in his own name, the principal may sue upon it, even though it is in part to be performed by the agent personally. *Phelps* v. *Prothero*, 16 C. B. 370; 3 C. L. R. 906; 24 L. J., C. P. 225; 1 Jur. (N.S.) 1170.

Although an agent enters into an agreement for the purchase of an estate in his own name, and appears to act on his own account, yet, on the vendor's default in completing the purchase, the principal may maintain an action for the deposit in his own name. *Norfolk (Duke)* v. *Worthy*, 1 Camp. 337; 10 R. R. 749.

The rule that an undisclosed principal may sue and be sued upon mercantile contracts made by an agent in his own name, subject to any defences or equities which without notice may exist against the agent, is applicable to policies of marine insurance under the Canadian as well as under the English law. *Browning* v. *Provincial Insurance Co. of Canada*, L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587.

But in assumpsit on a charterparty executed not by the plaintiff but by a third person who in the contract described himself as "owner of the ship":—Held, that evidence was not admissible to show that such person contracted merely as the plaintiff's agent. *Humble* v. *Hunter*, 12 Q. B. 310; 17 L. J., Q. B. 350.

If a broker enters into a contract for an undisclosed principal, the latter may sue on such contract in his own name; and a rule of the exchange, on which the contract was made, which declares that a contract made by a broker for an undisclosed principal shall be regarded as the contract of the broker only, does not control this right, even although the principal was cognisant of such rule. *Humphrey* v. *Lucas*, 2 Car. & K. 152. S. P., *Langton* v. *Waite*, 37 L. J., Ch. 345; L. R. 6 Eq. 165; 18 L. T. 80; 16 W. R. 508.

There is in general sufficient privity of contract to maintain an action, if the party actually making the contract with the defendant was acting for the plaintiff, and intended at the time to make the contract for him, though the defendant was not aware that the contract was made for the plaintiff. *Cooke* v. *Seeley*, 2 Ex. 746; 17 L. J., Ex. 286.

The name in which a contract is made is primâ facie evidence of the party for whom the contract was made; but it is not conclusive, except by the custom of trade in the case of bills of exchange. *Ib.*

Brokers very often transfer stock without the principal being so much as mentioned, and yet he may maintain an action against the person to whom the stock was transferred. *Lissett* v. *Reave*, 2 Atk. 394.

Contract, whether with Principal or Agent.]—In an action for the price of goods sold, the fact that the party who took the order from the defendant called himself a "commission agent," and exhibited plaintiff's prospectus (there being no evidence that plaintiff sent an invoice to defendant or that defendant sent any order to plaintiff), will not be any evidence of a liability to the plaintiff. And if the party who took the order agreed that he would allow the defendant a certain discount off the prices specified, this will tend to show that the contract was with him as principal. *Burton* v. *Furniss*, 27 L. J., Ex. 139.

Where an agent treated with defendant as principal, but, on the delivery of the goods, the ticket was made out in the principal's name, it was held in an action for the price by the principal, that the defendant was bound to inquire into the nature of the agent's situation, and should not continue to treat him as principal. *Pratt* v. *Willey*, 2 Car. & P. 350.

Principal must accept Burdens of Contract.]—Where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. *Bristowe* v. *Whitmore*, 4 L. T. 622.

Prior Contract by Agent—Delivery.]—If an owner of goods places his goods for sale in the hands of an agent, and that agent, for the purpose of implementing a prior open contract made by

him, delivers those goods to the person who has made that contract with him, in such a way that upon delivery the sale becomes complete, and the obligation to pay the price arises, that is just as much a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal, as if there had been no contract before the goods were delivered. *North-Western Bank* v. *Poynter*, 64 L. J., P. C. 27; [1895] A. C. 56; 11 R. 125; 72 L. T. 93—H. L. (Sc.)

Repudiation by Third Party — Subsequent Ratification by Principal.]—Where a contract has been entered into by one as agent, although without his principal's authority, the principal may ratify and enforce the contract, notwithstanding that the other party thereto has in the meantime repudiated it. *Bolton* v. *Lambert*, 58 L. J., Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434—C. A.

Subsequently to some negotiations between A., a director of the company, and L., an offer by letter was made by L. to the company to take from it a lease of its property. On the 9th December, 1886, A. wrote to L. saying that his offer should be laid before the directors, and on the 13th December, 1886, A. again wrote to L. to inform him that the directors accepted his offer, and that the company's solicitors had been instructed to prepare the necessary documents. On the 13th January, 1887, L. wrote to the company alleging that he had discovered that he had been misled as to certain facts, and stating that he therefore withdrew all offers made to the company. An action was thereupon brought by the company against L. claiming specific performance of the contract, and damages. It appeared that at the time when A. wrote accepting L.'s offer he, although acting perfectly bonâ fide, had not in fact obtained the formal authority of the company to enter into the contract, and that the contract was not ratified by the company until after L.'s repudiation thereof: — Held (applying the maxim, Omnis ratihabitio retrotrahitur et mandato priori æquiparatur), that the ratification by the company related back to the date of the contract; and that therefore the repudiation by L. was of no avail, notwithstanding that the company itself was not bound by the contract until the ratification thereof took place. *Ib.*

Ignorance of Principal—Whether Knowledge of Agent is Knowledge of Principal.]—The plaintiffs, a firm of underwriters, instructed Glasgow brokers to effect a reinsurance on an overdue ship. The Glasgow brokers thereupon telegraphed to their London agents to insure at the rate named by the plaintiffs. The London agents replied stating the market rate. Meantime the Glasgow firm received information of the loss of the vessel, and, without communicating this to the plaintiffs or to the London agents, telegraphed to the London agents in the plaintiff's name to insure at the market rate. Subsequent negotiations were carried on directly between the plaintiffs and the London firm, who effected a reinsurance at a higher rate than that originally named by the plaintiffs. Upon an action being brought against underwriters of this policy, the jury found that the Glasgow firm were employed to effect the insurance, and that it was effected through their agency:—Held, upon this finding, that, there having been concealment of material facts by the Glasgow firm, the plaintiffs could not recover upon the policy. *Blackburn* v. *Haslam*, 57 L. J., Q. B. 479; 21 Q. B. D. 144; 59 L. T. 407; 36 W. R. 855; 6 Asp. M. C. 326.

A policy of marine insurance effected through a broker is not rendered void by the non-disclosure of a material fact which was unknown to the assured and to the broker, though it had come to the knowledge of a different broker while previously employed by the assured to effect another policy in respect of the same risk. Observations on *Fitzherbert* v. *Mather* (1 Term Rep. 12; 1 R. R. 134). *Gladstone* v. *King* (1 M. & S. 35; 14 R. R. 392), *Stribley* v. *Imperial Marine Insurance Co.* (45 L. J., Q. B. 396), and *Proudfoot* v. *Montefiori* (36 L. J., Q. B. 225). *Blackburn* v. *Vigors*, 57 L. J., Q. B. 114; 12 App. Cas. 531; 57 L. T. 730; 36 W. R. 449; 6 Asp. M. C. 216—H. L. (E.)

Discovery—Goods Sold—Profit made by Third Party.]—Bill brought by principal to discover what goods defendant bought of his agent; he demurred, for that he was not obliged to set out what gain he had made by retail; demurrer overruled. *Lisset* v. *Reave*, 2 Atk. 394.

Privity of Contract—Foreign Principals.]—When a foreign correspondent instructs his English agents to order goods for him in this country, the person contracting with the agent to supply such goods is not, although he knew for whom the goods were intended, liable to an action for breach of his contract at the suit of the principal. *Elbinger Actien-Gesellschaft* v. *Claye*, 42 L. J., Q. B. 151; L. R. 8 Q. B. 313; 28 L. T. 405.

A foreign company entered into negotiations through S. & Co., London commission merchants, for the supply, by C., of certain railway wheels and axles; and he, in consequence, had an interview on the 29th of January at S. & Co.'s office with S., one of the partners, and H., the managing director of the foreign company; and C. signed in a diary of S. the following entry: "Mr. C. offers to supply 150 sets of wheels and axles (describing them) at 31*l.* per set, to be delivered free on board at Hull during February and March. This offer to remain open until the 3rd of February." On the 3rd of February S. & Co. telegraphed and wrote, "We confirm the order for 150 sets of wheels and axles," repeating the terms of the offer. Some of the sets were delivered by C., the invoices being made out to S. & Co., and they paid for them; but the delivery of most of the sets was after March, and the company sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., and not with the company. The judge left it to the jury to say whether the contract was with S. & Co., or with the company. The jury found for C.:—Held, that the direction and verdict were right. *Ib.*

When a foreign principal orders goods of a broker here, who buys them in his own name, though the vendor knows he is acting as agent, and the broker pays the vendor the purchase-money, which he afterwards receives from his principal, and it turns out that the goods were not in existence at the time of the contract, the principal cannot recover back the money paid from his agent, the broker, but must proceed against the vendor for it. *Risbourg* v. *Bruckner*, 3 C. B. (N.S.) 812; 27 L. J., C. P. 90; 6 W. R. 215.

A firm of London stockbrokers received from C., a country stockbroker, a power of attorney executed by the plaintiff, who resided abroad, authorising them to sell certain stock for the plaintiff. They effected the sale, but credited C. with it in his account with them. C. subsequently became bankrupt :—Held, that the defendants were liable to refund the moneys to the plaintiff, as the credit to C. was not a payment to the plaintiff; and that, though the power of attorney to sell came to them through C., the defendants were not entitled to treat the plaintiff as a foreign principal, and so to act as if C. only were their principal. *Bridges* v. *Garrett* (L. R. 5 C. P. 451) distinguished. *Crossley* v. *Magniac*, [1893] 1 Ch. 594; 3 R. 202; 67 L. T. 798; 41 W. R. 598.

The plaintiffs, who were landowners in New Zealand, were in the habit of shipping wheat from New Zealand to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves in London, and indorsing these bills to M. and T., merchants and factors at Glasgow, with instructions to sell the wheat in London. M. and T. having no house or agency in London, were themselves in the habit of indorsing these bills of lading to the defendants, who were corn-factors and brokers in London, for the purpose of their selling there the wheat. When any sales were effected, M. and T. delivered account sales to the plaintiffs in the usual form, deducting a del credere commission of 3*l.* per cent., whilst the terms upon which the defendants were employed by M. and T. were different, being a factorage of 2*l.* per cent., and not a del credere commission. The indorsement of the bills of lading by the plaintiffs to M. and T. and by M. and T. to the defendants was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. and T. in London were made by brokers employed by M. and T., but the plaintiffs were in no way parties to the particular contracts of sale, nor were their names disclosed upon them. The defendants effected sales of certain cargoes of wheat which had been so consigned for sale by the plaintiffs in the above mode, and paid the proceeds into their own account with their bankers, and from time to time made remittances to M. and T. on account of them; but upon reference to the defendants' books of account the proceeds of the particular cargoes could be separated and identified. M. and T. carried on a business at Leith as well as at Glasgow, and they employed the defendants in respect of both, and when they stopped payment, which they did, they were indebted to the defendants upon the Leith account, but not on the Glasgow account. The plaintiffs having brought an action against the defendants for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. and T. in respect thereof, but without giving credit due to them from M. and T. on other transactions, the jury found at the trial, first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. and T. were acting in the sales as agents for a third person :—Held, that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as, whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds without giving credit for the sum due to the defendants from M. and T. on their general account. *New Zealand and Australian Land Co.* v. *Watson*, 50 L. J., Q. B. 433; 7 Q. B. D. 374; 44 L. T. 675; 29 W. R. 694—C. A.

—— **Right of Third Party to Sue.**]—A. and B. agreed with C., on behalf of a company intended to be formed, that A. and B. should sell and the company buy a certain business, and it was a term of the agreement that sixty guineas should be paid to J. and P., solicitors, for their expenses and charges in registering the company. The memorandum of association adopted this agreement, and the directors subsequently ratified it. An order having been made for winding up the company, J. and P. claimed to prove for the sixty guineas :—Held, that a contract between A. and B. and the company, to which J. and P. were in no way parties, that the company should pay money to J. and P., would not entitle J. and P. to proceed against the company. *Gregory* v. *Williams* (3 Mer. 582; 17 R. R. 136) explained. *Empress Engineering Co., In re*, 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342—C. A.

The mere fact that a company has received and adopted the benefit of services performed by a solicitor employed by the promoter in transactions preliminary to the formation of the company, even where the company has agreed with the promoter to pay such preliminary expenses, will not give the solicitor any right to sue the company except through the promoter. There is a distinction where a statutory obligation to pay is specially imposed upon the company. *Rotherham Alum and Chemical Co., In re, Peace, Ex parte*, 53 L. J., Ch. 290; 25 Ch. D. 103; 32 W. R. 131—C. A.

In May, 1863, a father, on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyd's was then a voluntary association, governed by certain bye-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. In 1871 the society was incorporated by act of parliament, all the rights of the committee on behalf of the members being vested by the act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to Lloyd's. In 1878 the son became bankrupt and thereupon ceased to be a member of Lloyd's :—Held, that the committee of Lloyd's, and the corporation of Lloyd's as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons, on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their

benefit. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452—C. A.

Where A. enters into a written contract with B. alone, for the purpose of giving B. a security for the repayment of money which the recitals show to have been in fact advanced by C. and D. jointly with B., C. and D. are entitled to sue on the agreement either directly or through B. as trustee for them. *Flower* v. *Buller*, 49 L. J., Ch. 784; 15 Ch. D. 665; 43 L. T. 311; 28 W. R. 948.

And see cases sub tit. CONTRACT, ante, Vol. IV., col. 89.

b. Fraud of Agent.

Payment of Money.]—Where an agent has made an agreement with a contractor which amounts to a fraud on his principal, the principal may rescind the contract with the contractor and receive back money paid under it. *Panama and South Pacific Telegraph Co.* v. *India-rubber, Gutta-percha, and Telegraph Works Co.*, 45 L. J., Ch. 121; L. R. 10 Ch. 515; 32 L. T. 517; 23 W. R. 583.

Where a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, and afterwards absconded, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds:—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor* v. *Plumer*, 3 M. & S. 562; 2 Rose, 415; 16 R. R. 361.

When a broker or other agent intrusted with the possession and apparent ownership of money pays it away in the ordinary course of his business for onerous consideration, then the transaction, if fraudulent as between the agent and his employer, will bind the latter unless he can show that the recipient of the money did not act in good faith with his (the employer's) agent. Money misapplied by a stockbroker in payment to his bankers of a debt due to them can be recovered from the bankers by the principal to whom the money belonged only where it can be shown directly or by inference that the banker or his representative knew that the money was being misapplied. *Thomson* v. *Clydesdale Bank*, 62 L. J., P. C. 91; [1893] A. C. 282; 1 R. 255; 67 L. T. 156—H. L. (Sc.)

A manager of a bank obtained the signature of A. to a cheque, purporting to be drawn upon the bank by A., under the pretence that it was a receipt (A. being unable to read it), and then paid him a private debt of his own with the bank's money. The transaction was entered in the books of the bank as a loan from the bank to A., upon his cheque:—Held, that the banker was not entitled to maintain an action against A. to recover back the money, the cheque having been obtained by the fraud of his agent. *Foster* v. *Green*, 7 H. & N. 881; 31 L. J., Ex. 158; 6 L. T. 390.

A person who receives, by way of security, from a defaulting agent, a deposit of money, which turns out to have been withdrawn from the funds of his principal, cannot, where circumstances are suspicious, be allowed to insist on his ignorance of the truth. *Berwick Corporation* v. *Murray*, 26 L. J., Ch. 201; 3 Jur. (N.S.) 1; 5 W. R. 208—L. C.

A stranger who is a party to a bargain with a servant which is a fraud upon his master must account. *East India Co.* v. *Henchman*, 1 Ves. J. 289.

Agent's Debt to Bank charged on Principal's Account.]—An agent, but without the knowledge or authority of his principal, and the general manager of a bank without the knowledge or authority of the bank directors, concerted for their own purposes the following scheme, which the court held to be entirely void for fraud, and not binding on the principal. Two accounts were opened with the bank in the respective names of the agent and of the principal. The agent, on behalf of his principal, requested the bank to honour the agent's cheques and guaranteed repayment, all moneys standing to the credit of the principal to be charged with such repayment. The agent paid to his principal's account 1,500*l.*, belonging to the principal, and drew on his own account for a like sum, which he spent in promoting the scheme. He drew other cheques on his own account, and paid the proceeds to his principal's account as moneys belonging to the principal. Thus in the bank books the agent's account stood with a large debit, and the principal's account stood with an equal credit charged with the guarantee. The principal having brought an action against the bank to recover the whole amount standing to his credit:—Held, that he could recover 1,500*l.*, his own money, but not the residue, which never had been his money. *British and American Telegraph Co.* v. *Albion Bank*, 41 L. J., Ex. 67; L. R. 7 Ex. 119; 26 L. T. 257; 20 W. R. 413.

Pledge of Securities.]—Dividend warrants on which the bankrupts in their character of stockbrokers were intrusted to receive the dividends, and which they had pledged for their own debt, were ordered to be delivered up to trustees, who had employed the bankrupts as their brokers. *Gregory, Ex parte, Wakefield, In re*, 2 Mont. D. & D. 613.

Assignment of Goods.]—Bill for the delivery up of specific chattels deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold; and for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A., the agent. Demurrer by B. overruled. *Wood* v. *Rowcliffe*, 3 Hare, 304; 13 L. J., Ch. 293; 8 Jur. 771.

H., a commission agent, being employed by B. to effect sales of goods at B.'s risk, had goods consigned to him by B., to be forwarded to W. H. fraudulently sent these goods to R. on his own account, and afterwards assigned his property to trustees for the benefit of his creditors. A balance was due from R. to H.:—Held, that B. was entitled to the balance due from R., in part discharge of the amount due to him (B.) from H., and to prove under the assignment for the balance. *Broadbent* v. *Barlow*, 3 De G. F. & J. 570; 30 L. J., Ch. 569; 7 Jur. (N.S.) 479; 4 L. T. 193.

Gratuity given to Agent.]—When a secret gratuity is given to an agent with the intention of influencing his mind in favour of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on the behalf of the principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such principal contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option. *Smith* v. *Sorby*, 3 Q. B. D. 552, n.

Secret Commission paid to Agent by Contractor—Liability of Contractor.]—The defendant, a coal merchant, obtained contracts through the intervention of H., the plaintiffs' gas manager, for the delivery to the plaintiffs of coal at a price in excess of the current market price. The excess, it was agreed between the defendant and H., was to be paid to the latter, and it was in part paid as a bribe. The plaintiffs, on discovering the fraud, brought an action against H. in the chancery division to recover the amount of the bribes that he had received, but afterwards entered into an agreement with him that on his depositing in a bank securities for 10,000*l.*—an amount taken to be equivalent to the sums received by H. from the defendant and other contractors as bribes—the plaintiffs would bring such actions against former contractors, at the expense of H., as he might direct. It was further agreed that when the amounts recovered in such actions amounted to 10,000*l.*, and on receipt by the plaintiffs of that sum, together with all costs, they would give H. a full discharge, and that in the meantime the chancery action should be stayed. If by a specified date the plaintiffs had not succeeded in recovering the sum of 10,000*l.*, the securities deposited were to be realised, and that sum, or any balance remaining due, was to be paid over to the plaintiffs. After the securities had been deposited in pursuance of the agreement, and after a sum of 4,000*l.* had been recovered by the plaintiffs from other contractors in respect of contracts obtained through the intervention of H., the plaintiffs brought an action against the defendant for damages, or, in the alternative, for money had and received. The judge at the trial held that the agreement could not be set up either as a defence to the action, or in reduction of damages, and directed a verdict for the plaintiffs for the full amount paid by them to the defendant in excess of the current market price of the coal:—Held, that the fraud committed by H. in accepting the bribe was separate and distinct from the fraud in respect of which the action was brought against the defendant, and that the latter was not relieved from liability by reason of the previous action brought by the plaintiffs against H. for the recovery of the amount of the bribes paid to him; that the agreement between the plaintiffs and H., not being under seal, was not binding upon them; but that even if it were to be treated as binding, it did not amount to a release of H., but only to a suspension of the plaintiffs' right of action against him, and that it could not therefore affect the liability of the defendant. *Salford Corporation* v. *Lever*, 60 L. J., Q. B. 39; [1891] 1 Q. B. 168; 63 L. T. 658; 39 W. R. 85; 55 J. P. 244—C. A.

Compare cases post, cols. 1055 et seq.

c. Payment to Agent when a Discharge.

i. *To Agents Generally.*

An agent authorised to sell goods has, in the absence of advice to the contrary, an implied authority to receive the proceeds of such sale. *Capel* v. *Thornton*, 2 Car. & P. 352.

The plaintiff placed goods in the warehouse of E. & Co., at Huddersfield, for sale, and while they were there he sold two parcels to the defendant, who resided in London. After the defendant had paid the plaintiff for one parcel, he received a letter from T., clerk to E. & Co., inclosing invoice of the other parcel, requesting payment, and stating that E. & Co. were authorised to receive the money for the plaintiff. The letter purported to be signed by E. & Co., per procuration of the plaintiff. The defendant remitted the amount as requested; but T. intercepted the letter at the office of E. & Co., and appropriated the money. T. only had authority from the plaintiff to receive payments over the counter for the goods deposited:—Held, that the receipt by T. was no payment to the plaintiff. *Kaye* v. *Brett*, 5 Ex. 269; 19 L. J., Ex. 346.

M., the plaintiffs' traveller, having received an order from the defendant, a customer, the plaintiffs wrote to M. expressing their unwillingness to execute the order until a former account was settled, adding, "We should like to draw upon him for the former," mentioning the amount. M. showed this letter to the defendant, and obtained from him an acceptance at three months' date payable to "my order," with a blank for a drawer's name. The bill was paid at maturity, but not to the plaintiffs, M. having filled up the blank with his own name, and fraudulently negotiated the bill. In an action to recover the value of the goods for which the bill had been given, it was proved that on one occasion at least the defendant had accepted a bill drawn by him in blank, which had been received by the plaintiffs as payment; but there was no evidence to show the form of that bill:—Held, that neither the letter nor the former dealing was any evidence of authority in M. to draw the bill in question, so as to sustain a plea of payment. *Hogarth* v. *Wherley*, 44 L. J., C. P. 330; L. R. 10 C. P. 630; 32 L. T. 800.

The defendant purchased copyhold land in a manor, and was admitted by C., who had been appointed by the steward of the manor as his deputy to admit the defendant. C. also acted as the defendant's attorney in completing the purchase. Nine days afterwards, the defendant gave C. a cheque for 87*l.* 10*s.* 8*d.*, viz. 78*l.* 15*s.* for the lord's fine, 4*l.* 11*s.* 8*d.* steward's fees, and 4*l.* 4*s.*, C.'s own charges as the defendant's solicitor. This cheque was crossed by the defendant, at the request of C., to C.'s bankers, and they retained the money in discharge of a debt due to them by C., who had overdrawn his account. In an action by the lord against the defendant to obtain payment of the fine due:—Held, that there was evidence that the payment of the fine to C. was a valid payment to the lord. *Bridges* v. *Garrett*, 39 L. J., C. P. 251; L. R. 5 C. P. 451; 22 L. T. 448; 18 W. R. 815—Ex. Ch.

A company was the holder of a bill of exchange drawn by the defendant on D. The bill was drawn by him as surety for D. in respect of a debt due by D. to the company, and was to be met by the proceeds of claims of D. on S., which would accrue due before the maturity of the

bill. The company took the bill with notice of these facts to C., their managing director. Subsequently, but before the maturity of the bill, C. obtained an order from D. upon S. for the amount of the above claims and received the money from S. This money he applied towards payment of his own demand upon D., instead of towards the company's bill:—Held, that the receipt by C. of this money and his application of it to his own purposes did not afford any defence to the action, inasmuch as C. could not be said to have been acting within his authority as managing director when he so received and applied the money. *McGowan* v. *Dyer*, L. R. 8 Q. B. 141; 21 W. R. 560.

A creditor in the country directed his debtor to pay money into a London banking-house for his account, but had no account with the house but through a country banker:—Held, that such direction to make the payment was complied with by a payment to the credit of his account with the country banker. *Breed* v. *Green*, Holt, 204.

Four-fifths of a rate were assessed upon the owners, and one-fifth upon the occupiers. For four years the occupiers, on payment of their rent, were allowed by the owner's agents (who were ignorant of an agreement between them) to deduct from the amount of rent the four-fifths of the rate, and a receipt was given for the balance:—Held, in an action to recover the sums so allowed, as arrears of rent, that the facts supported a plea of payment. *Waller* v. *Andrews*, 3 M. & W. 312; 1 H. & H. 87; 7 L. J., Ex. 67.

Sum secured by Deed or Bond.]—An annuity deed contained a stipulation that it might be redeemed on payment of a certain sum, and all arrears, on giving six months' notice to the grantee in writing:—Held, that an agent of the grantee, having a general authority to receive and invest money for the grantee, had authority to waive the stipulation and accept the redemption money (the deed being delivered up to him), though without the knowledge of the grantee. *Webber* v. *Granville*, 30 L. J., C. P. 92; 7 Jur. (N.S.) 420.

An agent having been employed to transact loans of money, and having lent money and taken a bond from the borrower, which he delivered to his principal, and having afterwards been repaid the money and misapplied it, but continuing to make good the interest, the obligor was held liable, although more than twenty years had elapsed without payment of interest by him, to pay the bond. If the agent had been permitted to hold the instrument, quære. *Curtis* v. *Drought*, 1 Moll. 487.

It is the rule of the court, that if the scrivener have the custody of the security, payment of the interest is good; if he delivers it up, being a bond, payment of the principal is good: but on payment of the principal, in case of a mortgage deed, the giving up the deed is not sufficient to restore the estate; there must be a reconveyance. So payment of interest good, if mortgagee consents, or after his death his executor, either expressly or by implication, as if he accept the money afterwards of the scrivener, though the scrivener have not possession either of deed or bond. *Whitlock* v. *Waltham*, 1 Salk. 157; 1 Vern. 150.

Scrivener puts out money on bond, and receives the interest from time to time, and then receives part of the principal, the bond remains in the obligee's custody. No good payment. *Roberts* v. *Matthews*, 1 Vern. 150. *See* 1 Salk. 157.

S. having borrowed 100*l.* of A. on a bond, B., the scrivener, when the bond was sealed, delivered it to A. S. paid many years' interest, and 50*l.* of the principal to B., which he paid over to A.; but the remaining 50*l.* which S. paid to B. was not paid over to A. when B. failed. Per curiam, though B. received the interest so long, and 50*l.* of the principal, it did not imply he had any authority from A.; and as S. could not prove he had any such authority, he shall pay the last 50*l.* again. *Wolstenholm* v. *Davies*, 2 Freem. 289.

If one trusts his scrivener (who puts out money for him) with the custody of his bonds, and the scrivener receives the money and delivers up the bond, the obligee is barred as against the obligor for ever. Secus, in case of a mortgage, because a legal estate is vested which cannot be devested without assignment. *Martyn* v. *Kingsly*, Pre. Ch. 209.

Revocation of Authority—When Possible.]—A creditor may insist upon payment being made either to himself or to his agent; but having once authorised payment to his agent, he cannot revoke that authority if the debtor has given such a pledge to pay pursuant to the authority as would bind him in a court of law. *Hodgson* v. *Anderson*, 5 D. & R. 735; 3 B. & C. 842. See *Pooley* v. *Godwin*, 4 A. & E. 94; 5 N. & M. 466.

A landlord demised premises to a tenant for a term, reserving rent payable quarterly. The lease contained a covenant to pay rent, and the following clause: "The landlord agrees and orders that Kittow or his appointed agent is to receive all rents from the tenant at all times when it becomes due, during the term granted, and his receipt to be a full and sufficient discharge from all liabilities thereof":—Held, that the clause amounted to a bare authority to Kittow to receive the rent, and was revocable at the landlord's pleasure. *Venning* v. *Bray*, 2 B. & S. 502; 31 L. J., Q. B. 181; 8 Jur. (N.S.) 1039; 6 L. T. 327; 10 W. R. 561.

—— **Notice of.**]—The plaintiff having sent horses to a licensed horse dealer for sale in the horse dealer's own name, the dealer sold the horses in his own name to the defendant. The plaintiff, unknown to the defendant, revoked the dealer's authority to sell or receive the price, and the defendant afterwards paid the dealer:—Held, that unless he had received notice of the revocation of authority (which he denied), the payment was good as against the plaintiff, he having allowed the dealer to appear as the owner. *Curlewis* v. *Birkbeck*, 3 F. & F. 894.

When a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to A. B., the assignees are justified in paying subsequent dividends to A. B., until they have notice from the creditor that he has revoked A. B.'s authority. *Bright, Ex parte*, 2 Deac. & C. 8.

ii. *To Brokers.*

If the owner of goods allows the broker, through whom he sells, to sell them as a principal, the purchaser will be discharged by payment to the broker in any way which would have been sufficient had he been the real owner. *Coates* v. *Lewes*, 1 Camp. 444.

When a principal has allowed his broker to take payment for goods sold, by drawing bills upon

the purchaser in his own name, without mention of the principal, the latter is bound by such mode of payment, on the insolvency of the agent after a particular payment made. *Townsend* v. *Inglis*, Holt, 278.

A payment to the broker is good, where the name of the principal is not disclosed, although the purchaser knows that the broker sold for some unknown principal; and a del credere commission makes no difference. But a payment so made would not be good if it varied from the terms of the original contract; and evidence of a custom to that effect is not admissible. *Campbell* v. *Hassell*, 1 Stark. 233. And see *Thornton* v. *Meux*, M. & M. 43.

Declaration for goods sold; a plea that the plaintiff sold the goods by his agent, and that the defendant purchased them of D., not as the agent of the plaintiff, but as himself being the vendor on his own account, and the defendant had no notice or knowledge that D. was an agent until after he had paid for the goods, and the defendant paid for them bonâ fide, believing that D. was the vendor of the goods on his own account, and entitled to receive payment, is no answer. *Drakeford* v. *Piercy*, 7 B. & S. 515; 14 L. T. 403.

A., having purchased goods of B., through a broker, paid for them to the broker partly by an advance on his general account with the broker before the delivery of the goods, and partly by cash on a settlement of accounts after the delivery. The broker did not pay over the money to B., and became bankrupt. In an action by B. to recover from A. the price of the goods, except so much as had been paid in cash:—Held, that it was a question of fact for the jury, whether payment to a broker in advance was a good payment as against the principal, depending on the custom of the trade; and that question not having been left to the jury, the court granted a new trial. *Catterall* v. *Hindle*, L. R. 2 C. P. 368—Ex. Ch. Reversing 1 H. & R. 267; 35 L. J., C. P. 161; 12 Jur. (N.S.) 488; 14 L. T. 102; 14 W. R. 371.

If goods are sold by a broker without disclosing his principal, the purchaser is justified in paying him in a different manner from that stipulated for by the terms of the contract. Aliter, where the principal is disclosed at the time of sale. *Blackburn* v. *Scholes*, 2 Camp. 343.

Goods sold by a broker for a principal not named, upon the terms as specified in the usual bought and sold notes (delivered over to the respective parties by the broker), of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that by a bill of exchange accepted by the buyer, and discounted by the broker within the month, though having to run a longer time before it was due. But, where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment, such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. *Favenc* v. *Bennett*, 11 East, 36.

iii. *To Attorneys.*

Payment of a debt to the attorney of a plaintiff amounts to payment to the plaintiff himself, and the latter is bound by the receipt of his attorney. *Yates* v. *Freckleton*, 2 Dougl. 623.

Payment to a plaintiff's attorney's clerk, unauthorised to receive, is no waiver of the plaintiff's right. *Perry* v. *Turner*, 1 D. P. C. 300; 2 C. & J. 89; 2 Tyr. 128; 1 L. J., Ex. 13.

But a payment to the plaintiff's late attorney, changed without leave of the court, will be good. *Powell* v. *Little*, 1 W. Bl. 8.

iv. *To Bailiffs.*

A bailiff, acting under a warrant of distress for arrears of rent, has an implied authority to receive the amount of the rent and costs if tendered by the tenant, and such authority cannot be limited by a previous express instruction given on behalf of the landlord to the bailiff not to receive the rent, but to refer the tenant to the landlord's attorney. *Hatch* v. *Hale*, 15 Q. B. 10; 19 L. J., Q. B. 289; 14 Jur. 459.

A debtor against whose goods a fi. fa. issued, paid the amount for which execution issued, at the office of the bailiff, who held the warrant from the sheriff to execute the writ, in the absence of the bailiff, to an assistant of the sheriff, authorised by the bailiff to receive the money. The assistant did not pay it over to the bailiff, and the sheriff never in fact received the money:—Held, a good payment as against the sheriff, and satisfied the writ. *Gregory* v. *Cotterell*, 5 El. & Bl. 571; 25 L. J., Q. B. 33; 2 Jur. (N.S.) 16; 4 W. R. 48—Ex. Ch.

v. *To Other Persons.*

In what Cases Valid.]—Payment to a person found in a merchant's counting-house, ostensibly interested with the conduct of the business there, is good payment to the merchant, though it turns out that the person was never employed by the merchant. *Barrett* v. *Deere*, M. & M. 200.

If one allows another to trade in his own name, and as carrying on the business for himself, a payment to such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade, the person so carrying it on may recover, unless the person for whom it is carried on asserts his or her own right to the sum due. *Gardiner* v. *Davis*, 2 Car. & P. 49.

Payment by a client to one of two partners, after the partnership has been dissolved, is a good payment, if the debtor permits one of such partners to receive moneys, in the confidence that those moneys will be a satisfaction of the partnership debt. *Pritchard* v. *Draper*, 1 Tam. 332.

The retainer of those moneys is equivalent to an actual payment. *Ib.*

One of the assignees having the sole charge of paying the dividends pays the dividend of a creditor to a person who is not duly authorised to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend. *Winnall, Ex parte*, 3 Deac. & C. 22.

vi. *Payment, how to be Made.*

In Cash.]—A debtor who pays the amount of his debt to the agent of his creditor must pay it in cash unless he can shew that the agent had authority to receive payment in any other way. *Barker* v. *Greenwood*, 2 Y. & C. 414; 1 Jur. 541.

By Bill.]—An agent who is authorised to receive payments on behalf of his principal must

receive cash or a cheque drawn upon a banker and immediately paid, which will then be counted for cash. Payment by a bill of exchange, drawn by the agent and accepted by the debtor of the principal payable at three months' date, is outside the agent's authority, and is not a payment to the principal, even though the bill is immediately discounted and is honoured at maturity. *Hine* v. *Steamship Insurance Syndicate; The Nether Holme*, 11 R. 777; 72 L. T. 79; 7 Asp. M. C. 558—C. A.

An auctioneer, who is authorised to sell goods on the condition that purchasers shall pay a deposit at once, and the remainder of the purchase money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser. *Williams* v. *Evans*, 35 L. J., Q. B. 111; L. R. 1 Q. B. 352; 13 L. T. 753; 14 W. R. 330.

In Goods.]—A traveller who receives orders for goods from his employer's customer in the country, is authorised to receive payment for them in money, but not in other goods. *Howard* v. *Chapman*, 4 Car. & P. 508.

In Ordinary Course of Business.]—Where an agent has authority unrevoked to receive payment, the ordinary rule of law, in the absence of any evidence of a special authority, is that the authority is to receive payment in the ordinary course of business; and payment to the agent in any other way before the time when due, will not, if there is a revocation before that time, be a good payment as against the principal. *Breming* v. *Mackie*, 3 F. & F. 197.

Agent Writing off Debt.]—If a creditor employs an agent to receive money of a debtor, and the agent instead of receiving money writes off a debt due from himself to the debtor, the latter is not thereby discharged. *Underwood* v. *Nicholls*, 17 C. B. 239; 25 L. J., C. P. 79; 4 W. R. 153.

The plaintiff employed a solicitor to sell securities; the solicitor employed the defendant, a stock broker, in the sale. The defendant had notice that the solicitor was only an agent to sell and receive the price. The defendant paid the purchase money to the solicitor partly by cheque and partly by carrying the balance to his credit:—Held, that the defendant was liable to the plaintiff for that balance. *Pierson* v. *Scott*, 47 L. J., Ch. 705; 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.

If a man authorises his agent to receive money, intending that the agent should thereout pay himself his own debt, he thereby gives the agent authority to receive payment to the extent of his own debt, in any manner he may think fit; consequently, the amount of the agent's own debt may be written off in account between him and the debtor. *Barker* v. *Greenwood*, 2 Y. & C. 414; 1 Jur. 541.

To Brokers.]—*See cases* supra, cols. 1026, 1027.

2. LIABILITY OF PRINCIPAL TO THIRD PARTY.

a. On Contracts.

i. *In what Cases.*

General Principle.]—The principal in a business who holds out an agent to the world as ostensible principal, and carries on the business under the management of and in the name of such agent, is bound by all such acts and contracts of the agent as are incidental to the ordinary conduct of the business, and such liability as to the rest of the world cannot be restricted by any private arrangement between them. *Edmunds* v. *Bushell*, 35 L. J., Q. B. 20; L. R. 1 Q. B. 97; 12 Jur. (N.S.) 332.

When one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he would, in general, be estopped from disputing the agency, though in fact no agency existed. *Pole* v. *Leask*, 33 L. J., Ch. 155; 9 Jur. (N.S.) 829; 8 L. T. 645—H. L.

Where a trader allows his agent to hold himself out as being the real owner of the concern, carrying on the business on his own account, and the agent accordingly deals with a creditor of his own, on the terms that the goods supplied by him to such creditor shall be taken in satisfaction of the debt, at the prices invoiced to him, there is, in fact, no sale of the goods, and the trader cannot recover from him the price in an action ex contractu. *Ramozotti* v. *Bowring*, 7 C. B. (N.S.) 851; 29 L. J., C. P. 30; 6 Jur. (N.S.) 172; 8 W. R. 114.

Where the owner of goods has invested an agent with authority to sell the goods, and has delivered to him the indicia of title, a purchaser who deals in good faith with such agent, and pays the purchase money before the authority is revoked, acquires a good title to the goods; and it makes no difference whether any property therein passed to the agent, or whether, as between him and his principal, his authority was obtained by fraud. *Kingsford* v. *Merry* (1 H. & N. 503) observed upon. *Henderson* v. *Williams*, 64 L. J., Q. B. 308; [1895] 1 Q. B. 521; 14 R. 375; 72 L. T. 98; 43 W. R. 274—C. A.

Authority of Agent.]—The defendant owned a jeweller's shop at Lewes, living himself at London, and visiting the shop monthly. The shop was managed by a shopman, from whom the plaintiff had for some years received orders at Lewes, in the defendant's name, for goods, which were sent to the shop, and afterwards paid for by the defendant. The shopman absconded and came to London, and ordered jewellery there of the plaintiff in the defendant's name, which he carried away with him:—Held, that the previous course of dealing justified the plaintiff in assuming that the shopman had general authority to order goods for the shop on the defendant's credit, and that the defendant was therefore liable for the goods obtained by the shopman in London. *Summers* v. *Solomon*, 7 El. & Bl. 879; 26 L. J., Q. B. 301; 3 Jur. (N.S.) 962; 5 W. R. 660.

A., in London, authorised B., a broker in Liverpool, to buy goods for him on certain terms. B. bought the goods on terms which so far differed from the authority, as to omit a stipulation which was contained in the authority, and to express one which was not therein mentioned; but both these were stipulations which would have been by custom annexed to the contract, unless expressly excluded:—Held, that, as the effect was the same as if the contract had been made in the very words of the authority, it was within the

scope of the broker's authority to make such a contract; and that it was binding on the principal. *Heyworth* v. *Knight*, 17 C. B. (N.S.) 298; 33 L. J., C. P. 298; 10 Jur. (N.S.) 866.

Written communications passed between two brokers, in which the terms of a sale of goods were proposed and assented to. The letter of the buying broker finally accepting the offer, concluded with these words: "contract, we presume, in due course." The contract was sent, and was accepted by the buying broker, but was repudiated by his principal, as not within the scope of the broker's authority:—Held, that the contract contained in the previous written communications, which was within the scope of the broker's authority, was not the less binding on the principal, by reason of the subsequent sending of the unauthorised contract. *Ib.*

Where at a meeting held at B., resolutions were passed for the purpose of continuing the publication of a certain newspaper, some of which were that J. be appointed editor, and that we find a person to undertake the printing and publishing, and that "the B. committee, or some members thereof, and the members of some other committee, shall give a guarantee to the publisher against loss to the extent of 300*l.*":—Held, that no guarantee being given, the persons present at such meeting gave J. the authority to employ a printer and publisher, and that they were liable for the work done by him until such guarantee were given. *Waterlow* v. *Cotton*, 2 W. R. 562.

A sale of engravings by a cashier in the employment of a picture engraver is not a sale within the ostensible authority of the cashier. *Graves* v. *Masters*, 1 Cab. & E. 73.

See the case of the liability of the great Duke of Marlborough to the contract for building Blenheim House, from the circumstance of a person giving directions to workmen as his agent. *Marlborough* (*Duke*) v. *Strong*, 1 Bro. P. C. 175.

A steward has a general authority to contract with tenants, &c. This will not bind the lord without his consent, nor unless part of the bargain is executed. *Anon.*, 5 Vin. Abr. 522, pl. 35.

An objection to title on purchase having been waived, an offer of compensation made by a clerk of the vendor's solicitor, without express authority, is of no effect. *Burnell* v. *Brown*, 1 Jac. & Walk. 168; 21 R. R. 136.

—— **Private Contract instead of Auction.**]—Baron and feme, having joint power to sell an estate of the wife's, give authority to an agent to sell by auction. He sells by private contract for more than the price they required. The buyer shall not compel specific performance. Husband delivering his wife's compliments in a letter to the agent is no proof of her joining in giving authority to agent. *Daniel* v. *Adams*, Ambl. 495.

Where an agent of an English firm instructed to buy goods at a foreign auction within a limited price, bought the goods by private contract before the auction at less than the limited price; it was found by the jury that this was within the scope of his authority. *Stein* v. *Cope*, 1 Cab. & E. 63.

—— **Agreement for Lease.**]—Specific performance of an agreement to lease refused, when the alleged contract was founded upon expressions in a letter written by the defendant's agent to the intended lessee, to the effect that instructions had been given for the preparation of the lease in conformity with terms arranged; no agreement having been actually signed. *Ridgway* v. *Wharton*, 3 De G. M. & G. 677. Affirmed, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 840.

The owner of an estate, in answer to an inquiry from an intending lessee, said, "A. B. manages all my affairs, and you are to treat with him." This does not imply that A. B. had authority to enter into a binding agreement. Semble. *Ib.*

Agent, authorised to make agreements for leases for lives or years, makes an agreement in which the term of the proposed lease is not mentioned. This is an agreement not pursuant to his authority, and not binding on his principal. *Clinan* v. *Cooke*, 1 Sch. & Lef. 32; 9 R. R. 3.

—— **Agent to find a Purchaser.**]—An estate or house agent, to whom instructions are given to procure a purchaser for property, has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property. *Hamer* v. *Sharp*, 44 L. J., Ch. 53; L. R. 19 Eq. 108; 31 L. T. 643; 23 W. R. 158.

When an owner of property employs an estate agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale; his duty is simply to find a purchaser or tenant, and to communicate his offer to the owner. *Wilde* v. *Watson*, 1 L. R., Ir. 402.

The defendant employed house and estate agents, with instructions to find a purchaser for leasehold property. The plaintiff made an offer in writing to the agents, which was submitted by the agents to the defendant, who then further instructed them to withdraw part of the property, and named the lowest price he was prepared to take for the remainder. Acting under this authority, the agents purported to enter into an open contract for sale of the remainder of the property to the plaintiff at the price named by the defendant. In an action for specific performance:—Held, that the agents had no authority to enter into a contract for sale on behalf of the defendant, and that the action must be dismissed. *Chadburn* v. *Moore*, 61 L. J., Ch. 674; 67 L. T. 257; 41 W. R. 39.

Instructions to a house and estate agent to procure a purchaser and to negotiate a sale do not amount to authority to the agent to bind his principal by a contract for sale of real or leasehold property. *Hamer* v. *Sharp* (L. R. 19 Eq. 108) followed. *Ib.*

—— **Manager of Public-house.**]—The licensed owner of a public-house is not liable for spirits supplied to the person whom he has left in possession of the premises as manager of the business, although the invoices are made out in his name, if he has only authorised such manager to deal with particular persons, and the spirits were not supplied by one of them. In such a case there is no evidence of liability on the part of the owner to be left to the jury. *Daun* v. *Simmins*, 41 L. T. 783; 28 W. R. 129; 44 J. P. 264—C. A.

A manager put in to manage a beerhouse has authority from the owner to order cigars for sale in such beerhouse, and can therefore bind the

owner by his contract. *Watteau* v. *Fenwick*, 56 J. P. 839.

—— **Manager of Property—Power to Sell.**]—A., on behalf of himself and certain other persons resident in Scotland, his constituents, by deed engaged B. and C. to act as agents and managers in New South Wales, empowering them to purchase sheep, cattle, and land on behalf of A. and his constituents, for which purpose certain sums were remitted to the colony to be invested for them and placed to their individual interest, and the proceeds of the stock, &c., were to be remitted to their respective credits. B. and C. were to receive for their trouble and expense one-third of the proceeds of the stock. With the money remitted, B. and C. bought stock and lands, and conducted the establishment in the colony in their own names. B. and C. afterwards became embarrassed, and contracted liabilities in the management of the property, and drew bills on A. on account of the establishment, which bills were endorsed by D. and other parties in the colony; these bills being dishonoured, and B. and C. being pressed by the indorsees, they executed a deed of assignment, and conveyed the whole of the trust property, and some property of their own, to D. for himself and other indorsees. D. had notice of the deed appointing B. and C. agents and managers, and that there was no authority on the part of B. and C. to draw bills on behalf of their constituents which could personally bind them. Upon a bill filed by A. and his constituents against B., C. and D., to set aside the deed of assignment as fraudulent and void, and for an account, the supreme court at Sydney held that the plaintiffs were not entitled in equity to relief, and that their remedy was to sue D. at law:—Held, by the judicial committee of privy council, reversing such decree, first, that the decree was erroneous in declaring that the relief sought by the bill was not of a proper equitable character; and secondly, that, under the circumstances, B. and C. had, as such agents and managers, authority to dispose of the property entrusted to them, in discharge of the debts incurred by them on behalf of A. and his constituents, in the management of such property; and that the deed of assignment was valid as against A. and his constituents to the extent of subjecting such joint property to the payment of the debts and liabilities contracted, but null and void as to the residue; and an account directed to be taken in the court below of such debts and liabilities. *Bute* (*Marchioness*) v. *Mason, Heard, Ex parte*, 7 Moore, P. C. 1.

—— **Manager of Company—Signing Firm.**]—The manager of a company is not entitled, as such, to sign the firm or name of the partnership. *Beveridge* v. *Beveridge*, L. R. 2 H. L. (Sc.) 183.

The authority of trustees representing three-fourths of the property of a company is insufficient to empower a manager, as such, to sign the company's firm, especially when the proceeding is opposed by the representative of the remaining fourth. *Ib.*

—— **To Borrow.**]—A person allowing a voluntary bond to remain in the hands of his agent, for the purpose of raising money on it, is bound by his agent's acts, though he never receives any of the money raised; but the assignee of it can only hold it as security for the amount actually advanced on it to the agent. *Tottenham* v. *Green*, 1 N. R. 466; 32 L. J., Ch. 201.

—— **To Barter.**]—A factor having an authority to sell for money is not entitled to barter. *Guerreiro* v. *Peile*, 3 B. & Ald. 616; 22 R. R. 500.

—— **Whether Conditional.**]—B., wanting to raise money, authorised R. by power of attorney to borrow it and grant a mortgage. R. employed, with leave, a sub-agent, who got the money from D. on producing the power of attorney and a declaration signed by B. The power to mortgage was invalid, and R. failed to account to B.:—Held, that B. was estopped from setting this up as against D., and was bound by the acts of R., for the borrowing was not upon condition of the mortgage being valid. *Denyssen* v. *Botha*, 2 L. T. 126; 8 W. R. 710.

—— **In case of Bills, Notes and Cheques.**]—The defendant, a partner in a firm of C. Brothers, agreed with her co-partner that the partnership should be dissolved, that the affairs of the firm should be liquidated by an agent, who should realise the assets and pay the creditors, and that the business should thereafter be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account, signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers, and accepted by the agent in the names of the defendant and himself, and honoured. The defendant knew nothing of these cheques and bills. The plaintiff sued as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened:—Held, that the agent had no authority to accept the bill in the defendant's name, so as to bind her, and that, not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable. *Kirk* v. *Blurton* (9 M. & W. 284) commented on and distinguished. *Odell* v. *Cormack*, 19 Q. B. D. 223.

The business of a company was that of importers and dealers in tinned ox-tongues and other provisions. Hunter was appointed manager of the company's business in South America, "to take the entire charge of the interests of the company there." No express authority was conferred on him to sign or accept bills or promissory notes on behalf of the company. He was desirous of entering into a contract with one Liberos for the supply of ox-tongues to the company in South America. Liberos refused to enter into a contract unless a guarantee was given by some third person, and, at the request of Hunter, one Simpson agreed to give the required guarantee, which he did by depositing 1,000*l.* in a bank to the order of Liberos. As a counter security to Simpson, Hunter gave him a promissory note for 1,000*l.*, signed by him "in representation of" the company. The company made default in carrying out the provisions of the contract with Liberos, and, under a power contained in it, he forfeited the deposit, which was paid over to him by the bank. No goods were supplied to the company under the contract. The company never recognised the promissory note, and it was dishonoured at maturity. The company being in liquidation, Simpson claimed to prove in the winding-up upon the note:—Held, that it not

being shewn that the giving of the note was necessary for the carrying on of the business of the company, or that it was in the ordinary course of the business of such a company, the note was not binding upon the company, and the claim in respect of it could not be admitted. *Cunningham & Co., In re, Simpson's Claim*, 57 L. J., Ch. 169; 36 Ch. D. 532; 58 L. T. 16.

Where B. drew a cheque, and delivered it to his farming bailiff to give to C., in whose favour it was drawn; and the bailiff discounted it with A., a banker residing sixteen miles from where the cheque was drawn; and five days afterwards the drawee stopped payment, A. not having presented the cheque:—Held, that the bailiff was not acting within the scope of his authority in discounting the cheque, so as to bind his principal. *Waters* v. *Brogden*, 1 Y. & J. 457.

M., owner of a ship, lets it to the commissioners of the navy, and appoints T. his factor and attorney, with power to receive the freight and profits, and to compare and transact with the commissioners. T. settled the account, and took a navy bill for the money to M.; he then sells it, and indorses it as attorney for M. Quære, whether M. bound. *Ekins* v. *Macklish*, Ambl. 184.

Secret Instructions.]—Where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known to those who deal with the agent to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing in order to prove what was the scope of the agent's authority. *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 209; 43 L. T. 70—H. L.

The ordinary rule that a principal is liable for the acts of his agent which are within the authority usually confided to an agent of that character, notwithstanding secret limitations upon that authority, applies also where the existence of any principal was unknown to the person contracting with, and giving credit to, the agent alone. *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346; 5 R. 143; 67 L. T. 831; 41 W. R. 222; 56 J. P. 839.

Where an owner of title deeds has placed them in the hands of an agent with authority to raise money on them to a limited amount, and the agent deposits them with a bonâ fide lender who has no knowledge of the limit imposed by the principal, for an amount in excess of that which he had authority to borrow, the principal cannot redeem the deeds except by payment of the full amount which the agent in fact raised upon them. *Perry Herrick* v. *Attwood* (2 De G. & J. 21) approved. *Brocklesby* v. *Temperance Permanent Building Society*, 64 L. J., Ch. 433; [1895] A. C. 173; 11 R. 159; 72 L. T. 477; 43 W. R. 606; 59 J. P. 676—H. L. (E.)

See also *Edmunds* v. *Bushell*, col. 1030.

Variation between Bought and Sold Notes.]—Where a broker employed by the seller alone, effects a contract by means of a note sent to and accepted by the purchaser, a variation between this note and a note sent by the broker to the seller is immaterial. *McCaull* v. *Strauss*, 1 Cab. & E. 106.

Effect of Custom.]—If an agent is employed by a principal to deal in a market, the usages and customs of that market are imported into and become part of the contract between them, and bind as well the principal as the agent. *Duncan* v. *Hill*, 40 L. J., Ex. 137; L. R. 6 Ex. 255; 25 L. T. 59; 19 W. R. 894. Reversed in Ex. Ch., but not on this point.

Where a contract which requires notice of shipment of goods to be given by the vendor to the purchaser is made at Liverpool by one broker acting for both parties, by the usage of trade there, it is sufficient if notice of the shipment is given by the vendor to the broker:—Held, that this usage of trade was binding on a London merchant, who employed a broker at Liverpool to make a contract for him there. *Graves* v. *Legg*, 2 H. & N. 210; 26 L. J., Ex. 316; 3 Jur. (N.S.) 519; 5 W. R. 597—Ex. Ch.

A person who employs a broker to transact business for him in a market, with the usages of which the principal is unacquainted, gives him authority to contract upon the footing of such usages, provided they are only such as relate to the mode of performing the contract, and do not change its intrinsic character. *Robinson* v. *Mollett*, 44 L. J., C. P. 362; L. R. 7 H. L. 802; 33 L. T. 544. Reversing 20 W. R. 544.

In order to avoid a sale made by a broker, it may be shewn that, by the custom of that particular trade, the authority of the broker expired with the day on which it was given. *Dickinson* v. *Lilwall*, 4 Camp. 279; 1 Stark. 128.

So, by the custom of London, where goods are sold by a broker to be paid for by bill, the vendor has a right to annul the contract within a reasonable time, if he is dissatisfied with the sufficiency of the purchaser. But the intimation of his dissent must be made as soon as he has had an opportunity of making inquiry; and five days were considered too long. *Hodgson* v. *Davies*, 2 Camp. 533; 11 R. R. 789.

Implied Authority.]—An agent cannot sell the goods of his principal without authority; but such authority to sell may be implied from circumstances. *Dyer* v. *Pearson*, 4 D. & R. 648; 3 B. & C. 38; 27 R. R. 286.

A purchaser of hemp, lying at a wharf, had it, at the time of his purchase, transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp:—Held, that this gave the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So, if it had been transferred into the names of the principal or broker. *Pickering* v. *Busk*, 15 East, 38; 13 R. R. 364.

Brokers in the usual habit of buying and paying for, and of selling and receiving the value for sugars on speculation, in their own names, and upon their own judgment, for the principal; sometimes, when the market was low, under an unlimited authority as to quantity and price; at other times under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect of price, and advised from time to time by their principal as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and resold; may bind him by a resale of a particular parcel of sugars before purchased and paid for in their own names and lodged in their own warehouse,

though sold under the price directed by their principal, for whom they received the money, but afterwards failed; the general authority of the brokers to sell, so as to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Whitehead* v. *Tuckett*, 15 East, 400; 13 R. R. 509.

A., a widow, married B., whom she believed to be a single man. She was not the personal representative of her deceased husband, but she was possessed of furniture which had been his property, and which after her marriage with B. continued in the house in which they lived. B. sold and delivered those goods to C., with A.'s concurrence, and C. paid B. for them. After this it was discovered that B. was a married man, and that his marriage with A. was void. This was unknown to either A. or to C. till after the sale. A. sued C. for the value of the goods:—Held, that the property being in the personal representative of her deceased husband, she could not maintain an action against any one but as a wrong-doer, and that as C. had taken the goods with her concurrence, he was not a wrong-doer as against her. And that, even on the supposition that the goods belonged to her, she had constituted B. her agent to sell, and could not dispute the sale made by him as her agent to an innocent party. *Waller* v. *Drakeford*, 1 El. & Bl. 749; 22 L. J., Q. B. 274; 17 Jur. 853.

The agent employed by a miner in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds, and fixing the rents and duties in respect hereof, is not therefore the agent of the miner for the purpose of making a contract with the commissioners not within the powers which had been conferred upon them in that character. *Att.-Gen.* v. *Jackson*, 5 Hare, 365.

—— **To Warrant on Sale of Goods.**]—*See* SALE OF GOODS, post, vol. XII., cols. 502, 503.

See further cases, sub tit. COMPANY.

When Instructions Uncertain.]—If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bonâ fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised, because he meant the order to be read in another sense of which it is equally capable. *Ireland* v. *Livingstone*, 41 L. J., Q. B. 201; L. R. 5 H. L. 395; 27 L. T. 79. Affirming 15 W. R. 152.

L. sent an order by letter to T. & Co., commission agents at the Mauritius, to ship him 500 tons of sugar at a certain price—"fifty tons more or less of no moment, if it enables you to get a suitable vessel." T. & Co. purchased and shipped about 400 tons, construing the letter as an order to purchase up to 500 tons, and assuming that the words "fifty tons more or less" had reference only to the capacity of the ship. L. refused to take the sugar on the ground that his letter was an order for a shipment by one vessel of at least 450 tons and not more than 550 tons:—Held, that as the letter was capable of the construction T. & Co. had put upon it, L. was bound to accept the sugar. *Ib.*

When a principal orders his agent to purchase a certain quantity of goods, and the parties appear to have contemplated that the whole might not be obtainable at once, the order will be construed as divisible, and the agent will be authorised to buy a smaller quantity if the whole is not to be had. *Johnston* v. *Kershaw*, 36 L. J., Ex. 44; L. R. 2 Ex. 82; 15 L. T. 485; 15 W. R. 354.

Limitation of Powers.]—The powers of an agent are limited by the limitation of the powers of the principal. *Montreal Assurance Co.* v. *M'Gillivray*, 13 Moore, P. C. 87; 8 W. R. 165.

Contracts which would not be binding on a principal as ultra vires, do not become binding by means of their having been entered into through the medium of an agent. *Ib.*

Evidence of Authority.]—A. was the owner of a saw-mill, and B. was his foreman. B., as the agent of A., but without any express authority, entered into a contract in writing to supply C. with a quantity of Scotch-fir staves:—Held, that this contract was binding on A., inasmuch as B. must be presumed to have had a general authority to enter into such a contract as the one in question. *Richardson* v. *Cartwright*, 1 Car. & K. 328.

The plaintiff, having sold and delivered to the defendants granite blocks, which they refused to accept, on the ground that the blocks were of dimensions different from those for which they had contracted; and a dispute having thus arisen, the plaintiffs wrote to the defendants a letter containing the following passage: "I have seen E., and he has consented to see you on the subject of the granite, and I have authorised him to do so, and if possible come to some amicable arrangement in the matter." Shortly afterwards E. went to the defendants, and, on behalf of the plaintiff, agreed with them that on payment of 50*l.* the granite should be theirs, and no further claim in respect of it made by the plaintiff. The plaintiff repudiated the agreement made by E., and sued the defendants for the price of the granite:—Held, that the plaintiff's letter to the defendants constituted E. his agent, with power to make the agreement which in fact he did make, and that the plaintiff was therefore bound by it. *Trickett* v. *Tomlinson*, 13 C. B. (N.S.) 663; 7 L. T. 678.

B. employed C. to raise money, and C. procured 160*l.* from A., which he handed to B., from whom he took a cheque for that sum payable to him (C.) or bearer. C. subsequently applied to B. for payment of the cheque. In an action by A. against B. on the cheque:—Held, that C. was clearly B.'s agent, and that delivery to him supported the averment in the declaration of a delivery to A. *Samuel* v. *Green*, 10 Q. B. 262; 16 L. J., Q. B. 239; 11 Jur. 607.

Where under the terms of a will, one of two trustees carries on a business as "agent for the trustees," and employs the co-trustee to purchase goods for the business and to pay for them by cheques signed by both, the "agent for the trustees" is liable for the price of goods obtained on credit by the co-trustee from a person who had in previous transactions been paid by those cheques. *Brazier* v. *Camp*, 63 L. J., Q. B. 257; 9 R. 852—C. A.

In an action for goods sold, a letter from the defendant's broker announcing to his principals a purchase on their account, on certain terms stated, was held to be evidence of a preceding authority to purchase not merely on precisely the

terms stated, but upon terms not unusual nor unreasonable, and in substance the same. *Campbell* v. *Hicks*, 28 L. J., Ex. 70.

Proof of authority to hire carts to carry voters, and to employ persons to canvass, &c., at a contested election, will not supply evidence for a jury of an implied authority to open a public-house or order refreshments for persons present at the election. *Byrne* v. *White*, 16 W. R. 255—Ir. Ex. Ch.

On a programme for a fête the names of the two defendants appeared as stewards, and the name of P. as "general manager." P. ordered tents and flags from the plaintiff for use at the fête. On the programme was a statement that the stewards reserved the right of altering the programme, that five should form a quorum, and that tents would be provided. At the fête the defendants took an active part. The plaintiff sent in his bill to the stewards. The stewards stated that every one providing things for the fête would be paid:—Held, that there was evidence on which the court might find that P. was authorised to pledge the credit of the two defendants for the tents, and that they were therefore liable. *Pilot* v. *Craze*, 52 J. P. 311.

There is a broad distinction between acting stewards, such as those mentioned, and provisional committeemen, who only lend their names. *Ib.*

If the attorney of a creditor write to A. asking payment of a debt due from B., and A. answer the letter and pay 200*l.* of the debt; and afterwards the attorney again write to A., asking payment of the residue of the debt, and A. send a letter promising payment, this last letter is admissible as evidence in an action against B. with a view to shew that A. acted for B. *Roberts* v. *Gresley* (*Lady*), 3 Car. & P. 380.

What are circumstances sufficient to establish an agent's authority, and a contract made in the exercise of it. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 5 W. R. 804.

The question as to the authority of an agent to sign, denied by the answer and by his deposition, stating his declaration to the contrary at the time of execution, is to be determined by an issue; the evidence of a witness, impeaching the instrument he has attested, as a witness to a will denying the sanity of the devisor, &c., being admissible, but to be received with the most anxious jealousy. *Howard* v. *Braithwaite*, 1 Ves. & B. 202.

Answer of defendant read against co-defendant, whose agent he was, to prove the execution of an agreement by the agent, but not to prove his authority. *Fagan* v. *Howard*, Wall. Lyn. 33.

A., who was living in the same house with B., was the owner of certain goods therein, which goods A., for a fraudulent purpose, permitted B. to raise and receive money upon by way of bill of sale in his own name to C., who believed the goods to be the goods of B. The goods being afterwards seized upon a fi. fa. against A.:—Held, that the sale to C. of the goods was valid, B. being in effect the agent of A. in the transaction. *Low* v. *McGill*, 10 L. T. 495; 12 W. R. 826.

—— **Onus of Proof.**]—The burthen of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must shew that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it. *Pole* v. *Leask*, 33 L. J., Ch. 155; 9 Jur. (N.S.) 829; 8 L. T. 645—H. L.

Trustees for Debenture Holders of Company—Liability of, for Goods ordered by Receiver.]—See *Gosling* v. *Gaskell*, ante, col. 930.

Agreement with Agent to pay fixed Sum.]—The plaintiffs claimed 37*l.* from the defendant for use and occupation of a house, and authorised him to pay the amount to a person whom they named. She called on the defendant, and he then expressed his readiness to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender was made. The plaintiffs sued the defendant for the use and occupation, claiming 238*l.* The defendant paid 37*l.* into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more. *Gretton* v. *Mees*, 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

Contract made by Wife of Lunatic.] — The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards the defendant became insane, and whilst his malady lasted his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff:—Held, that the defendant was liable for the price of the goods. *Drew* v. *Nunn*, 48 L. J., Q. B. 591; 4 Q. B. D. 661; 40 L. T. 671; 27 W. R. 810—C. A.

In an action for the price of necessary repairs done to the defendant's house, it appeared that he was a lunatic, and that the work was done by order of his wife, with knowledge on the part of the plaintiff of the husband's lunacy. The wife had always received a sufficient allowance from her husband's estate:—Held, that the husband was not liable, as, under the circumstances, the wife had no more authority to pledge his credit than she would have had if he had been sane, and had provided her with means for all necessaries. *Richardson* v. *Du Bois*, 10 B. & S. 830; 39 L. J., Q. B. 69; L. R. 5 Q. B. 51; 21 L. T. 635; 18 W. R. 62.

Contracts on behalf of Foreign Principals.]—A commission merchant has no authority (in the absence of express evidence to the contrary) to pledge the credit of his foreign constituent. The fact that the foreign constituent and the commission merchant have agreed to share the profit and loss on the purchases made by the latter, will not affect the rule. *Hutton* v. *Bullock*, L. R. 9 Q. B. 572; 30 L. T. 648; 22 W. R. 956—Ex. Ch.

Therefore, when H. F. & Co., merchants in London, bought goods in their own name from the plaintiff for shipment to the defendant in Rangoon, charging the defendant a commission upon such purchases, and it was agreed between H. F. & Co. and the defendant that such purchases should be on their joint account, and the plaintiff took in payment for the goods the

acceptances of H. F. & Co., which were afterwards dishonoured:—Held, that the plaintiff could not recover from the defendant the price of the goods. *Ib.*

The defendants, jute merchants at Calcutta, appointed L. & Co. their agents for the sale of jute in England at an agreed commission. L. & Co. afterwards entered into a contract in their own name for the sale of a quantity of jute to the plaintiffs, and wrote to the defendants informing them that they had done so. The defendants subsequently wrote to the plaintiffs inclosing the invoice of the goods, and stating that they had drawn upon them for the price. The plaintiffs kept the invoice, accepted the draft, and obtained the bill of lading. The draft was duly taken up by the plaintiffs. The goods arrived in a damaged condition. In an action by the plaintiffs against the defendants for breach of contract:—Held, that the above circumstances excluded the application of the ordinary rule as to contracts between foreign and English principals, made through an agent in England, that privity was established between them, and that the action was maintainable. *Malcolm, Flinn & Co.* v. *Hoyle*, 63 L. J., Q. B. 1—C. A.

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods:—Held, that the seller might afterwards sue the principals for the price. *Thompson* v. *Davenport*, 9 B. & C. 78; 4 M. & Ry. 110.

A merchant, though in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit as purchasers for what he buys in the home market on their account. *Poirier* v. *Morris*, 2 El. & Bl. 89; 22 L. J., Q. B. 313; 17 Jur. 1116; 1 W. R. 349.

The right of the seller of goods to resort to an undisclosed foreign principal is barred by any circumstance which shews that the enforcement of that right would operate injustice. *Smith* or *Smyth* v. *Anderson*, 7 C. B. 21; 18 L. J., C. P. 109: 13 Jur. 211.

A foreign principal is in no case liable to an action, at the suit of the vendor, for the price of goods purchased by an agent resident in England. *Ib.*

Contracts on Behalf of Home Principals.]—The right of the vendor to sue a home principal, when discovered, is undoubted, provided that the vendor has not elected to charge the agent exclusively at all events, provided also that the state of accounts between the principal and his agent is not such as would make it unjust that the former should be sued. *Ib.*

Contract ultra vires of Agent to Knowledge of Third Party.]—An association was not registered under the companies acts. Persons became members by effecting mutual policies; members were empowered also to effect "special rate policies." The applicants were not members, but had taken out a "special rate policy," signed per procuration by J. and S., the managers, who gave and accepted on their personal liability a bill of exchange for the amount assured. In a similar case, the amount assured had been disallowed by the appeal court as a claim made on the association. J. and S. became insolvent, and their acceptance was dishonoured. De W. & Co. claimed that the amount of the premiums should be repaid them by the members of the association:—Held, that they were not entitled to have the premiums repaid, because, first, as they well knew, J. and S. had no power, as agents, to grant such a policy to non-members; and, secondly, there was no failure of consideration, as J. and S. had made themselves personally liable. *Arthur Average Association, In re, De Winton's Case*, 34 L. T. 942.

Previous Judgment against Agent set aside.]—The plaintiff had supplied goods on K.'s order to a theatre, and had obtained judgment against K. for the price. Whilst the judgment was still standing the plaintiff commenced an action against the lessee of the theatre for the price of the same goods. The lessee objected that the matter was res judicata. The judgment against K. was set aside before the hearing of an appeal to the divisional court:—Held, that as the judgment had been set aside, the action was rightly brought against the lessee. *Partington* v. *Hawthorne*, 52 J. P. 807.

Factor hiring Ship on his own Account.]—A factor makes an agreement with the master for the hire of a ship on his own account for 48*l.* per month, and not on the part of the merchants, his principals; they are not liable, nor are their goods put on board, to satisfy the master's demand, but they are liable to pay the factor the freight for their cargo; and as he was bound by the charterparty, which gave the master a specific lien on the goods, the master has a right to be paid in the first place, before the assignees of a factor under a commission of bankruptcy, for the assignees only stand in the bankrupt's place. Whoever lets a ship to hire must take care that the hirer is substantial, for if he be not competent the master must pay for his neglect; yet a factor may retain goods to pay custom for salvage. *Paul* v. *Birch*, 2 Atk. 621.

Joining Agent as Co-Defendant with Principal.]—*See* post, cols. 1114, 1115.

ii. *Notice of Authority.*

Duty to Inquire as to Agent's Authority.]—If a society or company had an unlimited power to borrow, but had, nevertheless, given secret orders to its agent not to borrow beyond a certain amount, I should have thought, nevertheless, the society was bound, because the plaintiffs would not have been called upon to inquire as to any secret authority; but where a society or a company has upon the face of its constitution—that is, either by the statute or statutory rules under which it is constituted—only a limited authority to borrow, then it seems to me that a person dealing with such a society or company must either inquire or run the risk. *Chapleo* v. *Brunswick Building Society*, 50 L. J., Q. B. 372; 6 Q. B. D. 696; 44 L. T. 449; 29 W. R. 529—C. A.

Where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs intrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business:—Held,

that the lender was not bound to inquire whether in the particular case the emergency had arisen or not; but that he was entitled to recover from the principal if he lent to the agent bonâ fide, and without notice that the agent was exceeding his mandate. *Montaignac* v. *Shitta*, 15 App. Cas. 357—P. C.

And see *National Bolivian Navigation Co.* v. *Wilson*, ante, col. 1035.

Notice—Construction.]—The ordinary import of language of a letter giving full authority to deal with the property of another ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document. *Pariente* v. *Lubbock*, 8 De G. M. & G. 5; 20 Beav. 588.

Where, therefore, a foreign merchant wrote to his English correspondent, directing the latter to consider any consignment from him as the property of his son, who was residing in England, so that the son might place and dispose of the father's money as if it was the son's own property, and stating that, as the son informed the father of everything, the consignor would not continue writing, but that whatever the son said for him was to be the same as if he said it himself, and must guide the consignee:—Held, first, that the son was thus constituted an agent with full powers to act for his father. *Ib.*

Secondly, that, although on one or two occasions the consignee had required a written authority from the son before so acting, neither this circumstance nor the terms of the letters rendered any writing necessary, but that a verbal direction or subsequent adoption by the son was sufficient. *Ib.*

Thirdly, that the circumstance of the consignee's firm having been changed by the death of a member of it, subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house, which continued as long as the relation between the plaintiff and it, however it might be composed. *Ib.*

—— **Means of Knowledge of Third Party.**]—W., as agent for the defendant, had occasionally employed B. to purchase wools, which purchases had been ratified by the defendant. In June, 1839, the defendant wrote to B., to say he would have nothing to do with any purchases made by him. This letter, it appeared, had been communicated to the plaintiff, but at what time was left uncertain. In July B. bought wools of the plaintiff, then lying at his premises, and they were sent to a warehouse of another person, where they were weighed and packed by B. (together with other wools) in sheets, which the defendant was in the habit of sending there for the purpose of packing such wools. The wools in question were not paid for, and it was in the course of dealing that wools were not to be removed from such warehouse till payment. In an action to recover the price of the wools:—Held, that there was sufficient evidence to warrant the jury in finding that B. was the defendant's agent for the purchase, and that the plaintiff had not had notice of the countermand of his authority. *Dodsley* v. *Varley*, 4 P. & D. 448; 12 A. & E. 632; 5 Jur. 316.

Indorsement on Bills of Exchange.]—An agent who has received from his principal bills indorsed on account of such principal (by which means their negotiability is restrained) cannot deposit them with his bankers as a security for advances; the special indorsement is a sufficient notice to the bankers that the bills are not the property of the party from whom they receive them, to enable him to pledge them. *Truettel* v. *Barandon*, 1 Moore, 543; 8 Taunt. 100.

The acceptance or indorsemnet of a bill of exchange, expressed to be per procuration, is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority. *Alexander* v. *Mackenzie*, 6 C. B. 766.

But an acceptance in the words "for Richardson & Son, Thomas Popple," is not equivalent, according to the mercantile law, to the form, "per proc. Richardson & Son, Thomas Popple." The former expression does not, like the latter, import a special and a limited authority to do a specific act; nor does it put the drawer of a bill, accepted in that form, upon discovery or inquiry, whether the agent has exceeded his authority or not. *O'Reilly* v. *Richardson*, 17 Ir. C. L. R. 74.

Payment Unauthorised by Statute.]—Neither a company created by act of parliament, nor its promoters, directors, or shareholders, can apply the assets of the company except in the manner provided by the act. On the facts of the case, it was held that there had been no ratification or approval by the directors of the respondent company of an agreement entered into by the appellants under which the respondent company was in effect to make an expenditure unauthorised by the act. *Mann* v. *Edinburgh Northern Tramways Co.*, 62 L. J., P. C. 74; [1893] A. C. 69; 1 R. 86; 68 L. T. 96; 57 J. P. 245—H. L. (Sc.)

iii. *Evidence of Liability.*

Signature of Agent.]—Specific performance of a contract concerning land not decreed on the signature of an agent without authority. *Howard* v. *Braithwaite*, 1 V. & B. 202.

—— **Banker Protected.**]—A signature "Smith & Co., per S. Kingsford, agent," is a signature per procurationem, and such a signature on a cheque drawn payable to Smith & Co. is sufficient to justify a banker in paying the cheque so indorsed, and the banker is protected by 16 & 17 Vict. c. 59, s. 19. *Charles* v. *Blackwell*, 45 L. J., C. P. 542; 1 C. P. D. 548; 35 L. T. 162; 24 W. R. 737. Affirmed, 46 L. J., C. P. 368; 2 C. P. D. 151; 36 L. T. 195; 25 W. R. 472—C. A.

—— **Construction of Contract.**]—K. entered by letter into a contract with the plaintiff for the sale of 300 tons of muriate of potash. At the commencement of the letter, K. said that he bought as agent for the defendant. Delivery at the rate of 50 tons per month. Cash payment to be made by K. fourteen days from receipt of bills of lading. A commission of 1 per cent. to be paid to K. The letter was not signed by him as agent:—Held, that on the true construction of the contract, whatever K.'s position might be, the defendant was the buyer, and therefore liable to the plaintiff. *Concordia Chemische Fabrik auf Actien* v. *Squire*, 34 L. T. 824—C. A.

—— **Employing Illiterate Agent to Sign.**]—A man who can read, who sends an agent who cannot read to sign a document or to enter into a contract in which a document must to his knowledge be signed, cannot dispute his liability on the document so signed on the ground that his agent could not read its contents. *Foreman* v. *G. W. Ry.*, 38 L. T. 851.

—— **To Memorandum of Association.**] — A man's name may be subscribed to the memorandum of association of a company by his agent, and it is not necessary that the agent should be authorised to sign his principal's name by deed under seal. *Whitley Partners, In re, Callan, Ex parte*, 55 L. J., Ch. 540; 32 Ch. D. 337; 54 L. T. 912; 34 W. R. 505—C. A.

Signature of Partner to bind Firm.]—Quære, as to the sufficiency of a signature to bind the firm where a deed was executed thus by one partner only, "for self and partners, A. B.," no consent of the other partners being shewn to this mode of execution. *Smith* v. *Winter*, 4 M. & W. 454; 8 L. J., Ex. 34.

Cf. *Beveridge* v. *Beveridge*, ante, col. 1033.

Statement by Agent forming Part of Contract.]—A. sent to B.'s agent a list of prices at which he would do work; B. wrote a letter to his agent, stating that he would agree to the prices, if A. would consent to be paid at stated periods, the first payment to be "in November." The agent shewed his letter to A., and said that he might consider the 100*l.* to be paid on 1st November. A. afterwards did the work for B. It was left for the jury to say whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was a mere observation by the agent himself. *Knapp* v. *Harden*, 6 Car. & P. 745.

Though an agent may, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts, evidence of his declarations is confined to what is either by the statement itself, or as tending to determine the quality of contemporary acts, the foundation of, or inducement to, the agreement. *Fairlie* v. *Hastings*, 10 Ves. 123.

Letter by an agent is not evidence against the principle of a pre-existing agreement, though it may be of an agreement contained in that letter. *Ib.*, 128.

Entry by Booking Clerk of Railway.] — It was the usage of defendants, a railway company, that cattle should be booked for carriage and forwarded in the order in which they were delivered in the defendants' yard. This usage was known to plaintiff and his servant. The plaintiff's cattle were brought to defendants' yard late at night, and could not be taken in owing to the illness of defendants' porter. Next day the booking clerk of the defendants, in the circumstances, booked the cattle, though not yet in the yard. Plaintiff's cattle were not forwarded in the order in which they were booked, but were postponed to those of some other dealers which arrived at defendants' yard before them, and they were in consequence delayed. Plaintiff sued the company for the delay. It appeared that the clerk acted contrary to his instructions, but the jury found that the plaintiff was not at the time aware that he was doing so:—Held, that the company were bound by the act of the booking clerk. *Page* v. *G. N. Ry.*, Ir. R. 2 C. L. 228; 16 W. R. 566.

Admission of Agent to bind Principal.]—At the trial of an action for the loss of a parcel of money sent via a railway, addressed to the plaintiffs at W., a police superintendent, as witness for the plaintiffs, gave evidence to the effect that the station-master at W. had made a statement as to the absconding of a porter, a servant of the railway company:—Held, that the evidence was admissible on the ground that the station-master, at the time he made the statement, was acting within the scope of his duty, and, being the agent of the company, they were bound by his statement, and could be looked upon as having made it themselves. *Kirkstall Brewery Co.* v. *Furness Ry.*, 43 L. J., Q. B. 142; L. R. 9 Q. B. 468; 30 L. T. 783; 22 W. R. 876.

An Irish railway company contracted with the plaintiff to carry certain pigs from a station in Ireland through to London, part of the journey being performed on the London and North-Western Railway. In an action against the Irish company, a letter from J. T., an agent of the London and North-Western Company, to the plaintiff, which contained evidence of delay, was held to be admissible. *Ruddy* v. *Midland Great Western Ry.*, 8 L. R., Ir. 224.

Where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assented to it, an acknowledgment or a promise by him to pay was sufficient. *Burt* v. *Palmer*, 5 Esp. 145. *See* 10 R. R. 707, n.

In an action against the East India Company by the holder of a forged imitation of one of their promissory notes, issued by the governor-general in council at Calcutta:—Held, that the company were not bound by the acknowledgment of it as genuine by a clerk in their accountant-general's office, who was authorised by the accountant-general to compare all such notes with the register, but not authorised to certify their genuineness, although it appeared that it was his practice to do so. *Bank of England* v. *East India Co.*, 2 Knapp, 245.

—— **Husband and Wife.**] — In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife, acknowledging the debt within six years, was admissible to take the case out of the statute. *Gregory* v. *Parker*, 1 Camp. 394; 10 R. R. 712.

But as the 9 Geo. 4, c. 14, s. 1, directed that no acknowledgment or promise shall be sufficient to take a case out of the statute unless in writing "and signed by the party chargeable thereby," an acknowledgment contained in a letter which was written by the wife of the debtor in his name and at his request was insufficient, because the statute gave no authority to an agent to make the acknowledgment. *Hyde* v. *Johnson*, 3 Scott, 289; 2 Bing. (N.C.) 776; 2 Hodges, 94; 5 L. J., C. P. 291.

Purchase under False Pretences.]—Purchaser under particulars giving a false description not bound at law or in equity, or by any act of his agent, without a fresh authority. *Deverell* v. *Bolton (Lord)*, 18 Ves. 509.

Informal Certificate.]—A purchaser of land from a railway company under a condition pro-

hibiting building thereon without the certificate in writing of the company's principal engineer proceeded to build upon the unwritten licence of one of the company's resident engineers:—Held, that the company were not bound, and the building was restrained; upon a prayer to restrain the erection of "new" buildings, the completion of half-built houses was restrained. *Att.-Gen.* v. *Briggs*, 1 Jur. (N.S.) 1084.

Knowledge of Agent imputed to Principal.]—B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the insured 500*l.* on permanent total disablement, and 250*l.* on permanent partial disablement, the policy stating that by permanent total disablement was meant, inter alia, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant, inter alia, "the complete and irrecoverable loss of sight in one eye." At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants. The assured during the currency of the policy met with an accident which resulted in the complete loss of sight in his other eye, so that he became permanently blind:—Held, that the knowledge of the defendants' agent was under the circumstances the knowledge of the defendants, and that they were liable on the policy. *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, 61 L. J., Q. B. 792; [1892] 2 Q. B. 534; 57 J. P. 116—C. A. See also *Blackburn* v. *Haslam*, and *Blackburn* v. *Vigors*, ante, col. 1018, and *Bowles* v. *Stewart* and *Solomon* v. *Honeywood*, post, col. 1061.

See also EVIDENCE—LIMITATIONS (STATUTE OF).

iv. *Election.*

Foundation of.]—The knowledge of the real facts required as the foundation of an election to charge the agent or the undisclosed principal must be actual knowledge. *Dunn* v. *Newton*, 1 Cab. & E. 278.

When Allowed.]—If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elects to give the credit to such agent, he cannot afterwards recover the value against the known principal; but if the principal is not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued at the election of the seller, unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad. *Paterson* v. *Gandasequi*, 15 East, 62; 13 R. R. 68.

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods:—Held, that the seller might afterwards sue the principals for the price. *Thomson* v. *Davenport*, 9 B. & C. 78; 4 M. & Ry. 110.

Where an agent, without declaring his principal, purchases goods, the vendor, on discovering the principal, may sue him, though he has debited the agent, and though the principal has remitted money to his agent to discharge the debt. *Welson* v. *Powel*, 3 Doug. 410.

Within what Time.]—A vendor, who sells to a person known to be the agent of an unknown principal, must elect to proceed against the principal within a reasonable time after discovering him, otherwise he loses his right to treat the principal as vendee, if the state of the accounts between the latter and his agent has been altered to the prejudice of the principal, before he makes his election. *Smethurst* v. *Mitchell*, 1 El. & El. 623; 28 L. J., Q. B. 241; 5 Jur. (N.S.) 978; 7 W. R. 226.

The sellers' right to resort to the undisclosed principal on a contract made by a broker in his own name is not affected by their delaying to do so until parties to whom the broker has resold have become insolvent; the defendants, the original purchasers, not having paid the brokers in the meantime or otherwise altered their position. *Campbell* v. *Hicks*, 28 L. J., Ex. 70.

In order to discharge a principal from his liability for a debt contracted by his agent, the principal must shew that the creditor has himself misled him into supposing that he has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition. Mere delay in enforcing payment from the agent will not be sufficient for the purpose. *Irvine* v. *Watson* (5 Q. B. D. 102), *Heald* v. *Kenworthy* (10 Ex. 739), and *Smethurst* v. *Mitchell* (28 L. J., Q. B. 241) considered. *Davison* v. *Donaldson*, 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601—C. A.

If one takes the security of the agent of the principal with whom he dealt, unknown to the principal, and gives the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent, on the faith of such receipt, the principal is discharged, although the security fails. Otherwise, if the principal does not shew that he was injured by means of such false voucher. *Wyatt* v. *Hertford (Marquis)*, 3 East, 147.

What amounts to.]—P. carried on business in London as agent for K. & Co., paper manufacturers at Vienna. D. ordered of P. paper, addressing the order to him personally, which he acknowledged by letter, and promised to supply the paper in certain quantities and at certain times as he obtained the goods from K. & Co. Some of the parcels were delivered, but D., being unable to obtain any more from P., who alleged default in K. & Co., wrote to them stating their position, and P.'s excuses. In an action against P. for breach of contract in not delivering the paper:—Held, that the letter of P. to D. agreeing to supply the paper amounted to a contract binding on P. personally, and that the subsequent letter of D. to K. & Co. was not an election by D. to substitute K. & Co. as the party bound in the place of P. *Dramburgh* v. *Pollitzer*, 28 L. T. 470; 21 W. R. 682.

The seller of goods to an apparent principal

upon discovering that the buyer is only an agent may so conduct himself by demanding payment from, and taking proceedings against the agent, that he will be deemed to have elected to look to the agent only for payment, and will be debarred from any remedy against the real principal. *MacClure* v. *Schemeil*, 20 W. R. 168. And see *Smyth* v. *Anderson*, ante, col. 1041.

Where a broker who had sold goods for the plaintiff to the defendant made an arrangement with the plaintiff unknown to the defendant, altering the time of payment :—Held, that the plaintiff had thereby taken the broker as his debtor, and had discharged the defendant. *Thornton* v. *Meux*, M. & M. 43 ; 31 R. R. 711.

—— **Proceedings in Bankruptcy.**]—The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after the undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor. *Curtis* v. *Williamson*, 44 L. J., Q. B. 27 ; L. R. 10 Q. B. 57 ; 31 L. T. 678 ; 23 W. R. 236.

B. purchased goods of the plaintiffs ; he was the agent of the defendants, his undisclosed principals. B. became insolvent, and the plaintiffs then became aware that the defendants were principals. With this knowledge the plaintiffs' clerk sent an affidavit of proof of the debt due to them against the estate of B., whose affairs were being liquidated by arrangement. The plaintiffs endeavoured to prevent the affidavit of proof from being filed, but were unsuccessful :—Held, that the mere filing of the affidavit of proof formed no obstacle to the plaintiffs suing the defendants for the price of the goods sold to B. *Borries* v. *Imperial Ottoman Bank*, 43 L. J., C. P. 3 ; L. R. 9 C. P. 38 ; 29 L. T. 689 ; 22 W. R. 92.

A. and B. were both in the habit of sending goods to C., a factor, for sale ; in the course of his dealings with C., B. purchased of him goods belonging to A., which were invoiced to him by C. in his own name, though, upon the balance of accounts between them, C. was indebted to B. A. afterwards filed an affidavit in the court of bankruptcy, in which he alleged that C. was justly and truly indebted for goods belonging to him sold and delivered by C., as the factor or agent of A., to B., and for which goods C. received payment by means of goods sold and delivered to him by B., and which goods were used by C. in his trade of a cheesemonger. Upon this affidavit a fiat was worked out against C. to its termination :—Held, that this affidavit did not estop A. from suing B. for the price of the goods, or afford sufficient evidence to sustain a plea of payment in that action. *Morgan* v. *Couchman*, 14 C. B. 101 ; 2 C. L. R. 53 ; 23 L. J., C. P. 36 ; 2 W. R. 59.

The creditors of A. having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that A. was only the agent of B. & Co., proceeded nevertheless to sign A.'s certificate : —Held, that this was not an election by the creditors to treat A. as their sole debtor. *Taylor* v. *Sheppard*, 1 Y. & Coll. 271.

Proof of.]—C., a broker, was authorised by the defendant to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, and bought and sold notes were exchanged between the plaintiffs and C., in which the latter was named as the buyer. C. sent the defendant an advice note informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to C., and, the market falling, C. was called upon by the plaintiffs to accept and pay for the cotton, and threatened with legal proceedings. Failing to obtain payment from C., the plaintiffs sued the defendant :—Held, that the fact of his name being disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him ; that parol evidence of the circumstances under which the contract was made was admissible ; and that the insertion of C.'s name in the contract, though his principal was known at the time, and the subsequent demands upon C. for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to C., and to him only. *Calder* v. *Dobell*, 40 L. J., C. P. 224 ; L. R. 6 C. P. 486 ; 25 L. T. 129 ; 19 W. R. 978—Ex. Ch.

Question for Jury—To whom Credit given.]—Where, in an action for goods sold and delivered, the question was whether they were purchased by a person on his own account, or for his principal ; and it was left to the jury to say to whom credit was given :—Held, that it was properly left, and that it was not necessary to leave it to them to say whether the vendor knew, at the time of the sale, that he was dealing with the purchaser in his character of agent. *Edwards* v. *Smith*, 5 L. J. (O.S.) C. P. 11.

Effect of.]—Where an agent having made a contract in his own name has been sued on it to judgment, no second action is maintainable against the principal. *Priestly* v. *Fearnie*, 3 H. & C. 977 ; 34 L. J., Ex. 172 ; 11 Jur. (N.S.) 813 ; 13 L. T. 208 ; 13 W. R. 1089.

And see per Cairns, C., in *Kendall* v. *Hamilton*, 4 App. Cas. 514.

Subsequent Acknowledgment of Indebtedness.]—Where goods were sold to an agent of a known principal, and the seller gave credit to the agent, who afterwards ran away, after which the principal (who had received the goods) acknowledged his liability to the vendor :—Held, that the vendor could recover against the principal, in an action for goods sold and delivered. *Wilding* v. *Collyer*, 1 L. J., C. P. 50.

Of Acceptor or Drawer of Bill.]—A firm abroad drew bills on one of its own partners, trading on his account in England, payable to an agent of the foreign government. The bills were not paid, process of insolvency issued against the foreign firm, and a commission against the English partner :—Held, the agent may prove under the commission, but will be restrained from receiving dividends, unless he elect not to prove under the insolvency abroad. *Mattos, Ex parte, Venzeller, In re*, 1 Mont. & Ayr. 345. Affirming *Cotesworth, Ex parte*, 1 Deac. & C. 281 ; Mont. & Bli. 92 ; 2 L. J., Bk. 18.

v. *Payment to Agent when a Discharge.*

Payment of Purchase-money.]—When goods are sold to an apparent principal for ready money, the seller must, at his peril, obtain immediate payment, and if the buyer is only an agent

contracting in his own name, and receives the price forthwith from his principal, the seller who omits to enforce immediate payment cannot at a subsequent time recover the value of the goods from the principal, upon the failure of the agent to pay over to the seller their price. *MacClure* v. *Schemeil*, 20 W. R. 168.

If an agent buys goods on credit for an unnamed principal, payment by the principal to his agent of the price of the goods before the credit expires may, under some circumstances, deprive the vendor of his right to sue the principal. *Smith* or *Smyth* v. *Anderson*, 7 C. B. 21; 18 L. J., C. P. 109; 13 Jur. 211.

If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he may have previously paid the broker. Secus, if the day of payment is allowed to pass without any demand being made upon the principal. *Kymer* v. *Suwercropp*, 1 Camp. 109.

A factor made purchases for his principal, who made payments to him on account; afterwards the factor was pressed for payment by a letter, which came to the hands of the principal, who transmitted it to the factor, and, with a knowledge of the fact, paid him the residue:—Held, that the principal was liable over to the sellers for the money he had so paid over to his factor after notice. *Powell* v. *Nelson*, 15 East, 65.

The defendant, through the agency of one Yates, granted to the plaintiff an annuity, redeemable at six months' notice. In May, 1830, notice was given to repurchase in November and in August, 1830, the defendant entrusted Yates with the money for the repurchase. In October Yates prevailed on the plaintiff to execute the deed of reassignment, dated in November and indorsed on the annuity deed, without receiving the repurchase money; but the plaintiff did not sign any receipt for the money. Yates afterwards produced the deed to the son of the defendant to satisfy him of the payment, and it was handed back to Yates to be kept by him with the defendant's other documents. Yates acted in the transaction as agent of both parties. He retained the money, and, to deceive both, continued the payment of the annuity, but afterwards died insolvent. The defendants subsequently obtained possession of the deed:—Held, under the circumstances, that the defendant was not discharged, but was bound to pay the plaintiff the repurchase money, with interest from November, 1830, the plaintiff accounting for the subsequent receipts of the annuity. *Vandaleur* v. *Blagrave*, 6 Beav. 565; 7 Jur. 1002. Affirmed, 17 L. J., Ch. 45; 11 Jur. 935.

When a principal authorises his agent to pledge his credit, and the latter makes a purchase on his behalf, and thereby creates a debt, the principal is not discharged by payment to the agent, if the money is not paid over to the seller, unless the latter, by his conduct, makes it unjust that the principal should be sued; as, for example, where the seller, by his words or conduct, induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent. *Heald* v. *Kenworthy*, 10 Ex. 739; 3 C. L. R. 612; 24 L. J., Ex. 76; 1 Jur. (N.S.) 70; 3 W. R. 176.

A vendor who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal if the principal has bonâ fide paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal. *Armstrong* v. *Stokes*, 41 L. J., Q. B. 253; L. R. 7 Q. B. 598; 26 L. T. 872; 21 W. R. 52.

The defendants employed C., a broker, to buy oil for them. C. accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery"; but though it is not infrequent in the oil trade, in such a case, to require payment before delivery, there is no invariable custom to that effect. The plaintiffs delivered the oil to C. without insisting on prepayment, and the defendants, not knowing that the plaintiffs had not been paid, paid C. Shortly afterwards C. stopped payment, and the plaintiffs thereupon sued the defendants for the price:—Held, that, as the plaintiffs at the time of the sale knew the broker was buying for principals, and not on his own account, the fact of the defendants having paid the broker did not preclude the plaintiffs from suing them for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker; and that the mere omission on the part of the plaintiffs to insist on pre-payment was not, in the absence of an invariable custom to that effect, such conduct as would reasonably induce such belief. *Heald* v. *Kenworthy* (10 Ex. 739; 24 L. J., Ex. 76) followed. *Armstrong* v. *Stokes* (L. R. 7 Q. B. 598) discussed. *Irvine* v. *Watson*, 49 L. J., Q. B. 531; 5 Q. B. D. 414; 42 L. T. 810—C. A. Affirming 49 L. J., Q. B. 239; 5 Q. B. D. 102; 42 L. T. 51; 28 W. R. 353.

On a Promissory Note after Payment to Agent.]—Where an agent tendered the amount of a note for his principal, on condition of having the note given up, which could not be done from its being mislaid, and afterwards failed with the money in his hands:—Held, that the principal was still liable on the note, but without interest from the time of the tender. *Dent* v. *Dunn*, 3 Camp. 296; 13 R. R. 809. And see *Stewart* v. *Fry*, 1 Moore, 74; 7 Taunt. 339.

vi. *Payment by Agent.*

What Amounts to.]—In an action for sheep sold and delivered, the defendant pleaded a payment of 175*l.* It was proved by J. that he received 175*l.* from the defendant's wife, and gave it to the plaintiff:—Held, that evidence might be given, that when the wife gave the defendant the money, she told J. to take it to the plaintiff for the sheep. *Walter* v. *Lewis*, 7 Car. & P. 344.

Action on a bill of exchange for 419*l.* 2*s.* First plea, as to 4*l.* 18*s.*, parcel of the sum mentioned in the declaration, payment of 5*l.* into court. Second plea, as to the residue of that sum, that the plaintiffs were agents and brokers for H., and, as such, sold property for him for 415*l.* 12*s.* 6*d.*, which was to be paid at a date to arrive before the maturity of the bill; that H. had applied to the plaintiffs to advance him this money, which they had agreed to do if he would procure the defendants' acceptance of the bill, they undertaking to appropriate the purchase money in satisfaction of the bill. Averment,

that the purchase money was received before the bill became due, and was sufficient to satisfy the residue of the bill. Third plea, to the residue, payment of 415*l.* 12*s.* 6*d.* before the bill became due and before action, in discharge of the promises and all damages as to the residue. The facts were that the plaintiffs sold shares for H. for 415*l.* 12*s.* 6*d.* Before the settling day he applied to the plaintiffs for this money, and they agreed to advance it if he would procure the defendants' acceptance for the amount, promising to appropriate the purchase money to its discharge. The bill was drawn for a period beyond the settling day, and for 419*l.* 2*s.*, to cover the accruing interest. The defendants accepted the bill on the faith of this arrangement. The purchase money was received in due time:—Held, after a verdict for the defendants on the second and third pleas, first, that the facts were evidence of payment by the defendants, and that the proceeds of the shares, when received by the plaintiffs, was money paid to the plaintiffs on the defendants' account, and by their agent. *Hills* v. *Mesnard*, 10 Q. B. 266; 16 L. J., Q. B. 306.

Held, secondly, that the plaintiffs had no right to deduct from the proceeds of the shares a sum due from H. to plaintiffs for brokerage on a previous purchase for him. *Ib.*

The defendant and K. gave their joint and several promissory note to the plaintiffs, and the latter subsequently agreed with K. and L. to take, and did take, L.'s bill of exchange in satisfaction of the defendant's liability on the note. R., by L.'s authority, paid the bill when due:—Held, in an action on the note, that these facts supported a plea of payment by the defendant. *Thorne* v. *Smith*, 2 L. M. & P. 43; 20 L. J., C. P. 71; 15 Jur. 469.

On the insolvency of a banking company, W., one of the principal shareholders, gave bills and other securities to another bank to cover advances to be made by that bank for the payment of the public creditors of the insolvent company, out of which advances the debts of such creditors were paid, and at the same time, the debts were assigned by the creditors to R., as a trustee for W., by a deed which recited these facts, and that R. had agreed to pay the amount of the bills, on having an assignment to him of the debts. In an action brought by one of the original creditors for W.'s benefit against certain of the shareholders of the insolvent company to recover the amount of his debt:—Held, that these facts did not support a plea of payment of the debt by the defendants. *M'Intyre* v. *Miller*, 13 M. & W. 725; 2 D. & L. 708; 14 L. J., Ex. 180.

Action on a bond: plea, payment. The sum of 200*l.* having been lent by the plaintiff to the defendant on his bond, through M., the defendant's attorney, and who acted for him generally as his agent in his pecuniary affairs, and repayment being afterwards demanded, M. obtained from his bankers (the real plaintiffs in the case) an advance of 400*l.* for himself, depositing the bond in question and another bond as a security for repayment, stating in a letter to the plaintiff that he had laid down the money to prevent her any further inconvenience. The defendant was not aware of the application for, or of the repayment of, the 200*l.*:—Held, that this was not a payment by the defendant. *Lucas* v. *Wilkinson*, 1 H. & N. 420; 26 L. J., Ex. 13; 5 W. R. 197.

Where a mercantile firm in England borrows money of another firm, and both have a common agent abroad, if that agent credit the lending firm with sums received for the borrowing firm, in pursuance of an agreement between them, that credit is not a payment. *McLarty* v. *Middleton*, 6 W. R. 379, 853.

The transfer from one account to another in the books of an agent is not payment as between the agent and the transferee of such account, and the entry is not an acknowledgment unless the transferee is informed of the fact. *Ib.*

—— **Acceptance of Bill.**] — Where a tradesman, who had supplied goods to a ship, sent in his account to the owner's agent and ship's husband, and took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit, and when the bill became due consented to a renewal of it adding interest, and in like manner took a third acceptance, which was dishonoured, and the agent soon afterwards failed, the balance in his hands in favour of his principal (the shipowner) having during all this time exceeded the amount of the bill, which was however unknown to the principal, who had never inspected the agent's accounts:—Held, that the tradesman might sue the shipowner for the amount of his claim, and that it was not discharged by the acceptance of the agent. *Robinson* v. *Read*, 9 B. & C. 449; 4 M. & Ry. 349; 7 L. J. (O.S.) K. B. 236.

Ratification of Payment by Stranger.] — Payment by a stranger considered to be for a debtor and on his account, and afterwards ratified by him, is a good payment. *Belshaw* v. *Bush*, 11 C. B. 191; 22 L. J., C. P. 24; 17 Jur. 67.

But payment by a stranger, without the authority, prior or subsequent, of the debtor, is not. *James* v. *Isaacs*, 12 C. B. 791; 22 L. J., C. P. 73; 17 Jur. 69; 1 W. R. 21. See *Cook* v. *Lister*, 13 C. B. (N.S.) 543; 32 L. J., C. P. 121; 7 L. T. 715; 11 W. R. 369.

The ratification in such case may be after the commencement of the action, as where the defendant adopts the payment of the stranger by pleading it as a payment to the plaintiff. *Simpson* v. *Eggington*, 10 Ex. 845. S. P., *Belshaw* v. *Bush*, supra.

To an action by an indorsee of a bill of exchange against the acceptor, he pleaded that the bill was an accommodation bill; that the drawer indorsed the bill and other bills to the plaintiff as security for the repayment of 30*l.* advanced by him to the drawer, and that the bill was satisfied by payment to the plaintiff by the acceptor of one of the other bills of the money so advanced:—Held, that the plea was no bar to the further maintenance of the action, the payment having been made by a stranger, and not having been ratified by the plaintiff. *Kemp* v. *Balls*, 10 Ex. 607; 3 C. L. R. 195; 24 L. J., Ex. 47.

When a creditor accepts payment of a debt from a stranger without the authority of the debtor, it is competent to the creditor, on discovering the want of authority and before any ratification of the payment by the debtor, to cancel the payment by returning the money to the stranger; and the debtor cannot in such a case ratify the payment by placing a plea of payment on the record in an action brought against him for the amount by the creditor. *Walter* v. *James*, 40 L. J., Ex. 104; L. R. 6 Ex. 124; 24 L. T. 188; 19 W. R. 472.

When a payment is made, not by way of gift

for the benefit of the debtor, but by an agent who intended to be reimbursed by the debtor, but who had not the debtor's authority to make it, it is competent to the creditor, and the party paying, to rescind the transaction at any time before the debtor has affirmed the payment, and to repay the money, when the payment of the debt will be at an end, and the original debtor will be again responsible. *Ib.*

b. Other Acts of Agents.

i. *Generally.*

Scope of Authority.]—An agent cannot bind his principal by any act or declaration which is out of the scope of his authority. *Olding* v. *Smith*, 16 Jur. 497.

An agent can only act within the scope of his authority as such. *Schumack* v. *Lock*, 3 L. J. (o.s.) C. P. 57.

Doctrine of Respondeat Superior not to be Extended.]—I agree that the court ought to be very careful how it extends the doctrine "respondeat superior." It has been carried in our law very far indeed—per Jessel, M.R. *Smith* v. *Keal*, 9 Q. B. D. 351; 47 L. T. 143; 31 W. R. 67.

Infringement of Patent by Agent.]—A patent consisted of the application of cards or strips of leather covered with wire to rollers at "wide distances." A person who contracted to clothe rollers and supplied to a "nailer" cards of such width that when applied to the rollers they must of necessity leave wide spaces, and who himself paid the nailer, was held to have infringed the patent, though he alleged that his business was that of a cardmaker only, and did not include the nailer's work. Semble, the conclusion would have been the other way if he had merely supplied the cards without making the nailer his agent. *Sykes* v. *Howarth*, 48 L. J., Ch. 769; 12 Ch. D. 826; 41 L. T. 79; 28 W. R. 215.

Act of Bankruptcy by Agent.]—A man cannot commit an act of bankruptcy by an act of his agent which he has not authorised, and of which he is not cognisant. *Blain, Ex parte, Sawers, In re*, 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.

ii. *Fraud.*

Acts within Scope of Authority.]—The fraud of an agent, to make the principal liable therefor, must be committed within the scope of his authority, and for the benefit of the principal. *Thorne* v. *Heard*, 64 L. J., Ch. 652; [1895] A. C. 495; 11 R. 254; 73 L. T. 291; 44 W. R. 155—H. L. (E.)

Fraud will vitiate any transaction, though the principal does not personally take any part in the fraud, if the agent does, for the principal is civilly responsible for the acts of his agent. *Doe* d. *Willis* v. *Martin*, 4 Term Rep. 39; 2 R. R. 324.

A local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss:—Held, in an action against them, that they were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and also that as local manager he had authority from the bank to make an assignment of an equitable mortgage. *Thompson* v. *Bell*, 10 Ex. 10; 2 C. L. R. 1213; 23 L. J., Ex. 321; 2 W. R. 559.

But where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had never been received, the principal was held not to be responsible, because it was not within the scope of the agent's authority, in the course of his employment, to give such a receipt. *Coleman* v. *Riches*, 16 C. B. 104; 3 C. L. R. 795; 24 L. J., C. P. 125; 1 Jur. (N.S.) 596; 3 W. R. 453.

A miller was in the habit of purchasing wheat, and directing the sellers to deliver the wheat at the landing place, at Bristol, of a wharfinger and carrier, to be carried by him from Bristol to Cardiff. B., his agent at Bristol, gave receipts to the sellers for the wheat when delivered, and the miller was accustomed to pay for the wheat upon the production of such receipts, but there was no contract between him and the wharfinger that receipts should be given, on the faith of which the former might pay:—Held, that B. had a limited authority to give receipts only when wheat had been delivered; and, therefore, where B. fraudulently signed a receipt for wheat delivered, when none in fact had been delivered:—Held, to be not an act done within the scope of his authority, as agent, for which his principal was responsible to the miller, who had paid to the seller the price of the wheat, on the faith of the receipt being true. *Ib.*

The secretary of a benefit building society employed H. as his private clerk to transact the business of the society. H. was not an officer of the society. The directors had drawn cheques from time to time, which were handed over to H. by the direction, and with the knowledge of, the secretary, for the purpose of being paid by him to the withdrawing members; but instead of being so applied they were misappropriated by H.:—Held, that the secretary was responsible for the acts of his clerk, to whom he intrusted the moneys, in the same manner and to the same extent as if the directors had placed the moneys in the hands of the secretary, and he himself had handed them over to his clerk. *James, Ex parte, Mutual and Permanent Benefit Building Society, In re*, 49 L. T. 530; 48 J. P. 54.

The shares of a proprietor in a joint-stock company were sold out without his authority, and not in conformity with the provisions of the deed by which the company was constituted. On a bill filed by the shareholders, alleging that the sale was the fraudulent act of the secretary of the company, and sanctioned by the directors, but assuming the transaction to be valid, as against the transferee, and praying that the loss might be made good out of the assets of the company; demurrer for want of equity allowed, on the ground that the bill stated no case for

making the company liable in damages. *Duncan* v. *Luntley*, 2 Mac. & G. 30; 2 Hall & Tw. 78; 14 Jur. 318.

Forgery by Secretary of Company—Certificate for Shares.]—G. having, through the plaintiff, as his broker, purchased 200 shares in the defendant company, had a transfer and apparently regularly issued certificates sent to him in ordinary course. The transfer and certificates were lodged at the company's office with a request for registration, and what purported to be a certificate that G. was the registered proprietor of 200 shares was issued to him, signed by one director and the secretary, and bearing the seal of the company. The form of this certificate was in accordance with the company's deed and resolutions, but, in fact, the name of the director was forged by the secretary. Subsequently G. deposited the certificate, as security for advances, with the plaintiff, who gave the company notice of such deposit, neither G. nor the plaintiff having any knowledge or ground for suspicion that the certificate was not genuine. On a case stated raising the question whether the plaintiff had a good title to the shares as against the company:—Held, that he had; that the company were liable for the fraud of their agent perpetrated in the ordinary course of his employment, as they had here placed the secretary in a position to warrant the genuineness of the signature and the seal. *Shaw* v. *Port Phillip Gold Mining Co.*, 53 L. J., Q. B. 369; 13 Q. B. D. 103; 50 L. T. 685; 32 W. R. 771.

Holding out Agent as authorised to Borrow Money in Excess of Prescribed Limits—Personal Liability of Directors.]—By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary, who was also acting treasurer; the usual course of business was that he delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed exceeding that limited by the rules, the plaintiffs paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:—Held, that, as the money had been borrowed in excess of the total amount limited by the rules, the society was not liable; but that, although there was no fraud on the part of the directors, they were personally liable. *Chapleo* v. *Brunswick Benefit Building Society*, 50 L. J., C. P. 372; 6 Q. B. D. 696; 44 L. T. 449; 29 W. R. 529—C. A.

Negligence of Principal.]—A plaintiff, appointed by the court paid manager of an estate, who transmitted moneys belonging to the estate to his solicitor in the action for payment into court, was held liable for the solicitor's misappropriation, on the ground of negligence, by reason of his sending the money before the orders for payment in had been actually obtained, and subsequently asking for no vouchers or other direct evidence of payment. *Mitchell. In re, Mitchell* v. *Mitchell*, 54 L. J., Ch. 342; 52 L. T. 178.

Fraudulent Mortgage by Agent.]—The defendant employed his attorney to obtain a loan of 100*l.* for him on mortgage, and placed his title deeds in his hands for that purpose. The attorney forged the defendant's signature to a mortgage deed to the plaintiff for 420*l.*, and received the money, and concealed the transaction from the defendant, to whom he afterwards advanced 198*l.* in various sums, and subsequently took from him a mortgage to a third person, to cover that advance:—Held, that the plaintiff had no cause of action against the defendant, even to the extent of 100*l.* *Painter* v. *Abel*, 2 H. & C. 113; 33 L. J., Ex. 60; 9 Jur. (N.S.) 549; 8 L. T. 287; 11 W. R. 651.

A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto" the wife, "her executors, administrators and assigns, as her separate estate." No trustees were appointed, the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife. The wife having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of 200*l.* upon them for the wife, and having asked for the return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of 1,200*l.*, which he appropriated to his own use:—Held, that there was no negligence on the part of the wife so as to bar her title to relief against the mortgagees. *Fox* v. *Hawks*, *Hawks* v. *Fox*, 49 L. J., Ch. 579; 13 Ch. D. 822; 42 L. T. 622; 28 W. R. 656.

Fraudulent Transfer of Mortgage by Agent—Authority to receive Mortgage Money.]—G. and H. were mortgagees for 1,000*l.* on property of S. Their solicitors D. and P., who had the deeds in their custody, applied to the defendant, who was also a client of theirs, saying that they believed he had 1,000*l.* to invest on mortgage, and that G. and H. wanted 1,000*l.* on a transfer of S.'s mortgage. The defendant inspected the property, and being satisfied, he, on the 19th of June, 1878, sent the 1,000*l.* to D. and P., who gave him a receipt for it. In July, D. and P. fraudulently induced G. and H. to execute a deed of transfer to the defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. and P. shortly afterwards handed his deed with the title-deeds to the defendant, and went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. and H.; G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. and P. became bankrupts, and the 1,000*l.* received from the defendant, which had never been handed over to G. and H., was lost. G. and H. then brought their action against the defendant asserting a right against the property in the nature of an unpaid vendor's lien:—Held, that, as the plaintiffs by the deed of transfer and receipt which they handed to D. and P. enabled them to represent to the defendant that the 1,000*l.* which he had previously handed to D. and P. had come to

the hands of the plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. and P. having no authority to receive money for the plaintiffs) the defendant had paid the 1,000*l.* to D. and P. at the time when the deeds were delivered to him, since he would then have known that the plaintiffs had not received the money. *Swinbanks, Ex parte* (11 Ch. D. 525), distinguished. *Gordon* v. *James*, 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217—C. A.

Quære, per Cotton, L.J., whether D. and P., assuming them to have authority to receive mortgage money on behalf of the plaintiffs, could be taken ever to have, in fact, received this 1,000*l.* on their behalf. *Ib.*

Fraudulent Act of Agent of which Principal gets the Benefit.]—A secretary and financial agent of a company, having authority to get bills discounted, forged bills and got them discounted. He paid the proceeds into a bank to the account of a firm to which he belonged, and in his character of a member of that firm drew cheques on the account in favour of the company; and it was alleged that out of the amounts so drawn he actually made payments for the benefit of the company. In the winding up of the company it was held, that an inquiry must be directed what amount of the proceeds of the bills had been applied, directly or indirectly, for the benefit of the company, and that a claim for the amount when ascertained would be good. *Japanese Curtains and Patent Fabric Co., In re, Shoolbred, Ex parte*, 28 W. R. 339.

The plaintiffs and the defendant having each lodged their respective India bonds with the same bankers, who afterwards privily, and without the defendant's authority, sold his bonds, and, upon his demand of them, delivered up to him the India bonds of the plaintiffs to the same total amount, and payable to the same obligee (being always the treasurer of the company, who indorsed such bonds in blank before they were circulated), but having different numbers, and for different separate sums, and therefore manifestly distinguishable from his own bonds, though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these:—Held, that the defendant, having sold the plaintiffs' bonds so received from his own agents, who had acted malâ fide in passing them to him, was liable to answer over to the plaintiffs for the amount. *Glyn* v. *Baker*, 13 East, 509; 12 R. R. 414.

A company cannot retain any benefit which they have gained through the fraud of their agents. *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. (Sc.) 145.

Corporate bodies may be made responsible for the frauds of agents to the extent to which they have profited by such frauds. *Ib.*

A. usually employed B. as his agent to buy hops of the several planters in and about Canterbury, but having in a particular season omitted to give him any orders at the usual time, B. enters into a partnership with three others for purchasing hops of that year for their mutual benefit. The hops are accordingly purchased, but A., having intelligence of this transaction before they were delivered, prevails upon B. to declare to the planters, that he bought them as A.'s agent, and by that means A. got the hops delivered to him:—Held, that this was a fraud upon the partners of B., and that A. should account for the value of the hops, according to the highest price for which he sold them. *Hunter* v. *Sheppard*, 4 Bro. P. C. 210.

Money borrowed by Agent without Authority—Money had and received.]—Money was lent by the plaintiff upon a cheque drawn by the defendants' manager, who had authority to draw cheques on their account per procuration, but no authority to overdraw or to borrow money. The defendants' account was overdrawn, and the money was borrowed to enable the manager to pay the defendants' workmen their wages, which he was unable to do through want of funds due to his own defalcations. The money was paid into the defendants' account at the bank, and out of it the manager paid the workmen's wages:—Held, that, as the money had come into the defendants' possession and had been paid to the defendants' workmen in discharge of legal obligations of the defendants, they were liable to the plaintiff for money had and received to the use of the plaintiff. *Marsh* v. *Keating* (1 Bing. (N.C.) 198) followed. *Reid* v. *Rigby*, 63 L. J., Q. B. 451; [1894] 2 Q. B. 40; 10 R. 280.

Lien of Customer on Goods Fraudulently Pledged.]—A horse dealer supplied a customer with a pair of horses, for which he paid 170*l.*, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the 170*l.*, when it was found that the horses did not belong to him, but to an employer, for whom he was agent to sell, but not to pledge, the horses:—Held, that the horses were in the bankrupt's order and disposition; and that the customer could not enforce a lien on them as against the trustee in bankruptcy. *Roy, Ex parte, Sillence, In re*, 47 L. J., Bk. 36; 7 Ch. D. 70; 37 L. T. 508; 26 W. R. 82.

Putting in Fraudulent Defence.]—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, the client is not bound by the act of the solicitor. *Williams* v. *Preston*, 51 L. J., Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555.

Cf. cases ante, cols. 1021 et seq.

iii. *False Representations.*

Principal not authorising Representations.]—An owner of a house employed an agent to sell it. The agent described it as being free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the owner knew. On the faith of the agent's description, a party bought the house:—Held, that he might maintain an action for deceit against the owner of the house, though it did not appear that he had instructed his agent to make any representation as to rates or taxes. *Fuller* v. *Wilson*, 2 Q. & D. 460; 3 Q. B. 58; 11 L. J., Q. B. 251—Ex. Ch.

A principal is liable in an action of deceit for the false and fraudulent representations of his agent as to the quality and value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that

the principal neither authorised nor knew of the fraudulent conduct of his agent. *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J., Ex. 337; 7 Jur. (N.S.) 777; 4 L. T. 797.

A timber merchant's traveller, with full knowledge of certain defects in a log of mahogany, induced a party to purchase, and pay for it by representing it to be sound. The timber merchant was neither aware of the defect, nor did he authorise his traveller to make such misrepresentation. In an action of deceit by the purchaser against the timber merchant: — Held, per Pollock, C.B., and Walde, B., that the principal was responsible for the fraud of his agent; per Martin, B., and Bramwell, B., that the principal was not responsible. *Ib.*

A principal is answerable for the act of his agent in concealing or suppressing deeds, though not done with the knowledge of the principal. *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

The arrangements for a deed between A. and B. were negotiated on A.'s behalf by C., his solicitor. B. cannot maintain a bill to have the deed set aside, on the ground that C., knowing material circumstances, concealed the same from him, unless he shews that A., the principal, at the same time had the same knowledge. But the knowledge of the principal would be the knowledge of the agent. *Solomon* v. *Honywood*, 3 N. R. 605; 10 L. T. 186; 12 W. R. 572.

Employing Agent Ignorant of Defect.]—The defendant's son, acting for the defendant, and with the defendant's authority, represented that certain sheep, which he sold to the plaintiff, were all right. The defendant had fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound:—Held, that the defendant was liable in an action to recover damages for fraudulent misrepresentation. *Ludgater* v. *Love*, 44 L. T. 694; 45 J. P. 600—C. A.

Where a principal purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement believing it to be true, and may so deceive the party with whom he is dealing, the representation by the agent becomes a misrepresentation by the principal so as to vitiate the contract. *Ib.*

Liability of Principal.]—A principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business. *Barwick* v. *English Joint Stock Bank*, 36 L. J., Ex. 147; L. R. 2 Ex. 259; 16 L. T. 461; 15 W. R. 877—Ex. Ch.

A master is answerable for every such wrong of his servant or of his agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master is proved; and there is no distinction between the case of fraud and the case of any other wrong. *Mackay* v. *Commercial Bank of New Brunswick*, 43 L. J., P. C. 31; L. R. 5 P. C. 394; 30 L. T. 180; 22 W. R. 473.

When one has suffered, and another has profited, by the fraudulent representation of an agent of the latter, made within the scope of his authority, the former is entitled to recover damages. *Ib.*

An action of deceit may be maintained against a company, whether it is incorporated or not incorporated, in respect of the fraud of its agent. *Ib.*

An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A. which, by omitting a material fact, misled him, and induced him to accept a bill in which the bank was interested; and he was compelled to pay the bill:—Held, that he could recover from the bank the amount so paid. *Ib.*

In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal. *Ib.*

—— **Secretary of Company.**]—The defendants, a tramway company, employed contractors to execute certain works. By the contract the defendants had a right to retain a certain percentage of the amounts for which their engineer from time to time certified on account of the price of the works, until after the completion of the same. The contractors applied to the plaintiffs for an advance upon the security of retention moneys under the contract. The defendants' secretary, in answer to inquiries made by the plaintiffs, erroneously represented to them that there was a certain amount of retention money in the defendants' hands which would be payable after the completion of the works, whereas in fact it was not so. The plaintiffs thereupon advanced money to the contractors on the security of an assignment of the retention money. There was no evidence to shew that the secretary had authority to make the representations which he had made:—Held, that it is not within the scope of a secretary's authority to make such representations, and, therefore, in an action by the plaintiffs as assignees of the retention money, the defendants were not estopped from denying that such money was due. *Barnett* v. *South London Tramways Co.*, 56 L. J., Q. B. 452; 18 Q. B. D. 815; 57 L. T. 436; 35 W. R. 640—C. A.

The secretary of the defendant company falsely, fraudulently, and without the knowledge of the directors of the company, represented to the plaintiff that if the plaintiff took certain shares in the company he would be appointed solicitor to the company, and afterwards represented that the plaintiff had been appointed solicitor. The plaintiff was induced by the secretary's representations to apply for shares in the company. He accepted and paid for the shares, and afterwards paid calls on them, and received a dividend:—Held, in an action by the plaintiff against the company, that the secretary had no such implied authority to make representations on behalf of the company as to render the company liable to the plaintiff for the fraudulent representations of the secretary, and therefore the plaintiff was not entitled to have his name struck off the register of shareholders, nor to recover the price which he had paid for the shares, or the calls which he had paid, and was liable to the defendants on their counterclaim for further calls. *Newlands* v. *National Employers' Accident Association*, 54 L. J., Q. B. 428; 53 L. T. 242; 49 J. P. 628—C. A.

—— **Of Director for Acts of Co-directors.**]—A company formed to work a mine was compelled from want of funds to cease working; money was then advanced to them by some of the directors, and amongst them Barnett and

Baldwin. Afterwards, at a general meeting of the company, held in order to provide for the existing deficit and for working expenses, the directors were authorised to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorised the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus bearing the names of Bell and others as directors, and containing statements as to the condition and prospects of the company on the faith of which the plaintiff and others purchased debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell and others in respect of the statements in the prospectus, some of which were alleged to be fraudulent. The jury found that the prospectus contained statements of facts which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Bell personally or by his authority; that the brokers had authority to issue a prospectus, but no authority to include in it statements which were fraudulent; and that Bell derived no benefit from the money raised by the debentures:—Held, that Bell was not liable, by Cockburn, C.J., and Brett, L.J., on the ground that, though a party as director to the receipt of money, Bell was not aware of the falsehood of the statements contained in the prospectus, and derived no personal benefit from the receipt of the money; by Bramwell, L.J., that Bell had been guilty of no moral fraud, and not being the principal of the brokers, could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus. *Weir* v. *Bell*, 47 L. J., Ex. 704; 3 Ex. D. 238; 38 L. T. 929; 26 W. R. 746—C. A.

But by Cotton, L.J., that Bell was liable in an action to the plaintiff, for it was his duty as director to ascertain whether the statements in the prospectus were true or false. *Ib.*

A director of a company is not liable for a fraud (such as the issue of a fraudulent prospectus) committed by his co-directors, or by any other agent of the company, unless he has either expressly authorised or tacitly permitted its commission. *Cargill* v. *Bower*, 47 L. J., Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.

For Agent's own Benefit.]—A principal is not liable in an action of deceit for the unauthorised and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends. The secretary of a company answered questions which were put to him as secretary as to the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own benefit. In an action against the company for loss arising from the representations, the jury found that the secretary was held out by the company as a person to answer such inquiries on their behalf:—Held, that the company were not liable. *British Mutual Banking Co.* v. *Charnwood Forest Ry.*, 56 L. J., Q. B. 449; 18 Q. B. D. 714; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150—C. A.

Signature of Agent not Sufficient to satisfy Lord Tenterden's Act as to Representation.]—By 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, and not by an agent. The plaintiff sued J. and G. jointly for a false representation with respect to the solvency of Sir William Russell. J. was sued as the public officer of a banking company formed under 7 Geo. 4, c. 46, and G. was the manager at one of their branches. The plaintiff was a customer of the S. Bank, and requested the manager of that bank to inquire for him as to Sir William Russell's credit. The manager wrote a letter addressed to the manager of the banking company, requesting information whether Sir William Russell was responsible to the extent of 50,000*l*. G. replied in his own name, signing his letter as manager, and giving a favourable account of Sir William Russell's responsibility. The plaintiff, in consequence of this letter, supplied Sir William Russell with goods, for which he never was paid, in consequence of his insolvency. The statement made by G. was false to his knowledge. The banking company had no knowledge, otherwise than through G., that such letter had been written, and gave him no express authority to write the letter; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—Held, that the signature of G. to the letter could not be considered the signature of the banking company itself. *Swift* v. *Jewesbury*, 43 L. J., Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319—Ex. Ch.

Held, also, that the letter was the representation of G., and not the representation of the banking company. *Ib.*

Held, also, that G. was liable personally for the false representation. *Ib.*

The signature of an authorised agent is not a sufficient signature within 9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 6, whereon to charge a party making a false representation. *Williams* v. *Mason*, 28 L. T. 232; 21 W. R. 386.

C. M. and A. M. were trading as M. & Son. A. M., the son, wrote to the plaintiff a letter signed "M. & Son," in which he represented G. to be solvent. This letter was shewn to, and tacitly ratified by, C. M., the father. G. proving insolvent:—Held, that, notwithstanding the ratification of the letter by C. M., the letter was not signed by the "party to be charged" within the meaning of the above statute, so as to make him liable for any false representation therein. *Ib.*

Liability to Penalties for.]—The Queensland Constitution Act, 1867, by s. 6, enacts that any person who shall, directly or indirectly, hold or enjoy any contract for or on account of the public service, shall be incapable of sitting or voting as a member of the legislative assembly; and s. 7 imposes a penalty on any person so disqualified so sitting or voting. The respondent, being part owner of a ship which had been chartered by the government, sat and voted as a member of the legislative assembly. The respondent had instructed his agents, who were also part owners, not to charter the ship to the government, and that if they did, the contract

should be made with such part owners only who should be held to have chartered the respondent's share at a rate fixed independently of such contract. The government had no knowledge that the respondent was a part owner :—Held, that under these circumstances the respondent was not liable to the penalties imposed by the act. *Freeman* v. *Cooke* (2 Ex. 654) approved. *Miles* v. *McIlwraith*, 52 L. J., P. C. 17 ; 8 App. Cas. 120 ; 48 L. T. 689 ; 31 W. R. 591—P. C.

iv. *Negligence.*

Adjoining Owners, Liability of—Dangerous or Hazardous Work.] — Two dwelling houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiff's) was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory :—Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury. *Bower* v. *Peate* (1 Q. B. D. 321) approved. *Dalton* v. *Angus*, 50 L. J., Q. B. 689 ; 6 App. Cas. 740 ; 44 L. T. 844 ; 30 W. R. 196—H. L. (E.)

The defendant was the owner of a house standing at the corner of two streets, between a house belonging to the plaintiff and a house occupied by B. The defendant being desirous of rebuilding his house employed a competent architect and competent builders to rebuild it. The defendant's new house was a storey higher than the old house, and the basement was lower. After the house had been nearly finished, the workmen employed by the builders began to fix a staircase ; in so doing they negligently and without the knowledge of the defendant or his architect, cut into a party-wall dividing the defendant's new house and B.'s house. In consequence the defendant's house fell ; and the girders having become displaced, injury was done to the plaintiff's house, for which he now sued the defendant. The fixing of the staircase was not in itself a hazardous operation if it had been carried out with ordinary skill :—Held that an action was maintainable against the defendant for the injury done to the plaintiff's house. *Bower* v. *Peate* (1 Q. B. D. 321) considered. *Hughes* v. *Percival*, 52 L. J., Q. B. 719 ; 8 App. Cas. 443 ; 49 L. T. 189 ; 31 W. R. 725 ; 47 J. P. 772—H. L. (E.)

Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract and specification, to a neighbour's vault, it was held under the circumstances that both the employer and contractor were liable for it, and judgment was given for the plaintiff, with costs against the defendants. *Lemaitre* v. *Davis*, 51 L. J., Ch. 173 ; 19 Ch. D. 281 ; 46 L. T. 407 ; 30 W. R. 360 ; 46 J. P. 324.

During the removal of refuse grains from a brewery, in pursuance of a contract, and under the superintendence of the foreman of the brewers, so far as the removal inside the brewery was concerned, some of the grains were spilt upon the footpath in front of the brewery. The plaintiff, while passing the brewery, stepped upon the grains and fell and sustained injuries. In an action for damages against the brewers :—Held, that it was no answer on their part to say that the answer arose through the negligence of the contractor's men. *Duke* v. *Courage*, 46 J. P. 453.

A steward, manager, or agent is not liable for damage done by the negligence of those employed by him in the service of his principal ; for, the principal, or those actually employed, only are liable. *Stone* v. *Cartwright*, 6 Term Rep. 411 ; 3 R. R. 220.

—— **Indivisible Contract.**] — A proprietor making a dangerous use of his property must use reasonable precautions to prevent damage to his neighbours, or, if he authorises another to act for him, must see that such precautions are taken. *Hughes* v. *Percival* (8 App. Cas. 443) followed. *Black* v. *Christchurch Finance Co.*, 63 L. J., P. C. 32 ; [1894] A. C. 48 ; 6 R. 394 ; 70 L. T. 77 ; 58 J. P. 332—P. C.

A contract "to start falling within three days from this date, and complete the falling by November 30, 1890, and to burn in a favourable time about February next," is a single and indivisible contract for the clearance of land ; and though the contractor violate his contract by burning before the time appointed, the proprietor of the land is liable for injury to his neighbour's property arising therefrom, for the legal consequences of doing an act at an improper time, and doing it in an improper manner are indistinguishable. *Ib.*

And see further NEGLIGENCE.

Manager of Bank.]—Censure of a manager's conduct in leaving signed cheques, blank as to the amount, in the hands of clerks to be used by them at discretion. *Beveridge* v. *Beveridge*, L. R. 2 H. L. Sc. 183.

Censure of manager's conduct in depositing company's cash in certain banks without consent of all the partners. *Ib.*

A manager exceeds his powers by increasing the wages of the company's servants, and also by substituting, for the original, more expensive machinery without consent of the partners. *Ib.*

Of Harbour-master — Liability of Harbour Commissioners.]—The "R.," which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the "R." where to beach her. Before the "R." left the outer harbour, S. came on board, although a Trinity-house pilot was on board, and when she had arrived near the place where she had to be beached, gave directions as to the lowering of her anchor. The "R." overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found as a fact that there was negligence on the part of S., and that the place where the "R." grounded was out-

side the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed the functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the "R." *The Rhosina*, 54 L. J., P. 72; 10 P. D. 131; 53 L. T. 30; 33 W. R. 794; 5 Asp., M. C. 460—C. A.

v. *Trespass.*

General Rule.]—A principal is not liable in trespass for the act of his agent unless he authorised it beforehand, or subsequently assented to it with knowledge of what had been done. *Freeman* v. *Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340.

Wrongful Distress.]—The defendants received, on behalf of the owners, the rent of a house, of which the plaintiff was tenant. Rent being in arrear, the defendants signed, as agents for the owners, a warrant of distress, and delivered it to a broker to be executed. Before it was actually executed, the plaintiff tendered to the defendants the amount due, which they refused to receive on the ground that a distress warrant had issued. The plaintiff subsequently tendered the amount to the broker, who refused to receive it unless certain alleged costs of distress were also paid. The broker having subsequently distrained:—Held, that the distress was unlawful, and that the defendants were not mere agents conveying an authority from the landlords, but persons committing a wrongful act; and therefore liable for the damages sustained by the plaintiff. *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J., Ex. 224; 2 L. T. 156; 8 W. R. 320.

The right of A. to do an act, e.g. to distrain on the property of B., depends on the authority he really has, not on what he says he has. *Snell* v. *Finch*, 13 C. B. (N.S.) 651; 32 L. J., C. P. 117; 9 Jur. (N.S.) 333; 7 L. T. 747; 11 W. R. 341. *See also* ante, col. 935.

vi. *Malicious Prosecution.*

Authority of Bank Manager to Prosecute on Behalf of Bank.]—In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorised on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution. A rule nisi to enter a nonsuit or for new trial was discharged:—Held, on appeal, that assuming the prosecution to have been authorised by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution, was on the evidence incorrect. *Bank of New South Wales* v. *Owston*, 48 L. J., P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox, C. C. 267.

The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorised to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to shew commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of acts which shews that such exigency is present, or from which it might reasonably be supposed to be present. Rule made absolute for a new trial. *Ib.*

Action against Corporation.]—An action for a malicious prosecution will lie against a company. *Stevens* v. *Midland Ry.* (10 Ex. 352) not followed. The employment of policemen by a railway company to protect their property is an act within the scope of the incorporation of the company. *Edwards* v. *Midland Ry.*, 50 L. J., Q. B. 281; 6 Q. B. D. 287; 43 L. T. 694; 29 W. R. 609; 45 J. P. 374.

A railway company, though a corporation, is liable to an action for false imprisonment if the act is committed by the authority of the company; the authority need not be under seal, but it lies on the plaintiff to give evidence justifying the jury in finding that the company's servants who imprisoned him or some of them had authority from the company to do so. *Goff* v. *G. N. Ry.*, 3 El. & El. 672; 30 L. J., Q. B. 148; 7 Jur. (N.S.) 286; 3 L. T. 850.

vii. *In Other Cases.*

Conversion.]—Semble, if an agent, acting under the direction of a committee for managing the affairs of an incorporated company, commits a conversion, he renders the company liable. *Duncan* v. *Surrey Canal Proprietors*, 3 Stark. 50.

Assault.]—Where the chief and under secretaries for Ireland gave directions to have a meeting legally prevented, it was held in an action against them for assault that they were not responsible for any illegality in the method in which those directions were carried out by the chief commissioner of police and his subordinates, who were the servants of the Crown, to whom alone they were responsible. *O'Byrne* v. *Hartington*, Ir. R. 11 C. L. 445—Ex. Ch.

Liability of Members of Trade Union for Acts of District Delegate.]—The plaintiffs were shipwrights, employed by the day by a firm of shiprepairers to execute repairs to the woodwork of a ship. Some ironworkers who were members of a trade union were employed on the ironwork of the ship, and they objected to working in the same yard with the plaintiffs upon the ground that the latter had previously worked at ironwork on ships in another yard. The district delegate of the union was called in by the ironworkers, and he informed the employers that the ironworkers would leave off work unless the plaintiffs were discharged that day. In consequence of that threat the plaintiffs were discharged at the end of the day. The plaintiffs brought an action against the district delegate, the chairman, and the general secretary of the union, for maliciously, and with intent to injure the plaintiffs, inducing the employers to discharge the plaintiffs, and to refuse to engage them again. The jury found that the district delegate had acted maliciously, and that the plaintiffs had been injured thereby, but that the other two defendants did not authorise his acts:—Held, that the district delegate was not the agent or servant of the members of the union, so

as to render each member liable for his acts, and that, therefore, the chairman and general secretary were not, merely by reason of their being members of the union, liable in the action. *Flood* v. *Jackson*, 64 L. J., Q. B. 665; [1895] 2 Q. B. 21; 14 R. 397; 43 W. R. 453; 59 J. P. 388—C. A. Affirming 72 L. T. 589.

It was held on appeal, however, that no actionable wrong had been committed by the district delegate. See *S. C.*, nom. *Allen* v. *Flood*, 67 L. J., Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258—H. L. (E.)

Estoppel of Principal by Act of Agent.]—The receipt of money by an agent in ignorance that the principal has struck a docket is not a forfeiture of the debt proved by the principal. *Gardner, Ex parte, Strutton, In re*, 3 Mont. & Ayr. 46; 2 Deac. 142; 6 L. J., Bank. 66.

Where the Irish agent of an English banking house received payments in Irish currency, and upon the footing of Irish interest, on account of a debt which, upon the construction of the contract, was decided to be payable in English currency:—Held, that the right of the banking house to receive payment in such currency was not prejudiced by the conduct of their agents. *Noel* v. *Rochfort*, 10 Bli. (N.S.) 483; 4 Cl. & F. 158.

3. Effect of Factors Acts.

a. Generally.

Statute.]—52 & 53 Vict. c. 45, *amends and consolidates the Factors Acts.*

Intention of Acts.]—The intention of the Factors Act (5 & 6 Vict. c. 39) is that where a third person has intrusted goods or the documents of title to goods to an agent, who in the course of such agency sells or pledges them, he shall be deemed by that act to have misled any one who bonâ fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorised to sell the goods or to procure the advance. *Cole* v. *North-Western Bank*, 44 L. J., C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733—Ex. Ch.

The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. *Ib.*

Debt after Date of Act.]—To entitle a person who claims a lien on goods pledged with him by a factor to retain them under 6 Geo. 4, c. 94, the debt for which they are pledged must really and substantially have been incurred after 1st October, 1826, and the act of pledging must have taken place after that day. *Ross* v. *Willis*, 6 L. J. (O.S.) K. B. 215.

Pledge after Revocation.]—An agent "intrusted with and in possession of goods, or of the documents of title to goods," within the Factors Acts (6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39), is a person who is intrusted as agent for sale; and consequently one whose authority to sell has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal. *Fuentes* v. *Montis*, 38 L. J., C. P. 95; L. R. 4 C. P. 93; 19 L. T. 364; 17 W. R. 208—Ex. Ch.

Further Pledge.]—A factor by pledging goods in his possession or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal. *Portalis* v. *Tetley*, 37 L. J., Ch. 139; L. R. 5 Eq. 140; 17 L. T. 344; 16 W. R. 503.

Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., a broker, and authorised him to receive and sell the cotton, and subsequently made a further pledge to D. of the balance of the net proceeds of the cotton by order in writing communicated and assented to by C.:—Held, that the pledge to D. was valid as against A. *Ib.*

Bonâ fide Advance.]—A merchant who has enabled his factor to raise money fraudulently can claim no redress against the party who has bonâ fide made the advance. *Vickers* v. *Hertz*, L. R. 2 H. L. (Sc.) 113.

The goods or symbols of property intrusted to the factor may be regarded by unsuspecting third parties as his own, and dealt with accordingly under the Factors Act (5 & 6 Vict. c. 39). *Ib.*

A factor, after depositing dock warrants with the defendant, as a security for the advance of money, withdrew them from his hands and substituted other dock warrants for silk belonging to the plaintiffs, the defendant having no notice that the factor was not the true owner:—Held, that this transaction was not protected by 6 Geo. 4, c. 94, there being no advance of money on the faith of such warrants. *Bonzi* v. *Stewart*, 4 Man. & G. 295; 5 Scott (N.R.) 1; 11 L. J., C. P. 228.

Advance on Promise to lodge Warrants.]—A wood broker gave to a bank, to secure an advance, a letter of hypothecation on certain wools, promising to lodge warehouse warrants for them next day. The bank made repeated application for the warrants, but did not obtain them. After a few days, the broker having left his house, the bankers by pressure obtained the keys of his warehouse, where the wool was stored, and took possession. Part of the wool had belonged to a customer of the broker, but he was under advances and made no claim:—Held, that the bank acquired a valid charge on the wool under the provisions of the Factors Act (5 & 6 Vict. c. 39). *North Western Bank, Ex parte, Slee, In re*, 42 L. J., Bk. 6; L. R. 15 Eq. 69; 27 L. T. 461; 21 W. R. 69.

In leaving his house the broker was, as it turned out, absconding:—Held, that the bank had no notice of this. *Ib.*

Nature of Advance—Antecedent Debt.]—A., a manufacturer, having consigned goods to C., who had acted as his agent, C. being liable, together with B., on a bill of exchange which had become due, obtained from B. 300*l.* for the purpose of taking up the bill, and at the same time deposited with B., A.'s goods. A. having brought an action to recover back the goods, the judge told the jury that, if they thought the transaction was only a circuitous mode of paying the bill, on which B. was liable, it was not within 5 & 6 Vict. c. 39. s. 1:—Held, that the direction was right, and that the transaction was not protected by the statute. *Learoyd* v. *Robinson*, 12 M. & W. 745; 13 L. J., Ex. 213.

The 5 & 6 Vict. c. 39, does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. *Macnee* v. *Gorst*, L. R. 4 Eq. 351; 15 W. R. 1197.

H. requested W. to purchase cotton for him, to be delivered and paid for on a future day. W. made such purchase in his own name through C., a broker. When the cotton was ready for delivery, the price had fallen and C. refused to pay for it, unless provided with security sufficient to cover the difference between the contract price and the value at the price of the day. H. accordingly indorsed and deposited with W., who indorsed and deposited with C., a bill of lading of goods consigned to H., and C. thereupon completed the purchase of the cotton. Such goods were in fact consigned to H. as the plaintiff's factor:—Held, that the deposit of the bill of lading was valid as against the plaintiff, and that it was not made in respect of an antecedent debt due from H. to W. *Jewan* v. *Whitworth*, 36 L. J., Ch. 127; L. R. 2 Eq. 692; 14 W. R. 1020.

The appellants, merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they from time to time consigned to him. M. employed the respondents, London brokers, to sell the appellants' consignments, and also in speculative purchases on his own account. The respondents purchased shellac for M. without disclosing that they were buying as agents, and therefore were personally liable to the vendors on the contracts. Subsequently they made advances to M. to enable him to pay deposits on the shellac, and took as security bills of lading of some of the appellants' cargoes. They had no notice that M. was acting improperly in pledging the cargoes. On obtaining the advances M. gave the respondents cheques for the amount of the deposits, which were then paid by the respondents:—Held, that the obligation under which M. lay to the respondents to pay the deposits and thus prevent their being called upon to pay them, did not constitute an antecedent debt within the meaning of the Factors Act, 5 & 6 Vict. c. 39, s. 3, and that the pledges were made in respect of bonâ fide advances, and not of antecedent debts, and were valid against the appellants. *Kaltenbach* v. *Lewis*, 55 L. J., Ch. 58; 10 App. Cas. 617; 53 L. T. 787; 34 W. R. 477—H. L. (E.)

M. also pledged with the respondents pepper consigned to him for sale by the appellants, to secure an advance protected by the Factors Acts. The goods had been sold for M. by the respondents, but not delivered to the purchasers, nor paid for, when M. died insolvent and heavily indebted to the respondents on a general account. After the sale, but before receiving the proceeds, the respondents had notice that the appellants claimed the pepper and the proceeds:—Held, that after repayment of the respondents' advance the surplus proceeds of sale belonged to the appellants; that the appellants could sue the respondents for such surplus, whether on the ground of privity of contract, or on the ground of property, or under the Factors Act, 5 & 6 Vict. c. 39, s. 7. *New Zealand and Australian Land Co.* v. *Watson* (7 Q. B. D. 374), distinguished and explained. *Ib.*

B., having sold 500 sacks of flour to H. consigned them to him by sea, with 500 more to sell on commission. The captain of the vessel executed and handed to B. two duplicate bills of lading expressed to be "to order or assigns;" and one of them having been forwarded by B. to H. unindorsed, the latter on the 9th of February, 1878, deposited it with a discount company (who carried on business in the same town as himself) to secure an advantage of 600*l.* then made to him. On the 11th of February H., who, in the meantime, and without informing B. of the transaction of the 9th had obtained from him the duplicate bill of lading duly indorsed, deposited it also with the company, at whose instance he, on the 13th, further executed to them a letter of lien, antedated the 9th, upon the whole cargo, in respect both of the 600*l.* advance and of about 800*l.* the amount of certain bills of exchange previously discounted for him by the company, and just reaching maturity. The vessel arrived shortly afterwards, and the company discovered that H. was owner of only half the flour, whereupon B. having brought an action to have his own half relieved from the company's lien:—Held (by Ball, C., and Deasy, L.J., dissentiente Fitzgibbon, L.J.), that the plaintiff was entitled to the relief sought. *Blake* v. *Belfast Discount Co.*, 5 L. R., Ir. 410—C. A.

Where defendants receiving a pledge from a factor for an antecedent debt, sell it, they cannot, under 6 Geo. 4, c. 94, s. 3, hold the proceeds against the real owner, but are liable to him in trover; but in estimating the damages they are entitled to credit for the balance, if any, due from the owner to the factor. *Taylor* v. *Trueman*, 1 M. & M. 453.

Money need not Pass.]—It is not necessary, in order that a purchase may be protected under 6 Geo. 4, c. 94, s. 4, that money should actually pass; the section applies equally where the goods are transferred in consideration of an antecedent debt. *Thackrah* v. *Fergusson*, 25 W. R. 307.

In case of Pledge.]—If A. holding B.'s goods with a lien on them against B., transfer them to C., C. cannot hold them against B. to the extent of A.'s lien under 6 Geo. 4, c. 94, s. 5, unless the transfer be expressly made as a pledge. *Thompson* v. *Farmer*, 1 M. & M. 48.

Principal Indebted to Factor.]—Whether a factor has a right to pledge the goods of his principal, under 6 Geo. 4, c. 94, s. 5, depends upon the question whether, upon the balance of all accounts between them, the principal is indebted to the factor. Accordingly, a factor, by the desire of his principal, kept separate accounts of sales in one set of which the principal was solely, and in the other but partly interested. The factor made a pledge of goods consigned to him on the latter set, for the purpose of meeting a draft drawn by his principal against that account. At the time of the pledge the factor, if the general account were taken, was indebted to his principal in a larger sum than it was necessary to raise by the pledge. If the accounts were taken separately, the principal was indebted to the factor upon the account on which the draft was drawn, and to which account the goods pledged belonged:—Held, that the factor, in these circumstances, had no right to pledge; and that the person to whom they were pledged could not retain them against the principal. *Robertson* v. *Kensington*, 8 L. J. (o.s.) K. B. 183.

Where the principal in such a case omitted for some time to make any demand, or any communication to the person who received the pledge :—Held, that such omission could not be considered as an affirmance of the act of the factor, unless it appeared that the delay had caused an alteration in the situation of the parties. *Ib.*

And see *Taylor* v. *Trueman*, supra.

Notice of Agent's Mala fides.]—Under 5 & 6 Vict. c. 39, a contract with an agent for the pledge of goods will be valid as against the principal, though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts bonâ fide and without notice that the agent is acting malâ fide and beyond his authority. *Navulshaw* v. *Brownrigg*, 2 De G. M. & G. 441 ; 21 L. J., Ch. 908 ; 16 Jur. 979.

To deprive the pledgee of the protection of the statute, he must be fixed with knowledge that the agent is so acting as above stated, and no mere suspicion will amount to notice ; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them. *Ib.*

Where an agent intrusted with a document of title to goods pledges it malâ fide, or without authority, it is necessary, in order to deprive the transaction of the protection given by 5 & 6 Vict. c. 39, s. 1, and to bring it within the proviso of s. 3, that the jury should find categorically that the lender had notice of the agent's mala fides or want of authority. *Gobind Chunder Sein* v. *Ryan*, 9 Moore, Ind. App. 140 ; 15 Moore, P. C. 230 ; 8 Jur. (N.S.) 343 ; 5 L. T. 559 ; 10 W. R. 155. S. P., *Douglas* v. *Ewing*, 6 Ir. C. L. R. 395.

To prove such notice it is sufficient to shew that the circumstances attending the transaction were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly infer that the agent had not authority to make the pledge, or that he was acting malâ fide in respect thereof against his principals. *Ib.*

Bankers having, at the request of I. L., made advances to S. L., and having a lien on certain goods in their possession in respect thereof, it was agreed between the bankers and I. L. that, in consideration of the delivery of those goods to I. L., the latter should deliver to the bankers certain other goods intrusted to I. L. by the plaintiff, his principal, to be held as a lien by the bankers in place of the other goods, and also in respect of any future advances to be made to S. L., and which I. L. requested the bankers to make, and which agreement was carried out, and further advances made to S. L., in pursuance of such request :—Held, that, the bankers having no notice of the plaintiff's title, the transaction was protected by 5 & 6 Vict. c. 39. *Sheppard* v. *Union Bank of London*, 7 H. & N. 661 ; 31 L. J., Ex. 154 ; 8 Jur. (N.S.) 264 ; 5 L. T. 757 ; 10 W. R. 299.

—— **Pleadings.**]—To a plea setting up these facts to detinue by the owner of the goods against the bankers, he replied, first, that he was induced to intrust I. L. with the possession of the goods by the fraud of I. L. ; secondly, that the agreement by I. L. to deliver the goods by way of pledge was not made, nor were the goods delivered to the bankers in the ordinary course of business ; and thirdly, that the goods first deposited with the bankers were not I. L.'s goods, nor had the bankers any lien thereon from I. L. :—Held, that the facts disclosed by the plea constituted an answer to the action under 5 & 6 Vict. c. 39, and that neither replication avoided the plea. *Ib.*

Power of Agent to Mortgage.]—The Factors Acts do not empower an agent acting under a power of attorney in a non-mercantile transaction to mortgage the property of the principal. *Lewis* v. *Ramsdale*, 55 L. T. 179 ; 35 W. R. 8.

b. Documents within the Acts.

Bill of Lading.]—Under 6 Geo. 4, c. 94, s. 2, an intrusting with the bill of lading for the purpose of the sale of goods was not an intrusting with a dock warrant, which represented those goods, notwithstanding that the possession of the bill of lading enabled the holder of it to obtain possession of the dock warrant. *Hatfield* v. *Phillips*, 12 Cl. & F. 343 ; 14 M. & W. 665. Affirming 9 M. & W. 647 ; 11 L. J., Ex. 425.

Delivery Orders.]—Nor were delivery orders within 6 Geo. 4, c. 94, s. 2. *Jenkins* v. *Usborne*, 7 Man. & G. 678 ; 8 Scott (N.R.) 505 ; 13 L. J., C. P. 196 ; 8 Jur. 1139.

East India Warrants.]—Nor East India warrants. *Taylor* v. *Trueman*, M. & M. 453 ; *Taylor* v. *Kymer*, 3 B. & Ad. 320 ; 1 L. J., K. B. 114.

Stock Certificates.]—The Neapolitan government raised money upon certain certificats de rentes, or bonds. With each certificat or bond was delivered a document called a "bordereau," annexed to which was a series of coupons, or receipts, for successive half-yearly payments of the rentes, or dividends. When the coupons attached to the bordereau were all made use of, the holder of the certificat and remaining bordereaux was entitled to receive from the Neapolitan government a new bordereau, with a new set of coupons ; both these instruments referred to the certificat, and they were never sold in the London market without being accompanied by the certificat. The plaintiff being possessed of certain of these certificats and bordereaux, deposited the latter with his broker, for the purpose of his procuring from the Neapolitan government new bordereaux, retaining the certificats in his own hands. The broker, having procured new bordereaux with coupons, fraudulently pledged them with the defendant. In detinue by the original owner, it was left to the jury to say—first, whether the bordereaux and coupons (unaccompanied by the certificats) were negotiable securities, passing by delivery, in the same manner as bank notes, exchequer bills, and the like instruments ; secondly, whether the defendant had exercised due caution in receiving them from the broker without inquiring for the certificats to which they referred :—Held, that the direction was right ; and the jury having found a verdict for the plaintiff, the court refused to disturb it. *Lang* v. *Smith*, 5 M. & P. 78 ; 7 Bing. 284 ; 9 L. J. (O.S.) C. P. 91.

Certificates of railway stock are not goods within the meaning of 5 & 6 Vict. c. 39. *Freeman* v. *Appleyard*, 1 N. R. 30 ; 32 L. J., Ex. 175 ; 7 L. T. 282.

Receipts.]—Where, in order to save trouble, delivery orders were not signed, but an arrange-

ment was made that delivery should be made to persons producing cash receipts from the cashiers of the holders of the bill of lading, such receipts cannot be considered as a document of title within s. 5 of the Factors Act, 1877 (40 & 41 Vict. c. 39). *Kemp* v. *Falk*, 52 L. J., Ch. 167; 7 App. Cas. 585; 47 L. T. 457; 31 W. R. 128; 5 Asp. M. C. 1—H. L. (E.)

Warrants.]—Where a factor, the consignee of goods for sale, and indorsee of the bills of lading, had landed and warehoused the goods, and taken the wharfinger's certificates and dock warrants in his own name, and then pledged the certificates and dock warrants for an advance of money on his own account:—Held, that such pledge was not protected by 6 Geo. 4, c. 94, s. 2, in an action of trover by the real owner of the goods. *Close* v. *Holmes*, 2 M. & Rob. 22.

A. purchased and paid for East India silks, the warrants for which he sent to B., his broker, with bills to nearly their value drawn upon B., which he accepted. B. did not pay his acceptances when due, but received from A. the acceptances of A. to nearly the same amount, for the purpose of taking up his own acceptances, but which he applied to his own use, and afterwards pledged the warrants with C. In trover for the warrants by A. against C.:—Held, that by 6 Geo. 4, c. 94, s. 8, B., not having paid his own acceptances, had no lien upon the warrants which he could transfer to C.; and that therefore C. had no right to detain them as against A. *Fletcher* v. *Heath*, 1 M. & Rob. 335; 7 B. & C. 517; 6 L. J. (O.S.) K. B. 95.

Security of Furniture.]—The 5 & 6 Vict. c. 39 applies to mercantile transactions, and not to the cases of advances made upon the security of furniture used in a furnished house—not in the way of trade—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner. *Wood* v. *Rowcliffe*, 6 Hare, 191; 11 Jur. 707, 915.

c. Agents Intrusted with Possession.

Warehouse-keepers.]—A warehouse-keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them within the Factors Act (5 & 6 Vict. c. 39), although he is also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal. *Cole* v. *North-Western Bank*, 44 L. J., C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733—Ex. Ch. Affirming 22 W. R. 861.

One Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorised to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker. Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:—Held, that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession" within the Factors Act (5 & 6 Vict. c. 39). *Ib.*

Wharfingers.]—A wharfinger, who was also a flour factor, having flour sent to him to keep till further orders, was not an agent intrusted with the flour within 6 Geo. 4, c. 94, s. 4, so as to give validity to a sale by him of the flour. *Monk* v. *Whittenbury*, 2 B. & Ad. 484; 1 M. & Rob. 81.

Merchants' Clerk.]—A clerk to a wine merchant, who is authorised by his employer to sign delivery orders per procuration, and who by doing so obtains the possession of dock warrants relating to goods belonging to his master, and afterwards obtains an advance of money upon the security of such dock warrants, is not an agent intrusted with the possession of documents within the meaning of the statute, so as to give validity to the contract, and his employer may recover possession of such warrants from the person with whom they are pledged, though the advance was made bonâ fide. *Lamb* v. *Attenborough*, 1 B. & S. 831; 31 L. J., Q. B. 41; 8 Jur. (N.S.) 280; 10 W. R. 20.

Insurance Agents.]—Merchants in London upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—Held, by Lord Blackburn, that the case fell within the Factors Act (6 Geo. 4, c. 94), s. 1. Sed quære by Lord Fitzgerald. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33; 8 App. Cas. 874; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. C. 182—H. L. (E.)

Pictures were deposited by the owner with J. (whose ordinary business was that of an agent for procuring business for two insurance offices in Liverpool), with instructions then or subsequently given to sell them for him for a certain commission:—Held, that J. was an agent intrusted with the possession of goods, and consequently that the owner was bound by a contract of pledge bonâ fide made with him. *Heyman* v. *Flewker*, 13 C. B. (N.S.) 519; 1 N. R. 479; 32 L. J., C. P. 132; 9 Jur. (N.S.) 895.

Forwarding Agent.]—The plaintiffs, being silk manufacturers in Germany, appointed, in addition to other agents in London, Fahrnbach to act as their agent in London. The course of business was as follows:—It was Fahrnbach's duty to call upon certain named customers of the plaintiffs and get orders for silks. These orders he then transmitted to the plaintiffs, giving a list of the buyers, and of the quantities ordered

by each buyer. The goods ordered were then sent over together from Germany to Fahrnbach, whose duty it was then to forward to each buyer the amount purchased by him. It did not appear that Fahrnbach, in the usual course of business, was allowed to represent himself to buyers as principal in the transactions. Fahrnbach, in the course of the business, from time to time collected the money due from the customers, and accepted bills drawn upon him by the plaintiffs for the amount of the invoices of goods sent to him from Germany. Fahrnbach pledged some of the goods so sent over to him with the defendant for advances. The pledging was in fraud of his instructions, but the defendant, in making the advances, acted bonâ fide, and without knowledge of the fraud. In an action to recover the goods so pledged, or their value :—Held, that Fahrnbach was not an agent intrusted with the possession of the goods within the meaning of the Factors Acts (4 Geo. 4, c. 83 ; 6 Geo. 4, c. 94 ; and 5 & 6 Vict. c. 39) ; that he was, in the first portion of his duty, merely an agent to make contracts, and in the second portion merely a forwarding agent. *Hellings* v. *Russell*, 33 L. T. 380.

Picture Dealer.]—In 1887 T. intrusted A. T. with an oil painting for sale. In the same year A. T., who was a dealer in drawings and etchings, and occasionally sold pictures on commission, deposited the painting with B., in substitution for certain drawings and etchings, as security for a loan. B. died. A. T. became insolvent. T. brought an action against B.'s executors for the recovery of the picture. The painting was sold, and the proceeds were paid into court. B.'s executors counter-claimed a charge on the fund in court for the amount payable in respect of the loan :—Held, that A. T. was an agent "intrusted with the possession of goods" within the meaning of 5 & 6 Vict. c. 39 ; that the pledge was valid ; and that the executors were entitled to the charge claimed on the fund in court. *Tremoille* v. *Christie*, 69 L. T. 338.

Condition against Selling without Further Authority—Sale in Ordinary Course of Business.]—Plaintiff was the owner of an opal matrix tabletop, which he intrusted to an agent who was a dealer in jewels and gems, and, as a known part of his business, sold jewels and gems for other people in his own name, and having them in his own possession. The tabletop was intrusted on the terms that it should not be sold to any person or at any price without plaintiff's authority, and that the cheque received in payment should be handed to plaintiff intact, plaintiff agreeing to pay certain commission. The agent sold the tabletop to defendant for 200*l.*, which was satisfied by defendant giving to a judgment creditor of the agent a diamond worth 120*l.*, and paying him 50*l.* in satisfaction of a judgment for 170*l.*, and paying 30*l.* to the agent. In an action to recover possession of the tabletop :—Held, that, as by the conditions on which the tabletop was intrusted to the agent he could not sell it without obtaining further authority, he was acting outside his authority in selling at all, and therefore defendant acquired no title by the sale, and plaintiff was not estopped from disputing his title, but was entitled to recover in spite of the sale :—Held, also, that as the tabletop never was intrusted for sale, and as, having regard to the manner in which payment was made, the sale was not in the ordinary course of business, defendant was not protected by the Factors Act, which was in force at the date of the transaction (6 Geo. 4, c. 94, s. 4). *Biggs* v. *Evans*, [1894] 1 Q. B. 88 ; 69 L. T. 723 ; 58 J. P. 84.

Person intrusted to sell only—Goods pledged with Pawnbroker.]—Where a person intrusted with goods for the purpose of sale only pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent" within the meaning of s. 2 of the Factors Act, 1889, and the pawnbroker is not protected by that section from an action by the owner to recover the value of the goods. *Hastings* v. *Pearson*, 62 L. J., Q. B. 75 ; [1893] 1 Q. B. 62 ; 5 R. 26 ; 67 L. T. 553 ; 41 W. R. 127 ; 57 J. P. 70.

Goods to be returned to Sender—Pledge not Protected.]—Where there is a power by law to sell, a purchaser may obtain from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge. Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1½*d.* per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight, and send back the hides. Barrow sent out a large number of the hides ; they were tanned, and freight was procured for them, but in the meantime Bonnell had obtained from the Toronto Bank advances, on his own account, on bills, and hypothecated the hides to the bankers as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honoured. They were not duly honoured, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied :—Held, that, under the circumstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow entitled to pledge Barrow's goods, and that consequently the bankers could not set up any title to the goods, as derived from him, against the real owners. *City Bank* v. *Barrow*, 5 App. Cas. 664 ; 43 L. T. 393—H. L. (E.)

Not intrusted by Owner with Document.]—H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the docks. The warrants for them had been issued to him. The plaintiff bought the tobacco from H., and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco, fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh warrants from the dock company :—Held, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title within 6 Geo. 4, c. 94, s. 2 ; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover their value from the defendants. *Johnson* v. *Crédit Lyonnais Co.* and *Johnson* v. *Blumental*, 47 L. J., C. P. 241 ; 3 C. P. D. 32 ; 37 L. T. 657 ; 26 W. R. 195—C. A.

A foreign owner of goods consigned them to a factor in London, to whom he indorsed the bill of lading in blank, and transmitted it, with instructions to receive and sell the goods. The factor received the goods, paid the freight and charges thereon, and entered them in his own name at the custom-house, by reason of which, and without the privity or express assent of the owner, he obtained a dock warrant, which he pledged for advances beyond the amount for which, as a factor, he had a lien on the goods:—Held, that, under these circumstances, he was not intrusted with the dock warrant within 6 Geo. 4, c. 94, s. 2. *Hatfield* v. *Phillips*, 12 Cl. & F. 343; 14 M. & W. 665. Affirming 9 M. & W. 647; 11 L. J., Ex. 425.

In order to make the factor a party intrusted with the dock warrant within the meaning of this act, it must appear that the owner of the goods intended that the factor should be possessed of it at the time of the pledge, or that he should exercise the power which the possession of the bill of lading gave him of obtaining the dock warrants, whenever he in his discretion might think fit. *Phillips* v. *Huth*, 6 M. & W. 572; 10 L. J., Ex. 65.

The plaintiffs, cloth manufacturers, were applied to by E., who was a factor and a commission agent, for a sample of their cloths, on the representation that he could get them a purchaser. The sample having been sent, E. afterwards told the plaintiffs that he had got them an order for a certain number of ends at a stated price. The plaintiffs required to know the firm, and S. being mentioned as the firm, they sent the goods to the warehouse of E., who was to pass them on to S. after seeing the process of perching performed upon them, for which he was to receive a commission from the plaintiffs of 1*s.* per end. E. had no authority from S., and he sold the goods to the defendants, who were cloth merchants, and bought them bonâ fide:—Held, per Wightman and Crompton, JJ., that E. was an agent intrusted with the cloths within 6 Geo. 4, c. 94, s. 4, and 5 & 6 Vict. c. 39, s. 4, and consequently the purchase of them from E. by the defendants was protected; per Blackburn, J., that, E. being in possession of the goods, he was, according to 5 & 6 Vict. c. 39, s. 4, to be taken to be intrusted with them by the owner, unless the contrary was shewn, and that was a question for the jury. *Baines* v. *Swainson*, 4 B. & S. 270; 32 L. J., Q. B. 281; 8 L. T. 536; 11 W. R. 945.

M., a merchant and factor of London, employed by V., a merchant in Holland, to negotiate sales as a commission agent, obtained and transmitted to V. an offer from L. and F. to purchase a quantity of oil. V. accepted the offer, and subsequently shipped a quantity of oil in pursuance of the contract, and sent the bill of lading, specially indorsed to L. and F., to M., in order that it might be exchanged for L. and F.'s acceptance of V.'s draft. Before this, M., without any authority from V., agreed to cancel the contract with L. and F., and when the bill of lading arrived, M. procured L. and F. to indorse it in blank and deliver it to him by falsely representing that the special indorsement had been made by mistake. M. then caused the oil to be warehoused in his own name, and immediately pledged it to the plaintiff as security for an advance of 350*l.*:—Held, that the pledge was not protected by the Factors Acts (6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39). *Vaughan* v. *Moffat*, 38 L. J., Ch. 144.

d. Person in Possession under Contract of Sale.

Vendee in Possession of Document of Title—Statute of Frauds, s. 17.]—The Factors Act, 1877, s. 4, provides that, where any goods have been sold or contracted to be sold, and the vendee obtains possession of the documents of title thereto from the vendor, any sale, pledge, or disposition of such goods or documents by such vendee so in possession shall be as valid and effectual as if such vendee were an agent or person intrusted by the vendor with the documents within the meaning of the principal acts as amended by the act itself, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods. It is not necessary, in order that the above-mentioned section should be applicable, that there should be a memorandum of the contract for sale of the goods so as to satisfy the Statute of Frauds; it is sufficient that there should be a de facto contract for sale, the vendee under which has obtained from the vendor possession of the documents of title to the goods; and a sale by such a vendee will give to a bonâ fide purchaser without notice a good title to the goods, free from any lien or other right of the original vendor in respect thereof. *Hugill* v. *Masker*, 58 L. J., Q. B. 171; 22 Q. B. D. 364; 60 L. T. 774; 37 W. R. 390—C. A.

Agreement for Hire and Purchase.]—An agreement for the hire of furniture, providing that the hirer shall pay certain sums at certain dates by way of rent, and that, after all such payments have been made, the furniture shall be the absolute property of the hirer, but that no property in the furniture other than as tenant shall vest in the hirer until the whole of such payments have been made, is an agreement to buy goods within the meaning of s. 9 of the Factors Act, 1889. Therefore, where the hirer under such an agreement sells and delivers the furniture to a person who takes the same in good faith and without notice of the right of the owner, such sale and delivery is valid. *Lee* v. *Butler*, 62 L. J., Q. B. 591; [1893] 2 Q. B. 318; 4 R. 563; 69 L. T. 370; 42 W. R. 88—C. A.

Where a party to a contract has agreed to hire goods on condition that he may terminate the contract at any time by returning them to the owner, but that upon payment of certain instalments they shall become his property, the hirer is not a person who has "agreed to buy goods" within s. 9 of the Factors Act, 1889, and consequently a pledge by the hirer to a third party without notice of the rights attaching to the goods is invalid as against the owner. *Lee* v. *Butler* (62 L. J., Q. B. 591; [1893] 2 Q. B. 318) distinguished. *Helby* v. *Matthews*, 64 L. J., Q. B. 465; [1895] A. C. 471; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20—H. L. (E.)

W. had obtained possession of goods from the plaintiffs under an agreement by which W. agreed to hire the goods, value 23*l.*, "and to pay the sum of 12*s.* 6*d.* per month for the hire thereof, commencing with the date of this agreement, and payable in advance on the seventh day of each succeeding month until the full sum of 23*l.* be paid, at which time, and on the completion of such payments, the said company agree to give up all claim to the said goods." There was a stipulation that, upon default in payment, W.

would give up possession of, and that the plaintiffs might seize, the goods; and there was also a declaration that the goods should remain the property of the plaintiffs until the sum of 23*l.* was paid, and that they were only lent on hire:—Held, that W. was in possession of the goods under an agreement to buy within the meaning of s. 9 of the Factors Act, 1889, and that a transfer by way of pledge by him to the defendant, who received the goods in good faith and without notice of the claims of the plaintiffs, was valid. *Thompson* v. *Veale*, 74 L. T. 130—C. A.

An agreement by a hirer to pay a stated sum per month till the full price of the subject-matter be paid, when it was to become his own property, is, in the absence of a provision that he might terminate the hiring by delivering up to the owner, an agreement to buy within s. 9 of the Factors Act, 1889, notwithstanding provisions that the owner might put an end to the arrangement for sale on various contingencies. *Helby* v. *Matthews* (64 L. J., Q. B. 465) distinguished. *Lee* v. *Butler* (62 L. J., Q. B. 591) followed. *Hull Ropes Co.* v. *Adams*, 65 L. J., Q. B. 114; 73 L. T. 446; 44 W. R. 108.

—— **Conviction of Hirer—Title of Purchaser.**]—Where a hirer in possession of goods under a hire-and-purchase agreement sells them to a bonâ fide purchaser without notice before all instalments agreed upon are paid, and is prosecuted to conviction for larceny as a bailee, the owner can maintain an action for conversion against the purchaser. *Payne* v. *Wilson*, 65 L. J., Q. B. 150; [1895] 2 Q. B. 537; 15 R. 239, n.; 73 L. T. 12; 43 W. R. 657—C. A.

—— **Disposition by Hirer.**]—Sect. 9 of the Factors Act, 1889, protects an auctioneer who, in good faith and without notice of any lien or other right of the original seller, receives and sells goods delivered to him for that purpose by a person who had obtained possession of the goods under a hire-and-purchase agreement which provided for payment by instalments, but some of the instalments had not been paid. *Shenstone* v. *Hilton*, 63 L. J., Q. B. 584; [1894] 2 Q. B. 452; 10 R. 390; 71 L. T. 339.

Where a debtor makes an assignment for the benefit of his creditors, having in his possession at the time a chattel under a hire-purchase agreement, e.g. a gas engine which has not yet become his property, and there is no specific delivery thereof, the trustee of the deed though he has no notice of the nature of the transaction acquires no title under s. 9 of the Factors Act, as against the true owner. It is not a "delivery or transfer" under a "sale, pledge or other disposition." Semble, ss. 9 and 2 of the Factors Act, 1889, do not apply to an assignment in favour of creditors at all. *Kitto* v. *Bilbie, Hobson & Co.*, 15 R. 188; 72 L. T. 266; 2 Manson, 122.

The addition by the owner of a mortgaged ship of some equipment to the ship is a "transfer under a disposition" to the mortgagee within s. 9 of the Factors Act, 1889. There is also a like transfer within that section where the mortgagee takes possession under the power in his mortgage. *Hull Rope Works* v. *Adams*, supra.

e. At Common Law before the Statutes.

Factor—Right to Pledge.]—The mere circumstance of a principal's drawing bills on his factor, to whom goods were consigned, to be provided for out of the proceeds of such goods, did not authorise the factor to pledge them for the purpose of raising money to meet the bills. *Gill* v. *Kymer*, 5 Moore, 503. S. P., *Fielding* v. *Kymer*, 2 Br. & B. 639.

Neither could a factor pledge the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves, though the indorsee knew not that he was a factor. *Newson* v. *Thornton*, 6 East, 17; 2 Smith, 207; 8 R. R. 378. S. P., *Guichard* v. *Morgan*, 4 Moore, 36.

A factor could not pledge, unless the owner of the goods armed him with such indicia of property as to enable him to deal with them as his own. *Boyson* v. *Coles*, 6 M. & S. 14; 18 R. R. 284.

Where goods were delivered to a person on a contract of sale and return:—Held, that he had no authority to pledge them. *Delauney* v. *Barker*, 2 Stark. 539.

Under a general power to sell, assign and transfer, an agent cannot pledge for his own debt. *De Bouchout* v. *Goldsmid*, 5 Ves. 211.

Where a principal gave his broker a clear and unequivocal power to dispose of the goods at his discretion:—Held, that he had no power to pledge in the absence of an express authority. *Graham* v. *Dyster*, 6 M. & S. 1; 2 Stark. 21.

Acceptances of a factor for his principal which are provided for by the principal before they became due, do not constitute such a demand against the principal, as to enable the factor, previous to 6 Geo. 4, c. 94, s. 2, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself. *Blandy* v. *Allan*, 3 Car. & P. 447.

Lien.]—Where goods were consigned to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor or his assigns, who afterwards indorsed and delivered the bill of lading, together with the goods, to the defendant as broker, with instructions to do the needful, and they made advances to him on the credit of those and other goods, without knowing that he was not the owner of them:—Held, that the defendant could not retain the goods against the consignor until payment of the debt due to them from the factor on account of these advances. *Martini* v. *Coles*, 1 M. & S. 140.

A foreign merchant remitted bills to his factor in London for the purpose of being sold, with a view to enable the factor to meet bills which the foreign merchant had drawn or was about to draw upon him. The bills remitted were indorsed by the foreign merchant to the factor, and by the latter in his own name to the purchaser. Before the purchase-money of the bills was paid the factor became bankrupt:—Held, that the proceeds of the bills belonged to the foreign merchant, and were not subject to a lien claimed by the purchaser in respect of a debt owing to him by the factor. *Pauli, Ex parte, Trye, In re*, 3 Deac. 169; 2 Jur. 208.

Right of Owner to Recover.]—Where a factor pledged the goods of his principal, the latter might recover the value of them in trover against the pawnee, on tendering to the factor what was due to him, without any tender to the pawnee. *Daubigny* v. *Duval*, 5 Term Rep. 604.

So a pawnee for a valuable consideration, who claimed under the tortious act of the broker, had no right to retain the goods against the principal in trover for the amount of the lien which the

broker had on the goods, for a balance due from the principal at the time of such pledge, the lien being personal and not transferable by such tortious act of the broker. *M'Combie* v. *Davies*, 7 East, 5 ; 3 Smith, 3 ; 8 R. R. 534.

A., who was a foreign merchant, consigned goods to B., his correspondent in L. ; B. pledged them with C., a factor, as his own property, and obtained the value of the goods in advance. B. afterwards became bankrupt :—Held, that A. might, in an action of trover, recover the goods from C. *Duclos* v. *Ryland*, 5 Moore, 518, n.

A. and B. having by their brokers purchased cottons, warrants for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of A. Immediately after the purchases B. paid A. the value. When considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased, and upon directions of A. and B., divided the goods held on their joint account by appropriating specific warrants to each party. A., after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers ; as a security for which, the whole of the warrants were deposited with C. by the brokers. Before the bills became due, the brokers were directed by A. to get one half renewed, C. having discounted fresh bills for this purpose, the brokers who had obtained the warrants from C. for the purpose of dividing them and returning him one half, left in the hands of C., as a security, the warrants belonging to B., C. not knowing that B. had any interest in them : —Held, that B. might recover from C. in respect of the goods thus pledged to him by A. *Williams* v. *Barton*, 3 Bing. 139 ; 10 Moore, 139 ; 24 R. R. 448.

A company of foreign merchants who had been accustomed to send cottons to England from Brazil consigned to a commission merchant for sale, sent three consignments to him by three ships at different times. By a letter they requested him to send them remittances before the cottons were sold. The bags were marked with the initials of that company, and the same marks were mentioned in the bills of lading. The merchant gave the bills of lading to a company of brokers to dispose of the cotton, but did not inform them whether he was principal or only factor. The brokers, before the goods were sold, advanced money to the merchant, who afterwards became a bankrupt, and the consignors sued them for the proceeds. The court held that the brokers had the means of knowing that the merchant was only a factor ; that the authority went no further than for the merchant to have a lien for any advance he might make himself, not by a third person ; that the whole transaction was in the nature of a pledge, and that the action was well brought against the brokers by the foreign merchants. *Queiroz* v. *Trueman*, 3 B. & C. 342 ; 5 D. & R. 192 ; 3 L. J. (o.s.) K. B. 36.

A factor, with whom goods are deposited for sale, indorses the bills of lading to the defendants, who, knowing him to be a mere agent, accept a bill in his favour. He directs them to sell the goods, and to reimburse themselves the amount out of the proceeds. The defendants accordingly sell the goods in the usual course of business. Trover will not lie by the original owner, but his remedy is for money had and received for the proceeds. *Stierneld* v. *Holden*, 4 B. & C. 5 ; 6 D. & R. 17 ; 1 R. & M. 219 ; 3 L. J. (o.s.) K. B. 127.

Where the plaintiffs consigned goods to their factor and at the same time drew bills upon him for the amount, which they themselves ultimately paid, and the factor sent them to the defendant, with whom he had general dealings, without intimating that they were the property of a third person, and drew a bill upon him for the amount, which the defendant accepted and paid ; after which the factor became insolvent, having previously told defendant that he had received a notice of countermand of the sale from the plaintiffs, but the defendant afterwards sold the goods :—Held, that the defendant was liable for the value of the goods, in an action for money had and received, and that he would have been equally liable had he not known that the goods were the property of the plaintiffs. *Jackson* v. *Clarke*, 1 Y. & J. 216.

A foreign monarch raised five million pounds sterling by his agents in London, as a loan, for the repayment of which he signed a general bond, containing stipulations for the payment of the interest, and the gradual reduction of the principal. Special bonds, reciting the general bond, and made payable to bearer, were given to the contractors to be disposed of. The plaintiff being owner of five such bonds, put them into the hands of a factor to receive the interest for him. He pledged them to the defendants :— Held, that such bonds could not be recovered back from the defendants, who were ignorant that they were not the property of the factor. *Gorgier* v. *Mieville*, 3 B. & C. 45 ; 4 D. & R. 641 ; 2 L. J. (o.s.) K. B. 206 ; 27 R. R. 290.

Pledge for Benefit of Principal.] — A., the owner of certain chattels, pledged them to B., who was a broker, to secure advances made on his behalf by B. ; and B. afterwards, in his own name, and unknown to A., re-pledged the same chattels to C. to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances, threatened to realise his security by a sale, which, however, he was from time to time induced to postpone by the solicitations of B. and his assurances of speedy payment ; and this was communicated by B. to A., his principal. In a suit by A. against B. and C., praying to redeem the property in pledge on payment of any balance found due on the account between himself and B., it was held that A. had no equity to restrain C. from proceeding to an immediate sale. *Nicholson* v. *Hooper*, 4 Myl. & C. 179. Reversing 2 Jur. 9.

Quære, whether in the circumstances above mentioned, C. could make a good title to a purchaser. *Ib.*

F. RIGHTS AND LIABILITIES OF AGENTS AND THIRD PARTIES.

1. ACTIONS BY AGENT.

Principal Undisclosed.]—A person contracting as agent for an unknown and an unnamed principal may himself sue as principal, unless the defendant relied on his character as agent only, and would not have contracted with him as principal if he had known him so to be. *Schmalz* v. *Avery*, 20 L. J., Q. B. 228 ; 15 Jur. 291.

Brokers bought goods on account of H., and by his authority. The purchase was made in their own names, but the vendor was told that there

was an unnamed principal. They afterwards, under a general authority from H., contracted to sell the same goods, which the vendor had not yet delivered. H., on hearing of the latter contract, told the brokers that he would have nothing to do with the goods, either as buyer or seller, and in this they acquiesced. The vendor then refused to deliver the goods, and the brokers sued him for damages sustained by them in consequence:—Held, that the renunciation of the contract by H., and their acquiescence in it, formed no objection to their right to recover. *Short* v. *Spackman*, 2 B. & Ad. 962.

As Agent, but really Principal.]—Where a party made a written contract for the sale of goods, in which he described himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plaintiff was himself the real principal in the transaction, and not the agent of A.:—Held, that the plaintiff might sue in his own name for the nonacceptance of and nonpayment for the residue of the goods. *Rayner* v. *Grote*, 15 M. & W. 359; 16 L. J., Ex. 79.

By Trustees.]—The plaintiffs chartered a vessel of the defendants to carry a cargo from Liverpool to Calcutta. The charterparty contained a clause that the vessel was to be consigned to E. & Co., merchants at Calcutta, on the usual terms. One of those terms was, that E. & Co. might procure the homeward freight at 5*l.* per cent. commission. The defendants consigned the vessel to E. & Co., but contracted with another party for the homeward freight. The plaintiffs having agreed with E. & Co. for a share in the commission, brought an action against the defendants for their breach of contract, but failed to prove in what proportion the commission was to be divided:—Held, that as the clause was inserted for the benefit of E. & Co., the plaintiffs were entitled to recover as trustees on their behalf, notwithstanding they failed to shew their interest in the commission. *Robertson* v. *Wait*, 8 Ex. 299; 22 L. J., Ex. 209; 1 W. R. 132.

Principal Disclosed — Form of Contract.]—The manager of an unincorporated association who, save as such manager, is a total stranger to the consideration, cannot sue in his own name upon a contract made with him as manager for his disclosed principals, although by the contract itself the manager was empowered to sue on it. *Corner* v. *Irwin*, Ir. R. 10 C. L. 354.

In whose Name.]—When a del credere agent sells for a disclosed principal he cannot sue the purchaser on the contract of sale in his own name. *Bramble* v. *Spiller*, 21 L. T. 672; 18 W. R. 316.

A broker cannot sue in his own name upon contracts made by him as broker. *Fairlie* v. *Fenton*, 39 L. J., Ex. 107; L. R. 5 Ex. 169; 22 L. T. 373; 18 W. R. 700.

A broker signed and delivered a bought-note for cotton in the following form: "I have this day sold you on account of T., &c. (Signed) E. F., broker":—Held, that he was not a contracting party, and could not sue the defendant for breach of the contract in refusing to accept the cotton. *Ib.*

A broker signing a contract note as selling as broker for undisclosed principals cannot sue in his own name on the contract. *Sharman* v. *Brandt*, 40 L. J., Q. B. 312; L. R. 6 Q. B. 720; 19 W. R. 936—Ex. Ch.

An agent who insures for another with his authority may sue for the insurance-money in his own name. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49; L. R. 6 P. C. 224; 31 L. T. 142; 22 W. R. 929—P. C.

A factor who sells goods for a principal may bring an action in the name of the principal against the vendee, or a vendor of goods to a factor for the use of his principal may maintain an action against the principal. *Snee* v. *Prescot*, 1 Atk. 248.

Agents must sue in name of principal. *Leigh* v. *Thomas*, 2 Ves. 313.

Deposit payable to Auctioneer — Acceptance of I O U—Right to sue.]—Under conditions of sale the deposit was payable to the auctioneer immediately after the sale. The auctioneer, without the vendor's consent, took the purchaser's I O U for the amount:—Held, that an action lay at suit of the auctioneer against the purchaser for the amount of the I O U. *Hodgens* v. *Keon*, [1894] 2 Ir. R. 657. Affirmed in C. A.

Right of Association to sue as Agent for Members.]—An association of shipowners and others formed for the protection of the shipping trade, but not carrying on such trade or owning goods in its corporate capacity, together with a firm of shipowners, brought an action against a dock company for an injunction to restrain them from imposing certain regulations and charges, as being ultra vires, and for a declaration that they were invalid until confirmed as required by statute:—Held, that the association, not being themselves shipowners, had no locus standi, nor were they entitled to sue as agent for their members. *London Association of Shipowners* v. *London and India Docks Joint Committee*, 62 L. J., Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195—C. A.

Action on behalf of Foreign Principal—Staying Action until Discovery made by Real Plaintiff.]—Where an action is brought by an agent, on behalf of a principal who is resident abroad, and such agent is only a nominal plaintiff, the real plaintiff will be compelled to make discovery to the same extent as if he had been the plaintiff upon the record, and the action will be stayed until such discovery is made through the nominal plaintiff. *Willis* v. *Baddeley*, 61 L. J., Q. B. 769; [1892] 2 Q. B. 324; 67 L. T. 206; 40 W. R. 577—C. A.

Counterclaim against Principal in Action by Agent.]—In an action of trover and for goods sold and delivered, a defendant cannot set off a claim for unliquidated damages which he has against a third party on another transaction, although the third party happens to be the plaintiff's principal. *Tagart* v. *Marcus*, 36 W. R. 469.

Agent of Trustees—Right to Indemnity against Trust Fund.]—The indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund. *Worrall* v. *Harford*, 8 Ves. 4.

When Agent may be made Co-Plaintiff in Action by Principal.]—If of several plaintiffs some have an interest in the matter of the suit

and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *Spain (King)* v. *Machado*, 4 Russ. 225 ; 6 L. J. (o.s.) Ch. 61 ; 28 R. R. 56.

A. ships goods from Cadiz, in 1793, for B. in Flanders, and receives payment for them from B. : Flanders being occupied by the French, the ship enters an English port, and C., being agent for the shipowners, and acting and holding himself out also as agent for the persons interested in the cargo, possesses himself of the cargo, sells it, and retains the proceeds. Upon a bill filed by the representatives of B. against C. for an account :—Held, that A. ought not to be made a party to such a bill. *Moons* v. *Bernales*, 1 L. J. (o.s.) Ch. 53.

As C. was the agent of the shipowners, it is not necessary to make them, or the captain, parties to such bill, in respect of the freight due on B.'s share of the cargo. *Ib.*

If in a bill for discovery in aid of the defence to an action, a plaintiff who is not a party to the record at law be joined with co-plaintiffs, the defendants in the action, the bill is demurrable. Certain bills of exchange, the second parts of which were made payable to the order of the treasurer of the royal treasury of Portugal, were accepted by bankers in London, on behalf of a customer who was substantially interested in such bills as one of the subscribers to a loan raised by the government of Portugal, under the regency of Don Miguel. After the expulsion of Don Miguel and the establishment of Donna Maria as Queen of Portugal, the second parts of the bills in question were indorsed by the treasurer of the royal treasury of Portugal (the same individual who filled that office at the time when the bills were drawn), to an agent of the Queen of Portugal, and by that agent were presented for payment to the bankers. The bankers refused payment on the ground that they had reason to doubt whether the indorsee was the officer to whose order the bills were meant to be payable, and whether he had any property or interest in the bills ; and an action was thereupon brought by the indorsee against the acceptors to recover the amount. To a bill filed by the bankers, the acceptors, and by the customer on whose behalf they accepted the bills, against the indorsee and the Queen of Portugal, praying for a discovery in aid of the defence to the action, a commission to examine the witnesses abroad, and an injunction, a demurrer was allowed on the ground of misjoinder of plaintiffs, who were defendants in the action, but who had no interest except as agents in the subject matter of the suit, with a plaintiff who was no party to the action, but substantially interested in the subject matter of the suit. Whether the bill was not demurrable on the ground of the Queen of Portugal having been improperly made a defendant, quære. *Glyn* v. *Soares*, 3 Myl. & K. 450.

2. Liability of Agent.

a. On Contracts.

Election by Third Party.]—If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elects to give the credit to such agent he cannot afterwards recover the value against the known principal ; but if the principal is not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued at the election of the seller : unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing ; as particularly in the case of principals residing abroad. *Paterson* v. *Gandasequi*, 15 East, 62 ; 13 R. R. 68. *See also cases* ante, cols. 1047 et seq.

Notice of Agency.]—The circumstance of persons selling goods being described in the catalogue of sale as sworn brokers, is not sufficient notice to the purchaser that they are only agents, to prevent him from dealing with them as principals. *Thornton* v. *Meux*, M. & M. 43 ; 31 R. R. 711.

When a party gives an order for another, and at the time tells the tradesman for whose use he orders the goods, he is not personally liable, unless the tradesman refuses to deliver them to the order of the person for whom they are directed, but will only give credit to the agent who ordered them. *Owen* v. *Gooch*, 2 Esp. 567.

In answer to an action for goods sold and delivered, it is not enough for a defendant to prove that he was agent for another person, without shewing that the plaintiff knew at the time of the sale that he was so ; but it is too narrow a direction to the jury to tell them that unless the agency was disclosed at the time of the purchase, the purchaser must be taken to be the principal ; the proper way of leaving the question being, whether the plaintiff knew at the time of the contract that the purchase was made by defendant, merely as agent. *Seaber* v. *Hawkes*, 9 L. J. (o.s.) C. P. 217.

Agent not responsible if he names his principal as the person to be responsible. *Hartop, Ex parte*, 12 Ves. 352.

Broker or factor not naming principal, may be examined on action in name of principal, but simply for benefit of trade ; if principal is declared, action must be against him. *Dixon* v. *Parker*, 2 Ves. 221.

But such broker or factor must act for another at the very time ; no subsequent consent or agreement will do. *Ib.*

Where really Principal.]—Where a defendant bought goods of the plaintiffs in the name and upon the credit of Smith & Co., but whose purchases were made in reality on his own account, he was held to be liable. *Railton* v. *Hodgson*, 15 East, 67 ; 13 R. R. 373, 691, n.

Where a son had ostensibly appeared as the proprietor and conductor of the business in a trade, not an extensive one, and the father, to whom the business really belonged, was superannuated and incapable of conducting it :—Held, that the son was liable on contracts connected with the business. *Turrell* v. *Collet*, 1 Esp. 321.

When no Principal.]—Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it ; and a stranger cannot by a subsequent ratification relieve him from that liability. *Kelner* v. *Baxter*, 36 L. J., C. P. 94 ; L. R. 2 C. P. 174 ; 12 Jur. (N.S.) 1016 ; 15 L. T. 213 ; 15 W. R. 278.

If a person describes himself in a written contract as an agent for a principal not named, he is liable upon the contract, if proved to be the

real principal. *Carr* v. *Jackson*, 21 L. J., Ex. 137.

A party who executes an instrument in the name of and expressly as agent for another, cannot be treated as a party to the instrument, so as to be sued upon it, unless he is shewn to be the real principal. *Jenkins* v. *Hutchinson*, 13 Q. B. 744; 18 L. J., Q. B. 274; 13 Jur. 763.

There is no rule of law by which an agent professing to contract on behalf of a principal, either non-existent, or under a legal disability to contract, is to be deemed to be himself the contracting party. *Hollman* v. *Pullin*, 1 Cab. & E. 254.

Admissibility of Evidence to shew Non-liability.]—Where a defendant on the face of a written agreement has contracted as a principal, it is competent to him, by way of equitable plea to an action against him, to shew that, in fact, he signed as agent for a third party, and that the plaintiff verbally agreed that he should not be responsible as a principal. *Wake* v. *Harrop*, 1 H. & C. 202; 31 L. J., Ex. 451; 8 Jur. (N.S.) 845; 7 L. T. 96; 10 W. R. 626—Ex. Ch.

In an action on a charterparty executed, not by the plaintiff but by a third person, who in the contract described himself as "owner of the ship":—Held, that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. *Humble* v. *Hunter*, 12 Q. B. 350; 17 L. J., Q. B. 310; 12 Jur. 1021.

In an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods above the value of 10*l*., it is not competent for him to discharge himself on an issue on the plea of non assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time the agreement was made and signed. *Higgins* v. *Senior*, 8 M. & W. 834; 11 L. J., Ex. 199.

When Agent is Personally Liable.]—A contract for the conveyance of goods from Liverpool to Australia was entered into as follows: "It is this day mutually agreed between J. and R. W., owners of the ship 'Jessica,' of the first part, and S. J. C., of the other part," that the ship should be ready by a given day to take on board certain goods, and should proceed therewith to Geelong, and there deliver the same. The rates of freight determined upon by the parties to this agreement are as under, &c.; "one-third to be paid in London, on receipt of bills of lading, and the remainder by the Geelong and Melbourne Railway Company at Geelong"; "goods to be taken on board at Liverpool, at ship's expense"; and the agreement was signed, J. & R. W., S. J. C.":—Held, that S. J. C. was personally bound by this contract, and entitled to sue for a breach of it. *Cooke* v. *Wilson*, 1 C. B. (N.S.) 153; 26 L. J., C. P. 15; 2 Jur. (N.S.) 1094; 5 W. R. 24.

A person signing a contract in his own name, without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words expressly or by necessary implication shewing that he only signs as agent. *Paice* v. *Walker*, 39 L. J., Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789.

Walker and Strange signed a contract for the sale of wheat in the following form: "Sold A. J. Praice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig). Signed, Walker and Strange":—Held, that they were personally liable upon the contract. *Ib.*

A broker signed and sent to the plaintiffs a note of a contract in the following terms:—"Messrs. Southwell,—I have this day sold by your order and for your account to my principals five tons of anthracene, payment in cash in fourteen days after delivery, less 2½ per cent. discount and 1 per cent. brokerage. W. A. Bowditch." In an action for goods sold and delivered:—Held, that in the absence of usage making the broker personally liable, he was not personally liable upon the contract. *Southwell* v. *Bowditch*, 45 L. J., C. P. 630; 1 C. P. D. 374; 35 L. T. 196; 24 W. R. 838—C. A.

The defendant, who was an agent of the Bebside Colliery Company, with whom B., W. & Co. had previously contracted for a supply of coals, gave to B., W. & Co. an undertaking as follows: "I undertake to load the ship 'Der Versuch' with Bebside coals in ten colliery working days. On account of Bebside Colliery, W. S. Huggett." This undertaking was obtained by B., W. & Co. because the plaintiff, the captain of the ship "Der Versuch," refused (without such an undertaking being procured for him) to sign a charterparty whereby B., W. & Co., chartered the ship "Der Versuch" to carry a cargo of coals to Elsinore, and in which no provision was made for payment of damages for detention in loading. The undertaking made no mention of the person contracted with by it, but it was communicated by B., W. & Co. to the plaintiff, who then signed the charterparty. The ship being detained beyond the ten days, the plaintiff applied to the defendant for comqensation; this the defendant at first refused, but afterwards offered 20*l*., which was declined by the plaintiff. The plaintiff then sued on the undertaking to recover damages for such detention:—Held, that there was evidence that the undertaking was a contract between the plaintiff and defendant, and that, even independently of the offer of 20*l*., there was such evidence, and that the defendant had rendered himself personally liable. *Weidner* v. *Hoggett*, 1 C. P. D. 533; 35 L. T. 368.

Where a contract in writing for the sale of goods is entered into by one who describes himself as agent, and as making the contract "as agent and on behalf of" his principal, naming him, the party so making the contract is not personally liable. *Greene* v. *Kopke*, 18 C. B. 549; 25 L. J., C. P. 297; 2 Jur. (N.S.) 1049; 4 W. R. 598.

By a charterparty it was agreed between the plaintiff, owner of the ship "N.," and the defendants, of London, merchants, that the ship should proceed to T., and there load from the factors of the merchants, a full and complete cargo at the merchants' risk and expense, which the merchants bound themselves to ship; and being so loaded, should proceed to Memel, and deliver the same on being paid freight, half to be paid on unloading, in cash, and the remainder by good bill on London; thirty running days to be allowed the merchants for loading at T., and discharging at Memel. "By authority of and as agents for S., of Memel, R. & F., J. M. L." (signatures of the defendants and the plaintiff). In an action for demurrage:—Held, that the defendants were

contracting parties, and therefore were personally liable. *Lennard* v. *Robinson*, 5 El. & Bl. 125; 3 C. L. R. 1363; 24 L. J., Q. B. 275; 1 Jur. (N.S.) 853.

A memorandum of charterparty was expressed to be made "between P. of the good ship 'C.,' and W., agent for E. W. & Son," to whom the ship was to be addressed; it was signed by W. without any restriction:—Held, that he was personally liable as charterer. *Parker* v. *Winlow*, 7 El. & Bl. 942; 27 L. J., Q. B. 49; 4 Jur. (N.S.) 584.

A charterparty made in London between the shipowner and the defendants, "as agents of S. F., of Anamaboo, merchants and charterers," was signed "for D." (the plaintiff), "owner, H. G., as agent. For S. F., of Anamaboo, G. Brothers" (the defendants), "as agents." The charterparty was partly written and partly printed, the words "merchants and charterers" being printed, and in the plural throughout it. The defendants, merchants in London, acted in England as agents for S. F., a native of Africa, and residing at Anamaboo, in that country. By the charterparty, the plaintiff's ship was chartered for a voyage from London to Africa and back, and freight was made payable on delivery of the return cargo:—Held, that the defendants were not personally liable, as principals, on the charterparty. *Deslandes* v. *Gregory*, 2 El. & El. 602; 30 L. J., Q. B. 36; 6 Jur. (N.S.) 651; 2 L. T. 634; 8 W. R. 585—Ex. Ch.

A charterparty was entered into between plaintiffs, shipowners, and defendants, "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading and payment of advance. In an action for breach of the charterparty, the defendants by their statement of defence denied their personal liability:—Held, on demurrer, that the defendants were liable on the charterparty. *Hough* v. *Manzanos*, 48 L. J., Ex. 398; 4 Ex. D. 104; 27 W. R. 536.

The defendants agreed in their own names to charter a vessel to be loaded on the usual berth terms, 2 per cent. commission to be paid to them:—Held, that they were liable as principals as they had contracted in their own names without any qualification. *Hick* v. *Tweedy*, 63 L. T. 765; 6 Asp. M. C. 599.

Plaintiffs and defendants entered into a charter of the ship "R." to load a cargo of deals. In the body of the charter defendants were described as follows: "It is this day mutually agreed between Messrs. J. H. & Co., of Newcastle, for owners of the good ship 'R.'" Defendants signed the charter, "For owners, J. H. & Co." A cargo was loaded on the "R." at H., for which the captain signed a bill of lading stating that he had received it in good condition, &c. The cargo was ultimately delivered to plaintiffs at G., where it was found injured to extent of 50*l.* In an action by plaintiffs against defendants for the damage, three letters which had passed between the plaintiffs and the defendants and their solicitors, were admitted in evidence, and as soon as plaintiffs' evidence was closed, defendants' solicitor objected that there was no evidence against defendants as principals, and applied for a nonsuit, on the ground that it appeared upon the charter that defendants were only agents of the owner. The judge decided that defendants were liable as principals:—Held, that his decision was right. *Adams* v. *Hall*, 37 L. T. 70.

If a man describes himself in the beginning of an agreement to grant a lease, as making it on behalf of another, but in a subsequent part of it says that he will execute the lease, he is personally liable. *Norton* v. *Herron*, 1 Car. & P. 643; R. & M. 229; 28 R. R. 797.

Where A., an auctioneer, being employed to sell an estate, belonging to B., entered into and signed an agreement with C. for the purchase, in his own name, as agent of B., and B. shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of A.'s having signed the same on my behalf":—Held, that A. was not personally responsible. *Spittle* v. *Lavender*, 5 Moore, 270; 2 Br. & B. 452; 23 R. R. 508.

A contract was made in London, as follows: "Contract between Messrs. V. T., of Morlaix, in France, and M. M., of London. M. M. engages himself hereby with Messrs. V. T., from, &c., to, &c., for the proper and merchantable cutting of French provisions at Morlaix, on receiving a free passage out to Morlaix from London, and back again, and wages of 30*s.* sterling per week; Messrs. V. T. finding the requisite tools." This contract was signed, "for V. T., C. K., M. M.":—Held, that the contracting parties were V. T. and M. M., and that C. K., by signing on behalf of V. T., did not render himself personally liable. *Mahony* v. *Kekulé*, 14 C. B. 390; 2 C. L. R. 343; 23 L. J., C. P. 54; 18 Jur. 313; 2 W. R. 155.

A written agreement was expressed to be made "between C. for and on behalf of N. of the first part, and T. of the second part." By it C., on the part of N., agreed to let T. premises for a term of years, T. paying rent to C. for the use of N. No auction to be held on the premises without the consent in writing of C. on the part of N. T. to take a lease and execute a counterpart when called upon to do so by C. on the part of N. C. signed this in his own name. N. did not sign it. In an action by T. against C. for not completing the lease:—Held, that it sufficiently appeared to be the intention of the parties that C. should himself contract, and that therefore he was personally liable. *Tanner* v. *Christian*, 4 El. & Bl. 591; 24 L. J., Q. B. 91; 1 Jur. (N.S.) 519; 3 W. R. 204.

The defendant, an estate agent, contracted to sell land to the plaintiff who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:—Held, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4. *Long* v. *Millar*, 48 L. J., C. P. 596; 4 C. P. D. 450; 27 W. R. 720—C. A.

A. articles on behalf of B. to purchase some houses, and covenants to pay 800*l.* for the same, and the houses are afterwards destroyed by an earthquake. Though A. had no effects of B.'s in his hands, yet the court decreed him to pay the 800*l.* *Cass* v. *Rudele*, 2 Vern. 280.

An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff; this being done by the authority of the client, attorney not liable, but only client; otherwise if the

attorney had no authority from client to make the engagement. *Johnson* v. *Ogilby*, 3 P. Wms. 277.

Brokers and factors who act or agree for their principals are not liable in their own capacities. *Ib.*

Liability on Invoices or Bought and Sold Notes.]—The plaintiff bought a quantity of hemp by auction at the rooms of the defendants, who were brokers in Liverpool. The defendants delivered an invoice in their own names as sellers. On payment being made by the plaintiff, the defendants gave him an order on C. and D. for the goods, which, on presentation, was refused, and the plaintiff could not obtain the delivery of the goods:—Held, that the defendants were bound by the representation in the invoice, and could not offer evidence to shew that they sold as agents for C. and D., and that the plaintiff knew C. and D. to be the principals at the time of the sale by auction. *Jones* v. *Littledale*, 1 N. & P. 677; 6 A. & E. 486; 6 L. J., K. B. 169.

A., a broker employed by B. to sell railway shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in the book as of a sale from A. to C.; and a contract note to the same effect was sent to C. A. subsequently saw the entry in the book, and altered it, by writing the name of B. as seller, and directed another note to be sent to C., with the name of B. as seller. A fresh note was accordingly sent the same evening, or the next morning, but C. received them both together the next morning. C. did not return the first note nor did A. request to have it returned. In an action by D. against A. for breach of the agreement, in not completing the sale, the judge left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant had entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name he was liable:—Held, no misdirection. *Magee* v. *Atkinson*, 2 M. & W. 440; 6 L. J., Ex. 115.

D. entered into the following contract with R.: "22nd March, 1860. From J. D., corn broker, to Mr. R., Liverpool. I have this day sold to you two cargoes of French maize, to consist of 800 to 1,000 quarters, shipment all April, from the port of Bordeaux, at 33*s.* 3*d.* per 480 lbs., cost and freight, payment in London, less sixty days' interest and 1 per cent. brokerage. Mr. Walker, London, will send contracts." On the following day Walker forwarded contracts for the two cargoes on behalf of T., of Bordeaux, the owner of the maize, but omitting the stipulation as to brokerage. R. remonstrated, and D. said he would write to Walker; but R., in order to obtain the cargoes, was subsequently compelled to pay the 33*s.* 3*d.*, without any deduction for brokerage:—Held, that D. was responsible for the failure of Walker to send the contracts stipulated for. *Reid* v. *Dreaper*, 6 H. & N. 813; 30 L. J., Ex. 268; 4 L. T. 650.

See cases post, SALE OF GOODS, Vol. XII., cols. 395, 396.

Agent Bidding at Auction.]—B. became the purchaser of premises at an auction, declaring himself the agent of C. in C.'s presence, but the vendor's solicitor required B. to sign the agreement, and declined to substitute the name of C. Communications afterwards took place between the vendor's solicitor and C. with reference to the title. The vendors afterwards brought their bill against B. and C. for specific performance of the contract:—Held, that supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it; that the communication between the vendor's solicitor and the solicitor of C. with reference to the title, was not an adoption of C. as the purchaser in place of B., but should be assumed to be made in furtherance of the original contract, in which, according to B.'s representation, he was (as between himself and C.) only a formal party; that the acceptance of the title by C. in such communications would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right as claiming through B., and not as agent for B. *Chadwick* v. *Maden*, 9 Hare, 188.

A solicitor who attends a sale, and bids for his client, is responsible for the payment of the deposit, and will be attached if it is not paid. *Hobhouse* v. *Hamilton*, 1 Hog. 401.

Auctioneers not disclosing Principals.]—A. bought at auction three lots of one hundred railway shares each, one of the conditions of sale being that, "the balance of the purchase-money shall be paid at the office of the auctioneers on the day following the sale, except in cases where any special transfers are required, and to such the utmost expedition will be given." After the sale, A. received the three hundred shares, together with a bill of parcels describing the transaction as a sale of three hundred shares, and paid the price. The name of the owner of the shares was not disclosed at the time of the sale; but upon A. applying for a transfer the constitution of the company requiring a transfer, by deed, the auctioneers informed him that they were only agents in the transaction, and referred him to B., as their principal, and as the party who alone could procure the transfer to be executed. In an action against the auctioneers for not transferring:—Held, that, inasmuch as they had not disclosed their principal at the time of sale, they were personally liable. *Franklyn* v. *Lamond*, 4 C. B. 637; 16 L. J., C. P. 221; 11 Jur. 780.

Contracts on Behalf of Foreign Principals.]—There is no rule of law that a person contracting in England as agent for a foreign principal resident abroad, is personally liable on the contract. *Green* v. *Kopke* 18 C. B. 549; 25 L. J., C. P. 297; 2 Jur. (N.S.) 1049; 4 W. R. 598.

In all cases, whether the principal or agent is liable is a question of intention, to be ascertained from the terms of the contract and the surrounding circumstances. *Ib.*

K., being agent in London of R., a foreign resident abroad, contracted by bought and sold notes to sell to the plaintiff tar, to be shipped from a foreign port. The sold-note, which was signed by K., as agent, ran, "Sold on behalf of R., Gothenberg"; and the bought-note, signed by the plaintiff, "Bought through K. of R.":—Held, that K. was not liable on the contract. *Ib.*

Fruit brokers in Liverpool gave a fruit merchant the following sold-note: "We have this day sold to you on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges, of the brand James Morand & Co., at 12*s.* 9*d.* per case free on board, shipment from commencement

of season to not later than the 7th of December next," and signed it without any addition. The purchaser having brought an action against the brokers for nondelivery of the oranges:—Held, that the words "on account of James Morand & Co." shewed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. *Gadd* v. *Houghton*, 46 L. J., Ex. 71; 1 Ex. D. 357; 35 L. T. 222; 24 W. R. 975—C. A.

Where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding and unquestionable there, the servant who does the act cannot be made responsible in the courts of this country (of which he is a subject) for the consequence of such acts, merely by reason of a personal disability, imposed by the law of this country upon him for contracting such engagement. *Dobree* v. *Napier*, 3 Scott, 201; 2 Bing. (N.C.) 781; 5 L. J., C. P. 273.

A. having set up some mill machinery at Roanne, in France, for a French millowner there, was requested by him to engage an overlooker to manage the machinery, and, on the 7th of December, 1876, a written agreement was drawn up and signed by A. and B. at Bury, in the following terms: "I hereby agree on behalf of M. B. P., Roanne, France, to engage B. as overlooker, at the rate of 4*l.* per week, with travelling expenses there and back. The sum of 30*s.* per week to be paid to his wife every fourteen days." B. proceeded to Roanne, receiving 10*l.* from A., and entered on his duties as overlooker at the mill there, and continued there in that capacity till the middle of October, 1877, when he returned to England. During his stay in France the 30*s.* was paid to his wife every fortnight by the defendant at Bury, and upon his leaving France a sum of 12*l.* was paid to him by A.'s agent at Roanne to enable him to return to England. The remainder of his wages under the contract, except a balance of some 17*l.* was regularly paid by the French millowner. For this balance he now sued the defendant:—Held, diss. Kelly, C.B.), that the words "on behalf of" in the body of the contract made it immaterial that A. signed the document in his own name without qualification, and that he did not thereby render himself personally liable. *Ogden* v. *Hall*, 40 L. T. 751.

Express Terms in Contract as to.]—By a charterparty between shipowners and the defendants' agents in England for foreign charterers, it was agreed that the ship should proceed to J. and there load in regular turn in the customary manner, from the defendants, a full and complete cargo of coffee. It was also agreed that as the defendants were acting for foreign principals all their liability in every respect, and as to all matters and things as well before and during, as after the shipping of the cargo, should cease as soon as they had shipped the cargo. The defendants having loaded and shipped the agreed cargo, the shipowners afterwards sued them for not having shipped it in regular turn:—Held, that the action could not lie, for that the charterparty limited the defendants' liability to the actual shipment of the cargo and protected them from responsibility for any irregularity or delay in the shipment. *Milvain* v. *Perez*, 3 El. & El. 495; 30 L. J., Q. B. 90; 7 Jur. (N.S.) 336; 3 L. T. 736; 9 W. R. 269.

A memorandum for a charterparty, made between the shipowners and the defendant, "as agent for the freighter" (no principal being named), after providing for demurrage over and above the laying-days, at 7*l.* per day, stated, that "it is further agreed that this charter, being concluded by the defendant for another party, the liability of the former, in respect and as to all matters and things as well before as after the shipping of the cargo shall cease as soon as they have shipped the cargo":—Held, that he was not liable, upon this memorandum, for demurrage at the port of discharge. *Oglesby* v. *Yglesias*, El. Bl. & El. 930; 27 L. J., Q. B. 356; 6 W. R. 690.

Liability by Custom in Trade.]—M. and W., brokers, being employed by P. to purchase raisins, sent the following, addressed to F. and D.: "We have this day sold for your account to our principal, to arrive per steamer from Trieste, fifty to seventy tons of good sound Chesne raisins, usual market terms. Customary allowances. M. and W., brokers." A portion of the raisins was accepted and paid for by M. and W. on behalf of P., whose name was declared before delivery. P. having subsequently made default in accepting the residue:—Held, in an action by F. and D. against M. and W. for not accepting the residue, that evidence of a custom in the fruit market, that if the principal's name is not declared on the contract, the broker is personally liable on default of the principal, was admissible. *Fleet* v. *Murton*, 41 L. J., Q. B. 49; L. R. 7 Q. B. 126; 26 L. T. 181; 20 W. R. 97.

Held, also (dubitante Cockburn, C.J.), that evidence of an analogous usage in the colonial trade was properly admitted to prove the usage in the fruit trade. *Ib.*

An agent contracting and signing, as such, for an undisclosed principal, may be rendered personally liable on the contract, if a custom, among merchants in the course of ordinary trade constantly entering into similar contracts, can be shewn to exist, that an agent so signing shall be personally liable in the event of his not disclosing his principal's name within a reasonable time, and evidence is admissible to prove the existence of such a custom and, by inference, the implied presence of such a term in the written contract—a liability so incurred not being considered as inconsistent with the general terms of such a contract. *Hutchinson* v. *Tatham*, 42 L. J., C. P. 260; L. R. 8 C. P. 482; 29 L. T. 103; 22 W. R. 18.

In an action upon a charterparty expressed to be made between the shipowners and T. & Co., "as agents to merchant," and signed "T. & Co., as agents for merchant":—Held, that although T. & Co. were primâ facie not personally liable upon this contract, yet that parol evidence was admissible to prove a custom of trade rendering agents who enter into such an agreement for an unnamed principal themselves personally liable if the name of their principal was not disclosed within a reasonable time, and that the jury was justified in finding a delay of two months before the name of the principal was given, was unreasonable. *Ib.*

According to the usage of the London dry goods market, a broker who buys for an undisclosed principal is personally liable to the seller for the price of the goods. *Imperial Bank* v. *London and St. Katharine Docks Co.*, 46 L. J., Ch. 335; 5 Ch. D. 195; 36 L. T. 233.

D., a broker, bought of C. for undisclosed principals a quantity of gum sandrac then lying

at the St. Katharine Dock, to be paid for on Saturday, March 18th, and obtained a delivery order from C., which he gave to his principals on the faith of their representation that the goods were wanted for immediate shipment. D.'s principals, however, pledged the delivery order with a bank, and on the evening of March 17th they stopped payment. On the morning of March 18th the bank sent the delivery order to the dock office in the city with a request for a warrant, which they were told would be ready on Monday. Notice of the delivery order having been lodged was sent by the dock company in due course to their warrant office at the dock, where, through a mistake of the messenger, it did not arrive until 3 p.m., and in the meantime a clerk of D., who had, in accordance with the usage of the trade, paid the price of the goods to C. that morning, applied at the warrant office in C.'s name for a warrant for the goods, which was made out and given to him, as the goods were clear in the cargo ledger. C. indorsed the warrant to D., and, in consequence of what had happened, the dock company on the Monday refused to act on the bank's delivery order. In an action by the bank against the dock company, D. and C.:—Held, that D. was entitled to the goods, for the bank had never obtained either actual or constructive possession of the goods, and that D., having paid the price of the goods as surety for his principals, was, notwithstanding his prior application for the delivery order and indorsement thereof, entitled, by virtue of s. 5 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), to the benefit of the unpaid vendor's lien subsisting in C. *Ib.*

The defendants, who were hop-brokers, gave to the plaintiffs the following sold-note: "Sold by Ongley & Thornton (the defendants) to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales . . . hops . . . (Signed) for Ongley & Thornton, S. T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make the defendants personally liable on the above contract, and tendered evidence to shew that, by the custom of the hop trade, brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by the plaintiffs to the defendants to name their principal:—Held, that the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial. *Hutchinson* v. *Tatham* (supra) considered. *Pike* v. *Ongley*, 56 L. J., Q. B. 373; 18 Q. B. D. 708; 35 W. R. 534—C. A.

A written contract, made by brokers on behalf of undisclosed principals for the sale of hides, provided that "if any difference or dispute shall arise under this contract, it is mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing should be final and binding on both sellers and buyers." In an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers as principals by custom of the trade:—Held, that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause. *Barrow* v. *Dyster*, 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199.

By a contract in writing, the defendants "sold to" the plaintiffs a cargo of cotton seed cake of a specified quality. The contract contained a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration." The defendants signed the contract with the addition of the word "brokers," and were acting as agents. Some time after the contract was signed, the defendants named their principals. The cargo proved to be of inferior quality, and an arbitration (which the plaintiffs did not attend) to determine the liability of the defendants was held; the arbitrators decided by their award that the defendants were not liable, inasmuch as a custom existed that a broker upon naming his principals ceases to be liable on the contract. At the trial of the action, the jury found that the alleged custom did not exist:—Held, that the defendants were personally liable on the contract. *Hutcheson* v. *Eaton*, 13 Q. B. D. 861; 51 L. T. 846—C. A.

In the rice trade a custom exists that where a broker does not disclose in the contract note the name of the principal dealt with, although he may mention it orally, he is liable on the contract as a principal. *Baemeister* v. *Fenton*, 1 Cab. & E. 121.

Quære, whether a custom exists on the London Stock Exchange that a broker not disclosing the name of the principal dealt with renders himself personally liable. *Wildy* v. *Stephenson*, 1 Cab. & E. 3.

Action brought against Agent without joining Principals.]—An action was brought against the agent-general in this country for a colonial government, the plaintiffs being equitable assignees of persons who had entered into a contract with that government, claiming relief in respect of a sum of money which the plaintiffs alleged had been received by the defendant from that government as trustee for the plaintiffs, and afterwards in breach of trust repaid by him to that government. The money in question was deposited in the personal name of the agent-general, and the plaintiffs contended that on that ground he was personally responsible for it. The government was not made a party to the action:—Held, that the defendant was the mere agent of the government, and could not constitute himself a trustee against his principals; and that therefore the question could not be tried in the absence of the government, the foundation of the plaintiff's case being that there was a trust which the government could not intercept. *Wright* v. *Mills*, 63 L. T. 186.

Joint owner not necessary party to bill against factor on a demand against the other moiety, defendant having kept separate accounts, and admitted the produce of that moiety to be in his possession. *Weymouth* v. *Boyer*, 1 Ves. J. 416.

b. On Bills and Promissory Notes.

Personal Liability—Trustees and Managers.]—A bill directed as follows, "To Messrs. Jackson and Shepherd, joint managers of the Royal

Mutual Marine Insurance Association," was accepted thus: "Accepted, J. J., W. S., as joint managers of the Royal Mutual Marine Association": —Held, that they were personally liable, and that the introduction of the word "as" before the words "joint managers" made no difference with respect to such liability. *Jones* v. *Jackson*, 22 L. T. 828.

A promissory note in this form, "On demand we promise to pay Mr. James Allan 200*l.*, value received for the Second Gateshead Provident Building Society, and interest thereon, at 5 per cent. per annum, payable half-yearly," signed thus: "G. M., C. D. G., J. N., trustees; T. N., secretary": —Held, that the trustees were personally liable on the note. *Allan* v. *Miller*, 22 L. T. 825.

—— **Directors of Companies.**]—A person advanced money for purposes of a company in which he was a shareholder, and received a promissory note: "We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay to John Dutton 1,600*l.*, with interest at the rate of 6*l.* per cent. per annum until paid." It bore the seal of the company, and was signed by four directors. The lender had stated that he would lend the money to the directors only: —Held, that the directors who had signed the note were personally liable upon it. *Dutton* v. *Marsh*, 40 L. J., Q. B. 175; L. R. 6 Q. B. 361; 24 L. T. 470; 19 W. R. 754.

A resolution to wind up a banking company voluntarily was confirmed on the 22nd, and advertised in the London Gazette on the 26th of November. On the 24th of the same month one of the directors, who had been appointed one of the liquidators, accepted, as director, a bill of exchange on the bank. This bill was afterwards indorsed for value to a person who had no notice that the bank was in liquidation: —Held, that the bill was not a bill of the company, and therefore that the holder could not prove against the company for the amount. *London and Mediterranean Bank, In re, Bolognesi's Case*, 40 L. J., Ch. 26; L. R. 5 Ch. 567; 18 W. R. 876. *See also* COMPANY.

—— **General Agent.**]—A bill of exchange to pay to the drawer's order at three months after date 137*l.* 10*s.*, value received in account (fire policy No. 597), was directed to Henry Connah, Esq., general agent of L'Unione Compagna D'Assicurazione Generale (Firenze), 8, York street, Manchester, who wrote upon it: "Accepted, payable at 8, York street, Manchester, on behalf of the company. H. Connah." In an action against him on this bill: —Held, that he was personally liable as acceptor. *Herald* v. *Connah*, 34 L. T. 885.

Where agent was obliged as such to indorse bill, and fact was known to indorsees, injunction was granted to restrain proceedings thereon against him. *Kidson* v. *Dilworth*, 5 Price, 564; 19 R. R. 656.

Agent presenting for Payment.]—A. drew bills in favour of B. in India upon the E. I. Co. in London, which the latter accepted: C., as the agent of B., indorsed the bills to D. and E., under the supposed authority of a power of attorney from B., which the E. I. Co. had inspected; D. and E. indorsed the bills to their bankers and agents, F. & Co., with instructions to present them for payment when due. F. & Co. indorsed the bills, presented them for payment when due, received the money, and paid it over to their principals, D. and E. The power of attorney from B. did not authorise C. to indorse the bills, and B. having died, his administrator recovered the amount of them from the acceptors. The latter brought an action against F. & Co., upon an alleged undertaking by them that they were entitled to receive payment of the bills. The jury found that the plaintiffs paid the bills, not on the faith of the indorsement by the defendants, but on the faith of the power of attorney, and that the defendants received the money as agents, and paid it over to their principals before they knew that the first indorsement by C. was unauthorised: —Held, that the action could not be maintained against them. *East India Co.* v. *Tritton*, 5 D. & R. 214; 3 B. & C. 280; 3 L. J., (o.s.) K. B. 24; 27 R. R. 353.

Agent promising to honour Bill.]—A general demurrer for want of equity allowed to a bill alleging, that the defendant, who was the agent of A., and had in his hands moneys and effects of A., had written a letter to a creditor of A. in which he promised to honour, on presentation, certain bills of exchange, drawn by that creditor, at A.'s request, upon the defendant, and praying that the defendant might be decreed to pay the bills of exchange out of the moneys and effects of A. in his hands, or otherwise out of his own moneys. *Baillet* v. *Mitchell*, 1 L. J. (o.s.) Ch. 197.

c. For Moneys received for Use of Principal and Others.

Money Paid to Agent by Mistake.]—An action lies against an agent for money paid to him by mistake, although he has forwarded his account to his principal, and placed the sum to his credit. *Cox* v. *Prentice*, 3 M. & S. 344; 16 R. R. 288.

One Liverpool cotton broker bought cotton of another, each in his own name; in consequence of a mistake by a clerk of the selling broker, the buying broker paid over too much money. The selling broker gave credit to his undisclosed principal for the sum which he had received, the principal being largely in his debt: —Held, that the buying broker was entitled to recover back from the selling broker the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has bonâ fide paid over moneys received by him on account of his principals. *Newall* v. *Tomlinson*, L. R. 6 C. P. 405; 25 L. T. 382.

If money is paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, an action for the money had and received to the use of the person so paying it by mistake will lie against the agent. The mere passing such money in account, or making rest, without any new credit given, fresh bills accepted, or further sums advanced for the principal in consequence of it, is not equivalent to the payment of it over. *Buller* v. *Harrison*, Cowp. 565.

A receipt signed by an agent for his principals is not evidence to support an action against him to recover the money back. *Edden* v. *Read*, 3 Camp. 339.

To make it a defence to an agent that he has paid over money, it is necessary that the money should have been paid to the agent expressly for

the use of the person to whom he has so paid it over. *Snowdon* v. *Davis*, 1 Taunt. 359.

Money Retained for Special Purpose.]—A. having received money as agent for B. and others, in specific proportions for each, paid it over to C. as a banker in his own name, and having drawn out part of it, directed C. not to pay away the remainder, except by his order :—Held, that C. was bound to hold the money for A., and that therefore B. could not recover the remainder of his share from C., though he had given C. notice that A.'s agency was at an end. *Pinto* v. *Santos*, 1 Marsh. 132 ; 5 Taunt. 447.

Where persons have received money for the express purpose of taking up a bill of exchange two days after it became due, and upon tendering it to the holders and demanding the bill find that they have sent it back protested for non-acceptance to the person who indorsed it to them :—Held, that such persons, having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received when, upon the bills being reprocured and tendered to them, they refused to pay the money. *Stewart* v. *Fry*, 1 Moore, 74 ; 7 Taunt. 339. And see *Dent* v. *Dunn*, 3 Camp. 296 ; 13 R. R. 809.

Where a bill is drawn on an agent, and made payable out of a particular fund, and the agent says he will pay it when he gets money from the principal, this is binding on him ; and if he gets money at any subsequent time, he is bound to pay the bill. *Stevens* v. *Hill*, 5 Esp. 247.

The assignee of an agent cannot retain bills sent to the agent with a direction to hand them over to a third party, to whom notice is also given of the appropriation. In this case the parcel containing the bills and letters, though sent before the bankruptcy of the agent, was not received till afterwards. *Cotterill, Ex parte, Douglas, In re*, 3 Mont. & Ayr. 376 ; 3 Deac. 12 ; 7 L. J., Bk. 2 ; 1 Jur. 825.

Upon allegations, that, under the decrees of the Cortes and orders of the Spanish government, the plaintiff had a lien for the payment of a debt due to him on a certain portion of stock, which, along with other stock, had been, by the commissioners of the Spanish government, placed at the disposal of, and sold by certain agents here, a bill is filed praying an account (amongst others) against the agents : — Held, that a good and complete defence may be made to such a bill by a plea stating matter from which it appears that the stock placed at the disposal of these agents was intended for special purposes, unconnected with the satisfaction of the plaintiff's demand, and did not include the stock specifically appropriated to meet his demand ; and that it is no objection to the plea, that after the special purposes are answered there may be in the hands of the agents a surplus in which the plaintiff may have an interest. *Jabat* v. *Campbell*, 3 L. J. (o.s.) Ch. 8.

A creditor cannot file a bill for an account against the agent of the principal, against whom his claim is, unless he makes out a case of collusion between the principal and agent. *Ib.*

M. & Co. abroad, through the agency of A. & Co., procure B. to consign goods to them. M. & Co. remit to A. & Co. bills, specifically appropriating them to pay B., and also write to B. to say they have done so. Before payment A. & Co. became bankrupt :—Held, that, as the original transaction was through the agency of A. & Co., they must be considered as agents throughout the transaction, and that there was sufficient privity to entitle B. to recover the bills from them, although M. & Co. were indebted to A. & Co. at the time. *Thompson, Ex parte, Douglas, In re*, 2 Jur. 734.

Where no Action lies.]—J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the dues for the client (which he was authorised to do), and gave a receipt, signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, who brought an action against him for the money :—Held, that the action did not lie ; for that the defendant received the money as the agent of his master, and was accountable to him for it, the master, on the other hand, being answerable to the client for the sum received by his clerk : and there was no privity of contract between the present plaintiff and the defendant. *Stephens* v. *Badcock*, 3 B. & Ad. 354 ; 1 L. J., K. B. 75.

A., B., and others were owners of a ship in the service of the East India Company. B. was managing owner, and employed C. as his agent for general purposes, and to receive and pay moneys on account of the ship ; and C. kept a separate account in his books with B., as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner ; and upon a receipt signed by B. and one of the other owners, C. received on account of the ship 2,000*l.* from the East India Company, and placed it to B.'s credit in his books, as managing owner. The part owners having brought an action for money had and received to recover the balance of that account :—Held, that C. had received the money as the agent of B., and was accountable to him for it ; that there was no privity between the other part owners and C., and consequently that the action was not maintainable. *Sims* v. *Brittain*, 2 N. & M. 594 ; 4 B. & Ad. 375.

A return cargo belonging to the plaintiff was consigned by the defendant to A. and B. to "be held at the orders of the latter," who had a lien on it ; and the cargo was sold by them and their lien satisfied :—Held, that the plaintiff could not consider them as agents of the defendant, so as to entitle him to maintain an action against the defendant for the balance remaining in their hands. *Tennant* v. *Mackintosh*, 1 B. & Ald. 594.

Her Majesty by royal warrant "granted" booty of war to the secretary of state for India in council, "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should be finally determined by the secretary of state unless her Majesty should otherwise order. An action having been brought against the secretary of state for India in council by K., on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue :—Held, that the warrant

did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinloch* v. *Secretary of State for India*, 51 L. J., Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845—H. L. (E.)

Agents in London of a foreign government, having money in their hands for the payment of a dividend on a loan, on the 22nd May advertised that the coupon due on the 1st June would be paid in full; but on the 1st June, being advised by the foreign government, they advertised that the payment would be made less 5 per cent. On action brought by a bondholder against the agents:—Held, that the announcement to pay in the future a debt due in the future was not a contract, and did not bind the agents; also that, if the decree authorising the deduction of 5 per cent. was valid according to the law of the foreign government, the revocation of the advertisement of payment in full was valid. *Henderson* v. *Rothschild*, 55 L. J., Ch. 939; 33 Ch. D. 459; 55 L. T. 165; 34 W. R. 769. Affirmed 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A.

Deposit Paid to Vendor's Solicitor—Repayment where Sale goes off.]—Upon a sale of land the purchaser paid a deposit to the vendor's solicitor as agent for the vendor. The vendor being unable to make a good title, the sale went off:—Held, that, as the solicitor received the deposit solely as the vendor's agent, he was not liable to repay it to the purchaser. *Ellis* v. *Goulton*, 62 L. J., Q. B. 232; [1893] 1 Q. B. 350; 4 R. 267; 68 L. T. 144; 41 W. R. 411—C. A.

Agent retaining Assets against Administratrix—Liability for Interest.]—A firm in India collected the estate of a deceased person in that country under power of attorney from the administratrix in England, and remitted the amount to their agents, a firm in London, with an order to pay it to the administratrix upon receiving a proper discharge. The London firm declined to pay over the fund to the administratrix, on the ground that the letters of administration which she had obtained did not bear a sufficient stamp. A suit was soon afterwards instituted by other persons, claiming to be next of kin of the intestate, for the administration of the estate and to restrain the payment to the intestate. The London firm were defendants to the suit. No application was made to pay the money into court for upwards of ten years, and during the whole of this period it remained in the hands of the London firm, mixed with their own moneys:—Held, that the London firm was not liable to pay interest on such moneys. *Wolfe* v. *Findlay*, 6 Hare, 66; 16 L. J., Ch. 241; 11 Jur. 82.

d. For Conversion of Goods.

Thirteen bales of cotton were fraudulently bought by B. from the plaintiffs' brokers; the defendants, who were cotton brokers, without notice of any fraud, bought, in their own name as principals, the cotton from B., and afterwards sold it to M. at the same price at which they had bought it, charging a commission. The defendants obtained B.'s signature to a delivery order, and took delivery of it from B.'s warehouse and conveyed it to a railway station, whence it was forwarded to M., by whom it was spun into yarn. The defendants in buying the cotton intended to act as brokers, believing the cotton would suit M. Afterwards the plaintiffs demanded the cotton from the defendants. The jury found that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they dealt with it only as agents to their principal:—Held, by Martin, Channell, and Cleasby, BB., that the defendants were liable to the plaintiffs in trover for the value of the cotton, Kelly, C.B., Byles and Brett, JJ., dissentientibus. By Martin and Channell, BB., that, the defendants having bought the cotton as principals from B., it was immaterial that they intended to deal with it only as agents to their principal, and that whoever deals wrongfully with the goods of another is equally liable whether he is an agent or a principal. By Cleasby, B., that by reason of the real principals not being known, and therefore not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion. By Kelly, C.B., and Byles, J., that the defendants were not guilty of a conversion, inasmuch as they acted only as brokers, and exercised no dominion over the cotton in their own right and for their own benefit. By Brett, J., that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in chattels, is not a conversion, and that the defendants, acting only as brokers by negotiating a bargain of purchase and sale and by passing a delivery order, were not guilty of a conversion. *Hollins* v. *Fowler*, 41 L. J., Q. B. 277; L. R. 7 Q. B. 616; 27 L. T. 168; 20 W. R. 868—Ex. Ch. Affirmed 44 L. J., Q. B. 169; L. R. 7 H. L. 757; 33 L. T. 73.

The London agent, who was also a member of a firm which was commissioned to sell goods on behalf of the local government of a Spanish colony, was held to be justified in refusing to give them up to the Spanish consul-general in England till he had communicated, through his immediate principals, with the local government. *Spain (Queen)* v. *Parr*, 39 L. J., Ch. 73; 21 L. T. 555; 18 W. R. 110.

e. For Misrepresentation or Assumption of Authority.

General Rule.]—If a person enters into a contract in writing on behalf of his principal, he is not personally liable on such contract, unless he had no authority to make it, or in making it exceeded his authority. *Bowman* v. *Williams*, 7 Q. B. 103; 14 L. J., Q. B. 226; 9 Jur. 454—Ex. Ch.

A promise in the following terms: "I undertake on behalf of E. to pay," is upon the face of it a promise as agent of another, and not as principal; and, in order to affect the party making it with a personal liability, it lies upon the party to whom it is made to prove either that there was no agency or authority, or that it was exceeded. *Ib.*

Contract "as Agent" without Authority.]—If a person professes to contract as agent only, and contracts in such terms as may express the character of agent only, he cannot, on the ground of his having had no authority to contract as agent, be held liable as a contractor, in an action on the contract, whether that which he assumed to do was done in fraud or not. *Lewis* v. *Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; 16 Jur. 1041.

Verbal Contract for Sale of Land.]—Where a person assumes, without authority, to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance; and there is nothing in the Judicature Acts to alter this rule. *Warr* v. *Jones*, 24 W. R. 695.

Warranty of Authority — Liability for Breach.]—A party who makes a contract as agent thereby warrants that he has authority as agent to make the contract; and if he has no such authority, he is liable for the damages necessarily occasioned by a breach of his warranty, although he acted bonâ fide under a mistaken belief that he had authority as agent to make the contract. *Collen* v. *Wright*, 8 El. & Bl. 647; 27 L. J., Q. B. 215; 4 Jur. (N.S.) 357; 6 W. R. 123—Ex. Ch.

W., professing to act as agent for G., made an agreement with the plaintiff for the lease of a farm belonging to G., and signed it "W., agent to G., lessor." He had not, in fact, authority from G.:—Held, that there was a contract on the part of W. that he had authority, on which he was liable. *Ib.*

If a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with the knowledge of its falsity or not. *Cherry* v. *Colonial Bank of Australasia*, 6 Moore, P. C. (N.S.) 235; 38 L. J., P. C. 49; L. R. 3 P. C. 24; 21 L. T. 356; 17 W. R. 1031.

The warranty which the law implies in such cases depends on the position of the parties and on the nature and effect of the representation, but when ascertained, as a matter of fact, the legal effect is the same as if the warranty had been express. *Ib.*

The remedy by special action, where there is fraud or deceit, is a distinct matter. *Ib.*

Two directors of a public company wrote to their bankers informing them that one C. had been appointed manager of the company, and had authority to draw cheques on the account of the company. At the date of the letter the account was, to the knowledge of these directors, overdrawn, and C. further overdrew the account. The directors, as such, had no authority to overdraw:—Held, that there was evidence of an implied warranty on the part of the directors that C. had authority to bind the company, and that the directors were personally liable. *Ib.*

A person lent 70*l.* to a building society, and received a receipt signed by two directors of the society, certifying that he had deposited 70*l.* with the society for three months certain, to be repaid with interest after fourteen days' notice. The society was formed under 6 & 7 Will. 4, c. 32, and had no power to borrow money; and the lender being unable to get her money back from the society, sued the two directors:—Held, that they were liable to the lender in damages for a breach of warranty of authority, they having, by signing the receipt, in effect represented that they had authority to make a binding contract of loan on behalf of the society, and so induced her to part with her money. *Richardson* v. *Williamson*, 40 L. J., Q. B. 145; L. R. 6 Q. B. 276.

By the articles of association of the T. Company, Limited, the directors, with the sanction of the company in general meeting, were empowered to borrow money on mortgage of the company's lands, or upon debentures, bonds, promissory notes, bills of exchange, and other transferable securities, or otherwise, as they should deem requisite for carrying on the works, &c. The plaintiff having been requested by the defendants, who were three of the directors of the company, to advance money to the company, agreed to advance 500*l.* upon having an agreement signed by the defendants to pay the 500*l.* and interest at the end of six months, upon the security of the machinery and tools of the company. The following agreement was afterwards written out and signed by the defendants and the plaintiff: "Agreement between the T. Company of the one part and W. M. [plaintiff] of the other part. In consideration for the advance of 500*l.* paid by the said W. M. to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.*, with interest, in six calendar months from this date hereof. And we do hereby assign to the said W. M., as security for the said advance of 500*l.*, the machines and tools, as invoiced to him 3rd June, 1878. . . ." This document was not sealed with the seal of the company, nor countersigned by the secretary, pursuant to the articles of association, nor did the defendants express that they signed on behalf of the company. The plaintiff, upon default in repayment of the loan at the expiration of six months, took possession of the machinery and tools, upon which the company obtained an injunction in the Chancery Division restraining him from dealing with the machinery, on the ground that the directors were not authorised to make the alleged assignment:—Held, after hearing parol evidence to explain the ambiguity of the agreement, that the defendants were personally liable to repay the 500*l.* *McCollin* v. *Gilpin*, 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408; 45 J. P. 828—C. A. Reversing 49 L. J., Q. B. 558.

The defendants, two directors and the secretary of an incorporated limited company, which had no power to accept bills, at the request of their engineer, and in accordance with a resolution that the company should accept his draft on account of professional services, gave to the engineer an acceptance in the following terms:—"Accepted payable at . . . for and on behalf of the tramway company—G. K., S. F. P. directors), B. W. (secretary)." When giving the acceptance the directors told the engineer that they did so on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills; and the engineer, on pressing them for the acceptance, told them that he could raise money on it from his father-in-law. The engineer indorsed the bill to the plaintiffs for value, and without notice to them of the understanding between him and the defendants. The bill was dishonoured, and the defendants were sued by the holders:—Held, that the defendants were personally liable, as by accepting the bill and putting it within the power of the drawer to negotiate it, they represented that they had authority to accept, and such representation being false in fact would therefore support an action. *West London Commercial Bank* v. *Kitson*, 53 L. J., Q. B. 345; 13 Q. B. D. 360; 50 L. T. 656; 32 W. R. 757—C. A.

Where a person by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred. *Firbank* v. *Humphreys*, 56 L. J., Q. B. 57; 18 Q. B. D. 60; 56 L. T. 36; 35 W. R. 92.

The plaintiffs supplied a limited company with goods upon a contract made with the board of the company, of which the defendant was chairman, whereby it was provided that a special portion of the purchase-money should be paid in first mortgage debentures. The debentures were never delivered to the plaintiffs, and neither at the time of the contract nor at any time subsequently had the company sufficient debentures at their disposal to satisfy the contract, although a sufficient number could have been made available if the company had been able to redeem a mortgage to which they were subject. The plaintiffs claimed to recover the amount in question from the defendant, upon the ground that the directors had made a representation which they were severally bound to make good:—Held, that there was no legal ground upon which the defendant was liable to the plaintiffs. *Firbank* v. *Humphreys*, supra, distinguished. *Elkington* v. *Hurter*, 61 L. J., Ch. 514; [1892] 2 Ch. 452; 66 L. T. 764.

A firm of shipbrokers signed a charterparty in the form, "by telegraphic authority" of the charterer "as agent." Owing to a mistake made by the officials in its transmission, the rate of freight offered by the charterer had been misrepresented in the telegram which the shipbrokers had received from him:—Held, in an action brought by the owners of the ship against the shipbrokers for breach of warranty of authority, that evidence of persons engaged in the business was admissible to explain the effect of the form of signature, that such evidence shewed that it was commonly adopted in order to negative the implication of any further warranty by the agent than that he had received a telegram, which, if correct, authorised such a charter as that which he was signing, and that the shipbrokers were therefore not liable. *Lilly* v. *Smales*, [1892] 1 Q. B. 456; 40 W. R. 544

Servant of the Crown.]—No action lies against a public servant of the Crown contracting on behalf of the Crown upon any implied warranty of authority to make the contract. *Dunn* v. *Macdonald*, 66 L. J., Q. B. 420; [1897] 1 Q. B. 555; 76 L. T. 444; 45 W. R. 355—C. A.

—— **Damage must be Proved.**]—In an action against directors of a company for false representation that they had authority to bind the company by their acceptance of a bill of exchange drawn on the company, it is incumbent on the plaintiff to shew that he has sustained damage, and an action is not, therefore, maintainable by the indorsee, unless he shews that he gave value for it, or was otherwise damnified. *Eastwood* v. *Baine*, 3 H. & N. 738; 28 L. J., Ex. 74; 7 W. R. 90.

Measure of Damages.]—A declaration stated that the defendant falsely and fraudulently represented to the plaintiffs that he was authorised by J. to order, and did order, certain stone for the building of a church, to be charged to J. and others, and did falsely and fraudulently write to the plaintiffs a letter (set out); and that the plaintiffs, relying on the representation of the defendant, supplied the stone, whereas the defendant had no authority to order it, and J. refusing to pay for it, the plaintiffs brought an action against him for the price, and failed in it, and were obliged to pay J.'s costs, and their own costs:—Held, first, that the declaration was sufficient, even if the letter set out did not itself shew a false representation of authority; and, secondly, that the plaintiffs were entitled to recover, by way of damages, not only the price of the stone supplied, but the costs which they had paid in the action against J. *Randell* v. *Trimen*, 18 C. B. 786; 25 L. J., C. P. 307.

The defendant entered into a contract on behalf of R. for purchase of a ship then being built by the plaintiff, and required extra work to be done to it. R., having given no authority to the defendant to purchase the ship, repudiated the contract, and the plaintiff resold it at a loss. In an action against the defendant for breach of the implied warranty that he had authority to enter into the contract for R.:—Held, that the plaintiff could recover as damages the loss on the resale, as well as the cost of the extra work. *Simons* v. *Patchett*, 7 El. & Bl. 568; 26 L. J., Q. B. 195; 3 Jur. (N.S.) 742; 5 W. R. 500.

The plaintiff instituted a suit in equity for specific performance of an agreement against G. The plaintiff gave notice, on hearing that G. denied the authority of W., to W. that the plaintiff would proceed with the suit at W.'s risk, unless W. gave him notice not to proceed; and in the event of his bill being dismissed on account of absence of authority, would hold W. liable. W. answered by denying all liability, but without retracting his assertion that he had authority. The bill was dismissed on the ground of his want of authority:—Held, that he was liable for the costs of the suit, they being, under the circumstances, a natural and direct consequence of the contract that there was authority. *Collen* v. *Wright*, 8 El. & Bl. 647; 27 L. J., Q. B. 215; 4 Jur. (N.S.) 357; 6 W. R. 123—Ex. Ch.

An agent professed to let premises by parol agreement for a term of seven years on account of his principal, and put the tenant in possession, no proper lease having been executed. Afterwards the principal brought an ejectment against the tenant, which the latter defended unsuccessfully, upon consulting the agent and his attorney, and being guided by their advice. Thereupon the tenant sued the agent for pretending to have authority to let for seven years, and claimed to recover the costs of the unsuccessful defence to the ejectment:—Held, that these costs were not recoverable. *Pow* v. *Davis*, 1 B. & S. 220; 30 L. J., Q. B. 257; 7 Jur. (N.S.) 1010; 4 L. T. 399; 9 W. R. 611.

The defendant, acting as broker for both buyer and sellers, made a contract for the sale of some wool on certain terms. The sellers afterwards repudiated the contract, alleging (as was the fact) that they had not authorised the defendant to sell on those terms. The wool had been imported from California, and could therefore have been exported to America free of duty; and there was no other wool similarly circumstanced in the market. The defendant persisting that he had authority, the buyer filed a bill in chancery for specific performance against the sellers, and

obtained an interim injunction; the bill was dismissed, and the injunction dissolved, with costs, on the ground of want of authority, in the defendant. In an action by the buyer against the defendant for the breach of his promise that he had authority:—Held, that the plaintiff could maintain the action, although the defendant was his agent as well as agent of the sellers; that the chancery suit was a reasonable course to adopt; and that the plaintiff was entitled to recover, as damages, the taxed costs of the chancery suit and the plaintiff's own costs taxed as between solicitor and client; and also the difference between the contract price of the wool and the value of that or similar wool, taking into account that it could have been exported duty free to America, and all the mercantile circumstances affecting the value. *Hughes* v. *Greeme*, 33 L. J., Q. B. 335; 12 W. R. 857.

The plaintiff was the holder of a nearly-expired lease of premises for twenty-one years. The defendant, professing to act as the agent of the landlord, agreed with the plaintiff that the landlord should renew the lease. The plaintiff then assigned to B. the residue of the lease and all interest under this agreement. The landlord refused to grant the new lease because the defendant acted without authority, and B. had to leave. The plaintiff brought a suit in chancery for specific performance, in which the landlord and the defendant swore there was no authority, and the bill was dismissed. B. then brought an action against the plaintiff, and recovered damages and costs:—Held, in an action by the plaintiff against the defendant, first, that in the absence of proof that the defendant had not persisted in his representation and told the plaintiff not to bring the suit, he was entitled to recover the costs of the chancery suit; secondly, that the plaintiff was entitled to a sum arrived at by capitalising the difference between the rent he was to have paid and the actual annual value of the premises, as and for the value of the term; but, thirdly, that as in the particular case a resale was not in the contemplation of the parties, he could not recover the damages and costs in B.'s action. *Spedding* v. *Nevell*, 38 L. J., C. P. 133; L. R. 4 C. P. 212.

L. instructed his brokers to apply for fifty shares at 1*l.* each in a company which he named. They by mistake applied for and obtained an allotment to L. in another company. L. repudiated the shares, but his name was placed on the register. The company had at that time a very large number of shares unallotted, and in the opinion of the court the shares were unsaleable in the market. The company was soon afterwards wound up, and the name of L. was removed on his application from the list of contributories. The official liquidator then claimed 50*l.* from the brokers by way of damages for their misrepresentation of authority:—Held, that the general rule as to measure of damages for breach of warranty of authority was applicable; that the liquidator was entitled to recover from the brokers the amount which the company had lost by losing the contract with L.; and that as L. was solvent and the shares unsaleable in the market, that loss was represented by the whole sum of 50*l.* payable for the shares. *National Coffee Palace Co., In re, Panmure, Ex parte*, 53 L. J., Ch. 57; 24 Ch. D. 367; 50 L. T. 38; 32 W. R. 236—C. A.

The plaintiff brought an action in England against a marine insurance company carrying on business in the United States, and obtained judgment in default of appearance for 1,000*l.* Negotiations for a settlement then took place between the plaintiff and the defendants, the agents of the company in England, and the defendants by mistake represented to the plaintiff in good faith that they were authorised by the company to offer 300*l.* in settlement of the plaintiff's claim. The plaintiff, relying upon the accuracy of the representation, entered into an agreement with the defendants, on behalf of the company, for the settlement of his claim for 300*l.*, but it afterwards appeared that the defendants were not authorised to make the agreement, and he was unable to enforce the performance of it. In an action against the defendants to recover damages for breach of warranty of authority, the defendants paid into court a sum representing the expenses incurred by the plaintiff in negotiating the compromise:—Held, on the authority of *National Coffee Palace Co., In re, Panmure, Ex parte*, supra, that the measure of damages was the loss by the plaintiff of the gain which he would have derived from the contract which the defendants warranted should be made, and that inasmuch as the judgment obtained by him was of no value (for the company had no assets in England, and the judgment could not under the circumstances be enforced in the American courts), and the value of the plaintiff's remedy on the policy could not be estimated, the plaintiff was entitled to recover from the defendants 300*l.* in addition to the sum paid into court. *Meek* v. *Wendt*, 21 Q. B. D. 126; 59 L. T. 558; 6 Asp. M. C. 331.

Warranty of Title.]—Where an auctioneer sells by auction standing corn with the straw, for an unnamed principal, the price to be paid at once, and the crop to be removed immediately after it has arrived at maturity at the purchaser's expense, there is a contract by the auctioneer to give the purchaser all proper authority to enter upon the land and to cut and carry away the corn and straw, but there is no actual warranty of the validity of the title of his principal to sell. *Wood* v. *Baxter*, 49 L. T. 45.

f. Fraud and False Representation.

Generally.]—The rule that an agent who induces persons to deal with his principal by means of false representations is personally liable to make good his representations, does not extend to an incorrect statement of a matter of law. *Beattie* v. *Ebury*, 41 L. J., Ch. 804; L. R. 7 Ch. 777; 27 L. T. 398; 20 W. R. 994. *S. C.*, in H. L., infra.

In the absence of fraud, an agent acting within the scope of his authority is not personally liable for a misrepresentation made by him on behalf of his principal. *Eaglesfield* v. *Londonderry (Marquis)*, 38 L. T. 303; 26 W. R. 540—H. L. Affirming 4 Ch. D. 693—C. A.

All persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud. *Cullen* v. *Thomson*, 4 Macq. H. L. 441; 9 Jur. (N.S.) 85; 6 L. T. 870.

An agent, charged with personal fraud, cannot,

by disclaiming interest, avoid answering fully. *Bulkeley* v. *Dunbar*, 1 Anstr. 37.

By Directors.]—A direction given by persons who are directors of a company to their bankers, when the company had a balance in the hands of the bankers, to honour cheques drawn and signed in a particular manner, does not of itself impose on the directors any personal responsibility as to those cheques. This direction is in no sense a misrepresentation, so as to make those who gave it personally liable to those who acted upon it. *Beattie* v. *Ebury (Lord)*, 44 L. J., Ch. 20; L. R. 7 H. L. 102; 30 L. T. 581; 22 W. R. 897.

Nor, though that direction should continue to be acted on by the bankers after the company's account has been overdrawn, will it entail on the directors who gave it any personal liability. Nor will it entail any such liability on those who, at a subsequent meeting of the board of directors, confirmed the minutes of the board meeting at which it was given, and who drew cheques in accordance with it, though the account was overdrawn when these latter cheques were issued and honoured. *Ib.*

Bankers under advances to a railway company made a demand on the directors of the company to deliver to them as security for the advances "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures, and the directors by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation, and did not render themselves liable to make good to the bankers those shares and debentures. *Ib.*

The directors of a railway company which had fully exercised the borrowing powers conferred upon it by its special act, in August, 1864, advertised that they were "prepared to receive proposals for loans on mortgage debentures," "to replace loans falling due." W. offered a loan of 500*l.*; and, his offer being accepted, he in the same month sent his cheque for 500*l.* to the directors, for which he requested that a debenture should be issued to him. In pursuance of a resolution of the directors to that effect, the cheque was handed to H., the contractor for the works, who had been (but had then ceased to be) the holder of seven debenture bonds for 500*l.* each; and H. was requested to transfer one of them to W.; and it was by the same resolution directed "that such bond be on the 1st of October exchanged for a new one." H. kept the cheque (which was duly honoured), but was unable to transfer the debenture; and in pursuance of a resolution of the directors of the 5th of October, a new debenture bond for 500*l.* was sealed and sent to the executor of W. The defendant, a director of the company, was a party to each of the above transactions. By a decree of the Court of Chancery of the 14th of February, 1868, the above-mentioned debenture was declared void, as being for a sum in excess of the borrowing powers of the company:—Held, that the defendant was liable as for a breach of warranty; that the directors had power under the circumstances to issue a debenture, which would be valid and binding upon the company; and that the plaintiff was entitled to recover as against him the 500*l.*, together with interest by way of damages. *Weeks* v. *Propert*, 42 L. J., C. P. 129; L. R. 8 C. P. 427; 21 W. R. 676.

By Agent to Sell.]—If a person employed as the agent of another in the sale of any property has notice that what he is about to sell is not his principal's, and he yet continues to sell, he is personally liable for the produce of the sale. *Hardacre* v. *Stewart*, 5 Esp. 103.

An agent, employed by seller and purchaser on the purchase of a business, may be liable to the purchaser for false representations as to its value, and if he declares that he has personal knowledge of the facts, and his statements are found to be false, that is evidence that they are false to his knowledge. *Wright* v. *Self*, 1 F. & F. 704.

Attorney as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnot* v. *Biscoe*, 1 Ves. 95.

By Broker Purchasing Goods.]—Brokers in the city of London being directed to purchase iron delivered to the buyer bought-notes, purporting to be notes of the contract for the iron, not disclosing the name of the seller, the brokers guaranteeing the performance of the contract; and the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered that there was no principal seller of the iron other than one of the firm of brokers, who intended himself to perform the contract; and upon a bill filed by parties from whom the buyer had obtained money on the security of the contracts, the deposits were ordered to be repaid with interest. If in such a case the plaintiffs had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for the recovery of the deposits; that the cancellation of certain letters, which gave the plaintiffs an interest in the contract as against the brokers, the plaintiffs being at the time of such cancellation ignorant, and the brokers knowing the truth of the case, does not in equity protect the brokers from the claim of the plaintiffs for the recovery of the deposits. If the plaintiffs had known that the brokers were also the sellers of the iron, or if the plaintiffs were otherwise not deceived by their representations, they would not have been entitled to relief in equity. Knowledge by the buyer of the fact that there was not any seller of the iron other than the brokers, would not affect parties advancing money to the buyer on the faith of representations made to them by the brokers that the contract was regular and valid, nor deprive such parties of their right of rescinding the transaction, and recovering payments which had been made. *Wilson* v. *Short*, 6 Hare, 366; 17 L. J., Ch. 289; 12 Jur. 301.

False Representation as to Credit.]—The plaintiff sued G., a manager, for false representations as to the credit of a customer; G. on being written to by the plaintiff, signed his reply as manager, giving a favourable account of the credit of the customer. This representation was false to G.'s knowledge, and the plaintiff, on supplying goods to the customer, suffered loss:—Held, that G. was personally liable. *Swift* v. *Jewesbury*, 43 L. J., Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319—Ex Ch.

Liability for Acts of Sub-agent.] — As a general rule one agent is not responsible for the fraudulent acts of the other unless he does something which makes himself a principal in the fraud. *Cargill* v. *Bower*, 47 L. J., Ch. 649 ; 10 Ch. D. 502 ; 38 L. T. 779 ; 26 W. R. 716.

A principal agent is not responsible for the act of a sub-agent with respect to a representation made in favour of his principal ; and therefore the directors of a company cannot be held personally liable for a fraudulent representation made by an agent of the company, unless they have induced or authorised him to make it. *Bear* v. *Stevenson*, 30 L. T. 177—P.C.

A company was in negotiation with S. for an advance upon the security of sheep and wool, the property of the company ; an agent of the company wrote, in answer to a question of S., " The mortgage to N. is the only incumbrance on the sheep and wool : " in fact, there were two other outstanding incumbrances, but at the time of writing the agent had them both in his possession on behalf of the company, under an agreement that they should be paid off out of the advance to be made by S., which was in fact done :—Held, that there was no evidence that the agent was guilty of making a false representation of the position of the company. *Ib.*

S. & Co. employed F. as their agent to make advances on goods. F. employed a sub-agent to make such advances, with power to draw on S. & Co. for the amount. The sub-agent fraudulently drew on S. & Co. for an amount not advanced : — Held, that such sub-agent was acting within his authority, and that F. was liable for the act of his sub-agent. *Swire* v. *Francis*, 47 L. J., P. C. 18 ; 3 App. Cas. 106 ; 37 L. T. 554.

Refunding Commission in Case of Fraud.]—A company being unable to get its shares taken up, the directors resolved to give 2*s.* 6*d.* per share to any one who found persons to take shares. B., the secretary and solicitor of the company, proposed for the allotment of 2,000 shares to a client of his. The directors approved, and ordered 250*l.* to be paid to B. The shares were duly allotted to K., the company's engineer, and by him transferred to R. B., who was chairman of the company and the father of B. The directors knew that R. B. was the person really taking up the shares. The company was wound up, and, upon a summons for the purpose, it was held that B. must refund to the liquidator the sum of 250*l.* which he had received. *Stapleford Colliery Co., In re, Chatteris, ex parte*, 49 L. J., Ch. 253 ; 42 L. T. 12 ; 28 W. R. 341.

g. Torts of Principal.

There is no agency as between wrongdoers ; each of them is personally liable. *Hugh* v. *Abergavenny (Earl)*, 23 W. R. 40.

Where there was a dispute between the plaintiff and one of the defendants about a weir situate on the plaintiff's land, and the other defendant was charged with intending to enter forcibly on the land and destroy the weir :—Held, that the last-mentioned defendant could not sustain a demurrer to a bill for injunction on the ground that he had no interest in the subject-matter of the dispute, and was a mere agent acting on the orders of the principal defendant. *Ib.*

Importation and Transhipment of patented Article—Custom-house Agents.]—A patent was granted in England for an invention rendering nitro-glycerine less dangerous. Foreigners imported into England an article compounded of nitro-glycerine and other substances which they had manufactured abroad according to the patent process. The respondents, acting as custom-house agents for the importers, passed the article through the custom-house, and obtained permission (as required by the Explosives Act, 1875) for landing and storing it in magazines belonging to the importers :—Held, that the respondents being only custom-house agents for the importers, and not themselves the importers, and having neither possession of nor control over the goods, their acts did not amount to an exercise or user of the patent, and that no action could be maintained against them for an infringement of the patent. *Nobel's Explosives Co.* v. *Jones*, 52 L. J., Ch. 339 ; 8 App. Cas. 5 ; 48 L. T. 490 ; 31 W. R. 388—H. L. (E.)

h. Joining Agent as co-Defendant with Principal.

In Action for Specific Performance.]—To a bill against vendor for specific performance, his stewards and receivers ought not to be made parties ; a specific performance being decreed, bill as against them dismissed with costs. *M'Namara* v. *Williams*, 6 Ves. 143.

A.'s solicitors and B.'s solicitors, acting as agents for A. and B., entered into an agreement of compromise to the effect that all litigation between A. and B. should be stayed in consideration of a sum of money. A bill was afterwards filed by A. against B. for the specific performance of this agreement ; and by amendment B.'s solicitors were made parties, the bill alleging that they had authority from B., but that B. alleged that they had no such authority ; and the bill prayed in the alternative relief personally against B.'s solicitors :—Demurrer by B.'s solicitors allowed with costs, on the ground that there was no allegation by the plaintiff to support the prayer for relief against them. *Clark* v. *Rivers, (Lord)*, L. R. 5 Eq. 91 ; 17 L. T. 166 ; 16 W. R. 123.

In Action for Forcibly Regaining Possession of Goods Seized.]—A solicitor who, in the belief that his client's goods had been improperly seized under a bill of sale, assisted him in forcibly regaining possession of them, was made a co-defendant in a suit in the county court by the holders of the bill of sale, on the ground that he had colluded with his client in resisting their proceedings. The judge made a decree against him, and subsequently, on further consideration, ordered him to pay a certain sum into court. Whereupon he appealed against both the decree and order, on the grounds that he had merely acted as solicitor in the transaction, and that there was nothing due from him to the holders of the bill of sale :—Held, that he had been improperly made a party. *Fallows* v. *Slatter*, 20 L. T. 104.

For Payment of Costs.]—The practice of making the agents of a party defendants, when nothing but costs is prayed against them, is improper, and should be met by directing an issue. *Attwood* v. *Small*, 6 Cl. & F. 232 ; 2 Jur. 200, 226, 246. Reversing Younge, 407.

Semble, the cases in which a mere agent may be made a party to a suit, and costs prayed as relief against him, are limited to cases of fraud, in the sense in which fraud is understood in a court of equity, to which the agent is a party, and do not apply to a case in which, though the agent acts erroneously, he acts openly and avowedly. *Marshall* v. *Sladden*, 7 Hare, 428 ; 19 L. J., Ch. 57 ; 14 Jur. 106.

For Discovery or Production of Documents.]—Demurrer by a married woman to a bill praying discovery only against her, and relief against her husband, as to contracts, &c., by her agent for her husband: alleging the vouchers, &c., to be in her possession, allowed upon the objection that it was making a mere agent a party. *Le Texier* v. *Anspach* (*Margravine*), 15 Ves. 159.

The plaintiff claimed upon the decease of the testator's widow to be entitled to a messuage, as the only surviving cestui que trust in remainder under the trusts of the will. It appeared by the bill that the testator had no right to devise the messuage, but that his widow became entitled to it by survivorship ; the widow, however, took certain benefits under the will, and, as was alleged in the bill, had elected to take thereunder. The bill was filed against a mortgagee, in whom the legal estate was vested, and against a solicitor, having the custody of the deeds :—Held, that the suit could be sustained against the solicitor. *Baker* v. *Strickland*, 3 Jur. 1047.

An agent is liable to account only to his principal, and the case of charity forms no exceptions to the rule. The trustee of a charity managed its affairs by an agent, who received the income, and had the title deeds in his possession. The agent was made party to an information for an account and a scheme :—Held, on demurrer, that he was not a proper party. *Att.-Gen.* v. *Chesterfield* (*Earl*), 18 Beav. 596 ; 18 Jur. 686 ; 2 W. R. 499.

II. POWER OF ATTORNEY.

A. BY AND TO WHOM.

By Churchwardens having no Corporate Seal.]—Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue receiving the dividends of stock, notwithstanding the fluctuations in the number and identity of the numbers of the corporation. *Annesley, Ex parte*, 2 Y. & Coll. 350 ; 6 L. J., Ex. Eq. 81.

By Prisoners.]—A prisoner under a charge of felony may, before trial, execute a power of attorney to obtain money from a savings bank, in order to pay his attorney for conducting his defence, or to pay any other bonâ fide debt. *Rex* v. *Cowon*, 7 Car. & P. 651.

By Husband and Wife.]—A power of attorney by husband and wife severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands, is a nullity. *Graham* v. *Jackson*, 6 Q. B. 811 ; 14 L. J., Q. B. 129 ; 9 Jur. 275.

To Partners.]—A general power of attorney granted to one partner does not give any authority to the others. *Edmiston* v. *Wright*, 1 Camp. 88.

B. THE INSTRUMENT.

Execution—Seal.]—A power of attorney must be under seal. *Berkeley* v. *Hardy*, 8 D. & R. 102 ; 5 B. & C. 355 ; 4 L. J. (O.S.) K. B. 184.

—— **Subsequent Insertion of Attorney's Name.**]—A power of attorney was executed abroad, appointing B. the attorney. It was delivered to Henry B., who was the party meant to be authorised by it, and he filled up the blank with his christian name, "Henry" :—Held, that the power was not invalidated thereby. *Eagleton* v. *Gutteridge*, 11 M. & W. 465 ; 2 D. (N.S.) 1053 ; 12 L. J., Ex. 359.

—— **Abroad — Proof of.**] — In an action brought to recover a piece of land in Lower Canada, the pleadings challenged a strict proof of the title. The land had been devised to Mary, the wife of "James" L. The plaintiff claimed the land under a power of attorney executed by "Alexander" L. and Mary his wife ; and on the face of the power of attorney it was stated that this Alexander L. was the same person who in the will was called "James," but no other evidence of their identity was produced. To the power of attorney there were two attesting witnesses, one of whom was a notary public of Upper Canada. Neither of these witnesses was produced, but a certificate that the notary public had been duly appointed was put in :—Held, that the plaintiff had failed to make out his title, because the notarial certificate was not sufficient proof of the execution of the power of attorney. *Nye* v. *Macdonald*, 39 L. J., P. C. 34 ; L. R. 3 P. C. 331 ; 23 L. T. 220 ; 18 W. R. 1075.

A power of attorney from a creditor resident abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature. *Myers, Ex parte*, 2 Deac. & C. 406.

A power of attorney to sign a bankrupt's certificate, executed by a creditor resident abroad, is sufficiently authenticated if attested by the British consul. *Wilkinson, Ex parte*, 2 Deac. & C. 585 ; Mont. & Bli. 257.

Power of attorney to sue in plaintiff's name need not be stated in bill, but if stated, proof will be directed of it before master in taking the accounts. *Edney* v. *Jewell*, 6 Madd. 165.

Where a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary under 15 & 16 Vict. c. 86, s. 22. *Goss' Estate, In re, Liddal* v. *Nicholson*, 12 Jur. (N.S.) 595 ; 14 L. T. 727.

It is not necessary that the notarial seal or signature mentioned in 15 & 16 Vict. c. 86, s. 22, should be verified, and the section applies to the notarial attestation of a power of attorney to be used in the Court of Chancery. *Hayward* v. *Stephens*, 36 L. J., Ch. 135 ; 15 L. T. 173.

To Whom it Belongs.]—A person who pays money to another, who is authorised to receive it by a power of attorney, is not entitled to keep possession of the power of attorney. *Pridmore* v. *Harrison*, 1 Car. & K. 613.

In an action upon a lease, executed on behalf of the lessor under a power of attorney, there being notice to the defendant to produce the power, but no subpœna duces tecum to the party

who executed the lease:—Held, that the power of attorney was the property of the party who executed the lease under its authority, and that secondary evidence of its contents was inadmissible. *Hibberd* v. *Knight*, 2 Ex. 11; 17 L. J., Ex. 119; 12 Jur. 162.

C. EXTENT OF AUTHORITY CONFERRED.

Means Necessary for Carrying out Power.]—A power of attorney must be pursued strictly; but it is to be so construed as to include all the necessary means of executing it with effect. *Howard* v. *Baillie*, 2 H. Bl. 618.

—— **General Words.**]—When limited powers are given by a power of attorney, words of general power in it are not to be construed at large, but as giving general powers to carry into effect the special purposes for which the power was given. *Attwood* v. *Munnings*, 7 B. & C. 278; 1 M. & Ry. 78; 6 L. J. (o.s.) K. B. 9; 31 R. R. 194.

Where there is a power of attorney to do a particular act, followed by general words, the general words are not to be extended beyond what is necessary for doing the particular act. *Perry* v. *Holl*, 2 De G. F. & J. 38; 29 L. J., Ch. 677; 6 Jur. (N.S.) 661; 2 L. T. 585; 8 W. R. 570.

General words in a power of attorney held limited by its special purpose. *Lewis* v. *Ramsdale*, 55 L. T. 179; 35 W. R. 8.

Where an agent is authorised by power of attorney to enter into contracts for (*a*) the purchase or sale of goods, (*b*) the chartering of vessels, and (*c*) the employment of agents and servants; and, as incidental thereto or consequential thereon, to do certain specified acts and other acts of the same kind as those specified, such an authority does not confer upon the agent powers at large, but only the necessary powers, in addition to those named, which are requisite to carry into effect the declared purposes of the power of attorney. *Bryant* v. *La Banque du Peuple*, 62 L. J., P. C. 68; [1893] A. C. 170; 1 R. 336; 68 L. T. 546; 41 W. R. 600—P. C.

To Indorse Bills in Name of Principal.]—A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorising the agent to do all lawful acts concerning all the principal's business and affairs, of what nature or kind soever, does not authorise the agent to indorse bills of exchange in the name of his principal. *Esdaile* v. *La Nauze*, 1 Y. & C. 394. *S. C.*, nom. *Esdaile* v. *Lanoge*, 4 L. J., Ex. Eq. 46.

So a power of attorney authorising an agent to demand, sue for, recover and receive, by all lawful ways and means, all moneys, debts and dues whatsoever, and to give sufficient discharges, does not authorise him to indorse bills for his principal. *Murray* v. *East India Co.*, 5 B. & Ald. 204; 24 R. R. 325.

And trover may be maintained for the bills indorsed by the agent, where the power of attorney was to receive all salary and money, with all the principal's authority to recover, compound and discharge, and to give releases and appoint substitutes. *Hogg* v. *Snaith*, 1 Taunt. 347.

A power of attorney having been given by the payee of notes, to agents, empowering them to sell, indorse and assign, they, under the power, indorsed the notes to a bank, by way of security for a loan to them. The agents failed:—Held, that the transaction was valid, and that the payee could not recover from the bank. *Bank of Bengal* v. *M'Leod*, 7 Moore, P. C. 35; 13 Jur. 945.

An indorsement of bills of exchange "per pro," by an agent, when within the powers conferred on him by power of attorney, is binding on his principal as against bonâ fide holders for value, though the agent abuse his authority. *Bryant* v. *La Banque du Peuple*, 62 L. J., P. C. 68; [1893] A. C. 170; 1 R. 336; 68 L. T. 546; 41 W. R. 600—P. C.

To Dissolve Partnership.] — One of two partners gave his son a power of attorney, "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit":—Held, that this gave the son power to submit the accounts to arbitration. *Henley* v. *Soper*, 8 B. & C. 16; 1 M. & Ry. 153; 6 L. J. (o.s.) K. B. 210.

P., a partner in the firm of B. W. & Co., gave A. a power of attorney "for the purposes of exercising for me, all or any of the powers and privileges conferred by an indenture of partnership constituting the firm of B. W. & Co."; and the power afterwards went on, "and generally to do, execute, and perform any other act, deed, matter or thing whatsoever . . . in or about my concerns, engagements, and business of every nature and kind whatsoever":—Held, that the former words restrained the generality of the latter words, and consequently that A. could not under this power execute a deed in P.'s name dissolving the partnership of B. W. & Co., and assigning over P.'s share of the partnership property. *Harper* v. *Godsell*, 39 L. J., Q. B. 185; L. R. 5 Q. B. 422; 18 W. R. 954.

To Sell Share in Partnership—Stipulation as to User of Firm's Name.]—Certain persons carried on business in partnership, one of whom, residing abroad, executed a power of attorney, empowering one of his partners to sell any of his real or personal property in such manner as the attorney should approve, and to sign any deeds, and generally to do and transact any other act or thing whatsoever which might be found requisite for transacting or settling all other his affairs and concerns whatsoever. The attorney entered into an agreement to sell the partnership business, which contained clauses allowing the purchaser to use the firm's name, and preventing the vendors from carrying on a similar business within fifty miles. On the vendors refusing to perform the said agreement, on the ground that the attorney had exceeded the powers conferred on him by one of themselves:—Held, that on the purchaser waiving the benefit of these two clauses, he was entitled to specific performance on the ground that the said clauses being only for the benefit of the purchaser, he might sever them from the rest of the agreement, and that the power of attorney was sufficient to authorise the attorney to enter into such an agreement as remained after the two clauses had been waived:—Semble (per Lord Justice A. L. Smith), that the power did not authorise the attorney to consent to the purchaser using the name of the old firm, because it might have rendered the donor of the power liable to

an action on the ground of his holding out that he was the trader. *Hawksley* v. *Outram*, 62 L. J., Ch. 215; [1892] 3 Ch. 359; 2 R. 60; 67 L. T. 804—C. A.

To Assign Passage-money of Ship.]—The owners of a ship gave a power of attorney authorising their agent to do many acts for them, and "to sign any bottomry bond or instrument of hypothecation on the vessel or her cargo, and to sell and dispose of, either absolutely or by way of mortgage or otherwise as he should think proper, the vessel or any share thereof, and to execute all instruments and to do all acts which should be requisite and necessary for completing such sales, transfers, mortgages or any of them, and generally to do all acts about the business and affairs aforesaid, which the owner if present could have done." Under this power the agent, by a deed reciting a mortgage of the ship, and the necessity for further advance to enable the ship to set sail, and the advance of 4,000*l.* for that purpose by the plaintiffs, assigned all the freight, hire and passage-money, and earning of the ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the 4,000*l.* should be paid. After the ship had sailed, the agent of the owners received the passage-money of certain passengers by bills on England, payable at sight, which bills were remitted to the owners in England, and the amounts received by them before the arrival of the ship:—Held, that the power of attorney authorised the assignment of the passage-money, and gave the mortgagees an immediate right to it before they took possession of the ship, and consequently that they were entitled to recover back the amount so received. *Willis* v. *Palmer*, 7 C. B. (N.S.) 340; 29 L. J., C. P. 194; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.

To Enter into Charterparty.]—The owners of a vessel, which had once been classed A 1 at Lloyd's in London, authorised their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner and in all respects as he should think proper, and generally to represent the owners in relation thereto, and in relation to her management or sale, as fully as if the owners were personally present, and to do all things necessary for that purpose, though the same were not specially mentioned:—Held, that the agent had authority to enter into a charterparty with a warranty that the ship was at the time of the charterparty A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given. *Routh* v. *MacMillan*, 2 H. & C. 750; 33 L. J., Ex. 38; 10 Jur. (N.S.) 158; 9 L. T. 541; 12 W. R. 381.

To Dismiss Captain—Construction for Judge.]—A., who was agent abroad for the owners of a vessel, under a written power of attorney from them, which gave him general authority to take care of their interests and to act as their representative, dismissed there the captain of such vessel for alleged misconduct, and he ceased afterwards to act as such captain. In an action by the captain against the owners for wages, secondary evidence was given of the contents of such power of attorney, in the absence of the document, which was lost, and the judge ruled that it gave A. power to dismiss the captain:—Held, that the construction of the contents of such document was properly for the judge, and not the jury, and that his decision on such construction was right; and the dismissal, therefore, being with the authority of the owners, the captain could not claim wages subsequently thereto. *Berwick* v. *Horsfall*, 4 C. B. (N.S.) 450; 27 L. J., C. P. 193; 4 Jur. (N.S.) 615; 6 W. R. 471.

To Receive Payments.]—Where the plaintiff, resident abroad, and appointed special administrator in a foreign court of the goods of a deceased native subject, appointed the defendant in this country his attorney, to receive moneys due here to the deceased, and he obtained administration in the prerogative court limited to receive the fund, and "until the plaintiff should obtain administration to the deceased":—Held, that he might pay over the money received to the plaintiff, although he had not obtained such administration. *De La Viesca* v. *Lubbock*, 10 Sim. 629.

A legacy of 100*l.* was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorising him to receive this legacy specifically. *Carr* v. *Eastbrook*, 2 Cox, 390.

To give Discharge for Payment of Money.]—Actual payment of money to an attorney under a power is not requisite to enable him to give a discharge. *Perry* v. *Holl*, 2 De G. F. & J. 38; 29 L. J., Ch. 677; 6 Jur. (N.S.) 661; 2 L. T. 585; 8 W. R. 570.

To Borrow.]—An agent, authorised by power of attorney to enter into contracts for (a) the purchase or sale of goods, (b) the chartering of vessels, and (c) the employment of agents and servants; and as incidental thereto, or consequential thereon, to do certain specified acts and other acts of the same kind as those specified, would exceed his authority by borrowing money on behalf of his principal. *Bryant* v. *La Banque du Peuple*, 62 L. J., P. C. 68; [1893] A. C. 170; 1 R. 336; 68 L. T. 546; 41 W. R. 600—P. C.

To Pledge.]—A power of attorney authorised the holder "from time to time to negotiate, make sale, dispose of, assign and transfer" a promissory note:—Held, that the holder had no authority to pledge the note. *Jonmenjoy Coondoo* v. *Watson*, 53 L. J., P. C. 80; 9 App. Cas. 561; 50 L. T. 411—P. C.

Under a general power to sell, assign and transfer, an agent cannot pledge for his own debt. *De Bouchout* v. *Goldsmid*, 5 Ves. 211.

To Execute Bill of Sale.]—A duly authorised attorney may properly execute a bill of sale on the grantor's behalf, and such attorney may be the grantee himself. *Furnivall* v. *Hudson*, 62 L. J., Ch. 178; [1893] 1 Ch. 335; 3 R. 230; 68 L. T. 378; 41 W. R. 358.

To Execute Mortgage.]—Where a principal, resident abroad, gave a power of attorney to his solicitor in England, with ample powers, but not in terms authorising the agent to borrow money, and subsequently directed him as his agent to do so:—Held, he could not repudiate a mortgage which the agent had effected in his name. *Perry* v. *Holl*, 2 Giff. 138; 6 Jur. (N.S.) 491. Affirmed on appeal, 2 De G. F. & J. 38; 29 L. J., Ch. 677; 6 Jur. (N.S.) 661; 2 L. T. 385; 8 W. R. 570.

A. gave a power of attorney to P., authorising him to manage his affairs whilst he was residing abroad. P. kept an account at a bank in A.'s name, and, being agent for the estate of M., obtained 1,500*l.* from it, and paid it into A.'s account at the bank. A., whilst abroad, was induced by P. to execute an assignment to him of a policy of insurance as a security for an alleged debt of 1,500*l.* due from A. to P., but this allegation was subsequently by A. discovered to be untrue. M. appointed P. and B. his executors, and P., having become insolvent, deposited the policy of insurance and the assignment with B. to secure 1,500*l.*, and B. claimed to hold the documents against A. as a security for that sum:—Held, that they must stand as a security in B.'s hands for only what, if anything, might be found due from A. to P., there being nothing to shew that any payment had been made to A., he being ignorant of the circumstances, and P. having had full control over the banking account in A.'s name. *Perry* v. *Parkinson*, 6 Jur. (N.S.) 493; 2 L. T. 261.

An authority to borrow money on mortgage, though deficient in the formalities necessary for creating a valid mortgage on land, may be effectual to bind the giver of the authority as to the money advanced. *Denyssen* v. *Botha*, 8 W. R. 710.

The chairman of a company borrowed of the company a sum of money in January, 1872. Soon afterwards he gave the secretary of the company a general power of attorney to execute for him all deeds that might be necessary, and in August left the country and never returned. On the 1st November, 1872, the secretary, purporting to act under the power, executed a mortgage to the company to secure the sum borrowed by the chairman. In the following month the chairman was adjudicated a bankrupt:—Held, that the mortgage was invalid, as not being authorised by the power of attorney, and that it was not necessary to decide whether it was void as a fraudulent preference. *Bowles' Mortgage, In re*, 31 L. T. 365—L.JJ. Affirming, on different grounds, 22 W. R. 817.

A partnership, consisting of A. & B., was in insolvent circumstances, the separate estates of the partners being also insolvent. On the 14th September, B. executed a power of attorney to C., authorising him in general terms to deal with his property. The power contained no reference to the partnership. It contained express powers as to a ship which was in reality partnership property, though the fact did not appear in the power. On the same day B. left England, under circumstances which constituted his departure an act of bankruptcy. In November A. and C. (as B.'s attorney) executed a mortgage of all the partnership property to S., a creditor of the partnership, and also a separate creditor of both parties, to secure all the past debts and such future advances as might be made. At the same time a bill of sale of the ship was executed by A. and C. (as attorney), in consideration of a sum of money paid by S. on account of the partnership. In April A. and B. were both adjudicated bankrupts. S., at the date of the deeds, knew the circumstances under which B. had left England, but he declared in his evidence that he did not infer that B. had any intent to delay or defeat his creditors, and therefore did not know that he had committed an act of bankruptcy:—Held, that the execution of the mortgage by C., as B.'s attorney, was void, as not being within the scope of the power of attorney. *Snowball, Ex parte, Douglas, In re*, 41 L. J., Bk. 49; L. R. 7 Ch. 534; 26 L. T. 894; 20 W. R. 786.

A., B. and C., as the only next of kin with D., the administrator of their intestate father, signed a memorandum in 1872 authorising D. to borrow, upon mortgage or otherwise, as he might deem best, upon the security of certain house property held by the intestate under an agreement for a lease to be granted on completion of repairs, such money as D. required for carrying out these matters, and to charge their respective shares with the interest. A lease of the houses was soon afterwards granted to D. as the sole legal personal representative of the intestate, which, with the memorandum, was shortly afterwards deposited by D. as a security for his own debt with E. In 1875 the administration accounts, shewing a balance due to D., were settled between A., B., C. and D., and D. then told A., B. and C. that he had not borrowed any money upon the security of their shares under the memorandum of 1872. In 1877, D., who had previously mortgaged his share of the house property to E., executed a further mortgage to him of the entirety, reciting the authority of 1872. No notice was given by E. to A., B. and C., that he held any charge upon their shares under the memorandum:—Held, that, in the absence of any notice by E. to A., B. and C., of a charge to him of their shares by D. under the authority of 1872, the mortgage of 1877, after that authority had been withdrawn by the settlement of accounts, did not affect their shares, and that they were entitled to an assignment from E. of their shares of the property comprised in the lease, which had been mortgaged by D. *Jones* v. *Stolwasser*, 50 L. J., Ch. 625; 16 Ch. D. 577; 44 L. T. 333; 29 W. R. 497.

A. gave a power of attorney to B. to manage real estate, recover debts, settle actions, also to "sell and convert into money" personal property, and to execute and perform any contract, agreement, deed, writing, or thing that might in B.'s opinion be necessary or proper for effectuating the purposes aforesaid, or any of them, and "for all or any of the purposes" of those presents to use A.'s name, and generally to do any other act whatsoever which in B.'s opinion ought to be done in or about A.'s concerns as fully as if A. were present and did the same, his desire being that all matters respecting the same should be under the full management and direction of B.:—Held, that the general words were limited by the special purpose of the power of attorney, and did not authorise a mortgage of his personal property. *Lewis* v. *Ramsdale*, 55 L. T. 179; 35 W. R. 8.

—— **Operative Part controlled by Recital.**]—A power of attorney contained a recital that the donor was about to return to South Australia, and was "desirous of appointing an attorney or attorneys to act for him during his absence from England." The operative part of the deed, which gave the attorney large powers of mortgaging the donor's property, contained no mention of the duration of those powers:—Held, that the operative part of the deed was controlled by the recital, and consequently that charges effected by the attorney upon the property of the donor while he was in England were invalid as against him. *Danby* v. *Coutts*, 54 L. J., Ch. 577; 29 Ch. D. 500; 52 L. T. 401; 33 W. R. 559.

—— **Ratification.**]—See *Munnings* v. *Bury*, ante, col. 938.

To Execute Lease.]—An agreement for a lease made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, shall effectually bind the principal. *Hamilton* v. *Clanricarde* (*Earl*), 1 Bro. P. C. 341.

To Sell Land.]—B. executed a voluntary settlement of land in favour of his wife and children, which contained a power of sale. Subsequently B., being about to leave England, executed a power of attorney to E. authorising him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to the defendant; and the defendant contracted the next day, the 4th May, 1876, to sell the same piece of land to the plaintiffs. On the execution of this contract a deposit of 200*l.* was paid, and the purchase was to be completed on the 1st January, 1877. The title was objected to by the plaintiffs on the ground that the power of attorney did not authorise the sale to the defendant, and an action was commenced in the Exchequer Division, in August, 1877, for the return of their deposit, and for damages for breach of the contract; the defendant asserted that the contract was binding, and the title good, and by his counter-claim asked for specific performance. An order had been obtained by consent in another action to administer the trusts of the settlement, confirming the proposed sale by E. to the defendant, and it had also been decided in the action that an order might be made directing a person to convey for B. The defendant subsequently offered a conveyance direct from B. or from the trustees of the settlement, which was declined:—Held, by the vice-chancellor, that the power of attorney did not authorise E. to sell to the defendant any portion of the land comprised in the settlement, and that such a sale was not sufficient to call into operation the statute 27 Eliz. c. 4; that the plaintiffs could not be affected by the order in the administration action; and that, the title being defective, the plaintiffs were entitled to recover the deposit, with the costs of the action; the damages, to be ascertained, to be limited to the conveyancing costs. *General Meat Supply Association* v. *Bouffler*, 41 L. T. 719—C. A.

Decision of the vice-chancellor affirmed on appeal, on the ground that the trustees' suit being a suit for the execution of the trusts of the settlement, there was no jurisdiction in it to make an order to confirm a sale in derogation of those trusts. *Ib.*

To Instruct Solicitor on Behalf of Donor.]—Where a person on leaving this country has authorised another, either in writing or verbally, to act for him generally in his absence, the latter has authority to instruct a solicitor to appear on behalf of the former to shew cause against an adjudication of bankruptcy against him. *Frampton, Ex parte*, 1 De G. F. & J. 263.

To Sue.]—The manager of an insurance company, by power of attorney, was authorised to sue for all sums due from members:—Held, that he could not maintain an action in respect of unpaid premiums from members. *Gray* v. *Pearson*, L. R. 5 C. P. 568; 23 L. T. 416.

A joint power of attorney from husband and wife to receive and to sue for moneys belonging to them or either of them is not sufficient authority to justify the attorney in maintaining an administration suit in respect of a legacy given to the wife for her separate use. *Kenrick* v. *Wood*, 39 L. J., Ch. 92; L. R. 9 Eq. 383; 19 W. R. 57.

A mere attorney has no right to sue in equity in his own name. *Spain* (*King*) v. *Machado*, 6 L. J. (o.s.) Ch. 61.

Transactions with a foreign prince and his government do not concern the trade of merchandise. *Sturt* v. *Mellish*, 2 Atk. 612.

A letter of attorney from one merchant to another to get in the debts will not make the person so deputed a merchant within the exception of 21 Jac. 1, c. 16, s. 3. *Ib.*

To Sign Bankruptcy Petition.]—A power "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings in which I or my property may be in any wise concerned":—Held, to confer on an attorney a right to sign a bankruptcy petition on behalf of his principal. *Richards* or *Wallace, Ex parte, Wallace, In re*, 54 L. J., Q. B. 293; 14 Q. B. D. 22; 51 L. T. 551; 33 W. R. 66; 1 Morrell, 246—C. A.

To Apply for or Consent to Supersedeas.]—Semble, that a power of attorney to transact any business in the courts of law authorises the attorney to apply for a supersedeas. *Crowther, Ex parte*, 4 Deac. & C. 31.

Where all creditors consent to supersedeas except A., who is abroad, and B. holds power of attorney from A. authorising him to consent:—Held, B. was entitled to consent, and an attested copy of power ordered to be filed with the proceedings. *Hamilton, Ex parte*, 2 Deac. & C. 139.

Where a creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, and the signature of the creditor himself to such consent was easily attainable:—Held, that his own signature ought to be procured. *Sampson, In re*, 3 Deac. & C. 198.

Liability of Attorney to be sued by Principal.]—A person acting under a letter of attorney from administrators may be sued by them in their own right as their bailiff or receiver, and they need not name themselves as administrators. *Hudson* v. *Hudson*, 1 Atk. 462.

D. AUTHORITY, HOW EXERCISED.

Execution of Deed—Signature.]—In executing a deed for the principal, under a power of attorney, the proper way is to sign in the name of the principal. *White* v. *Cuyler*, 6 Term Rep. 176; 1 Esp. 200.

One who executes a deed for another, under a power of attorney, must execute it in the name of his principal; but if that be done, it matters not in what form of words: and such execution is denoted by the signature of the names, as if opposite the seal is written "for J. B." (the principal), "M. W." (the attorney), ("L. S.") *Wilks* v. *Back*, 2 East, 142.

The execution of an indenture by an attorney must be in the name of the principal, in order to be binding upon the latter. *Berkeley* v. *Hardy*, 8 D. & R. 102; 5 B. & C. 255; 4 L. J. (o.s.) K. B. 184.

And the power of attorney must be under seal, as well as the deed itself. *Ib.*

A deed executed by A. on behalf of B. must, in order to bind B., be executed by A. in the name of B., or by A. in his own name, with such words as shew that he is acting solely as the agent of B. in such execution. *M'Ardle* v. *Irish Iodine Co.*, 15 Ir. C. L. R. 146.

Signature of Bankruptcy Petition on behalf of Principal.]—A bankruptcy petition signed by an attorney on behalf of his principal is sufficiently signed, provided that the power under which the attorney acts is wide enough to confer upon him the necessary authority. *Richards* or *Wallace*, *Ex parte*, *Wallace*, *In re*, 54 L. J., Q. B. 293; 14 Q. B. D. 22; 51 L. T. 551; 33 W. R. 66; 1 Morrell, 246—C. A.

A power "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings in which I or my property may be in any wise concerned," was held to confer such authority. *Ib.*

Power of Attorney to Several—Exercise by some only.]—When a power of attorney was given to fifteen persons therein named, jointly or severally to execute such policies as they or any of them should jointly or severally think proper:—Held, that an execution of such power by four of the persons named was sufficient. *Guthrie* v. *Armstrong*, 5 B. & Ald. 628.

E. REVOCATION.

When Allowed.]—A power of attorney is revocable. *Bromley* v. *Holland*, 7 Ves. 28.

A creditor, at the solicitation of a certificated bankrupt, executes a power of attorney to A. B. to receive the dividends on his debt for the bankrupt's use, the bankrupt undertaking to pay the debt in full, and for that purpose giving the creditor a bill of exchange, which is, however, never paid. A second commission issues against the bankrupt, under which the assignees claim to be entitled to the dividends under the first commission, by virtue of the power of attorney:—Held, that the power of attorney was revocable by the creditor, the consideration failing for which it was given; and the creditor and not the assignees under the second commission was entitled to the dividends. *Smithers*, *Ex parte*, 1 Deac. 413.

Where coupled with an Interest.]—A., being indebted to B., in order to discharge the debt, executed to B. a power of attorney, authorising him to sell certain lands belonging to him (A.):—Held, that this, being an authority with an interest, could not be revoked. *Gaussen* v. *Morton*, 9 B. & C. 731; 8 L. J. (o.s.) K. B. 313.

But when a power of attorney is given as part of a security for money, it is not revocable. *Walsh* v. *Whitcomb*, 2 Esp. 565. S. P., *Abbott* v. *Stratten*, 3 Jo. & Lat. 609. See *Smart* v. *Sanders*, 5 C. B. 916.

P. being seised under a lease of lives renewable for ever of premises in Dublin, and being indebted to F. in 448*l.*, in order to secure the repayment executed a power of attorney, whereby he authorised F. to mortgage the premises, and which power of attorney he declared to be irrevocable until F. should have received the whole of his account against P., or payment of any bill, promissory notes, or bills of exchange for which P. is or shall become liable to or on behalf of F.:—Held, that the power of attorney constituted an equitable mortgage of the premises. *Parkinson*, *In re*, 13 L. T. 26.

A power of attorney to receive rents, accompanied by an agreement that it should be irrevocable until the principal and interest of a loan, and the premiums on a policy of assurance effected to secure it, should be paid off by instalments, as specified in the agreement, is irrevocable, and amounts to an equitable mortgage, and the mortgagee is entitled to priority over a subsequent creditor by judgment, affecting the legal estate in possession by a receiver. *Whitworth* v. *Gaugain* (3 Hare, 421) approved of. *Abbott* v. *Stratten*, 9 Ir. Eq. R. 233; 3 Jo. & Lat. 603.

A., being entitled to a life estate in lands, with remainder to his wife B. for life, and C. being entitled to an annuity, and D. having a judgment against A. and a policy of assurance, A., B., C. and D., in consideration of 350*l.*, advanced to A., conveyed to E. the lands, annuity, and policy of assurance, subject to redemption; and it was provided that A. should become tenant to E. of these lands, at a yearly rent, in case of non-payment of the interest and premiums on the policy; and A., B. and C. appointed F. irrevocably their attorney, to receive the rents of the mortgaged premises and the annuity, for the purpose of paying (after receiver's fees and outgoings) the interest and premiums of the policy, and for the purpose, out of the annuity, of investing a sum to form a fund for payment of the principal, and of paying the balance of the annuity to C., and of the rents to A.; and the sums secured by the judgment and policy of assurance, when they should be paid, after deducting the 350*l.* and interest, were to be applied by E. to pay D. any demand due to her by A., and the balance to A.; and it was provided, that F. should not act as receiver until the interest or premium on the policy should be in arrear. F. entered into receipt of the rents (as he alleged, under a subsequent power of attorney from A.) and of the annuity, no portion of which he invested to form the fund for payment of the annuity, and applied the rents for the purposes of A., and in payment of the interest of a mortgage due to himself (F.), by the directions of A., and the annuity in payment of the interest on the 350*l.*, with the consent of C., who had, before such consent, taken the benefit of the Insolvent Act:—Held, that A. could not revoke the power of attorney in the mortgage deed. *M'Dowell* v. *Reede*, 14 Ir. Ch. R. 190.

But see *Watson* v. *King* and *Spooner* v. *Sandilands*, infra, col. 1127.

What constitutes.]—C. and D., who had since died, holders of stock as trustees, had given a power of attorney to bankers to receive the dividends and pay them to the cestui que trust, a married woman. She had given the bankers directions to pay the dividends, when received, to S., who had lent money to her and her husband. Subsequently, however, she wrote to the bankers, that in consequence of the death of one of the trustees she had been obliged to have a new power of attorney made to receive her own dividends, and that she would not trouble them any longer to receive them. No new power of attorney was in fact made. After this letter the bankers received a dividend and paid it over

to S.:—Held, that an action by C. against the bankers for not paying the dividends to the cestui que trust was not sustainable, as her letter did not amount to a revocation of the direction to pay to S. *Clark* v. *Laurie*, 2 H. & N. 199; 26 L. J., Ex. 317; 3 Jur. (N.S.) 647; 5 W. R. 629—Ex. Ch.

By Death.]—A power of attorney to a creditor to receive a debt not accompanying any assignment of it, nor making part of any security given, but with declarations that it was to enable the creditor to apply the money to his debt, is not an appropriation, and therefore fails by the death of the debtor. *Lepard* v. *Vernon*, 2 Ves. & B. 51.

A payment under a power of attorney, made after the death of the principal, is illegal. *Wallace* v. *Cook*, 5 Esp. 117.

Semble, that a power of attorney by husband and wife severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands is revoked by the death of the wife, and a surrender subsequently made by the attorney is inoperative. *Graham* v. *Jackson*, 6 Q. B. 811; 14 L. J., Q. B. 129; 9 Jur. 275.

As to the necessity of shewing that a party who has given a power of attorney is alive at the time it is acted on. *Bailey* v. *Collet*, 18 Beav. 179; 23 L. J., Ch. 230; 2 W. R. 216.

An Indian power of attorney to receive funds in a suit is valid, if the party executing it be proved to be living at the date of the decree. *Goodson* v. *Alexander*, 1 Jur. 39.

—— **Where an Interest.**]—A power of attorney is revoked by the death of the party giving it, even though the party to whom it is given has an interest, or the act is not to be performed until after the death of the party. *Watson* v. *King*, 1 Stark. 121; 4 Camp. 272.

A power of attorney authorising the sale of a vessel is revoked by the death of the owner. *Ib.*

A. having joined as a surety for B. in a bond to C. for securing the payment of the interest of a principal sum secured by a mortgage from B. to C., and having also executed a warrant of attorney as a collateral security with the bond, afterwards executed to C. a letter of attorney authorising C. to take possession of a rectory and glebe lands, of which A. was the incumbent, and of certain freehold lands and hereditaments of which he was seised in fee simple, and to hold such possession, and receive and take the tithes, fees, perquisites, emoluments, rents, and profits thereof, until thereby and therewith, or otherwise, he should be paid the interest secured by the bond and warrant of attorney:—Held, that the letter of attorney operated not merely as a letter of attorney, but also as a charge on the freehold estates, and that C. was entitled to retain possession of the freehold estates until, by means of the rents and profits, all arrears of the interest should be satisfied, notwithstanding the death of A., and the revocation by that event of the power of attorney. *Spooner* v. *Sandilands*, 1 Y. & Coll. C. C. 390.

By Lunacy.]—Where A., acting under a power of attorney of creditor, assented to an arrangement by which the joint liability of two debtors of his principal was transferred to one, who afterwards became bankrupt, and the principal was afterwards found, under a commission, to have been a lunatic previous to the date of his power, and A. was appointed his committee, and proved as such under the above arrangement against the separate estate, the court upheld the proof against the petition of other creditors, lunacy not being per se a revocation of a power. *Bradbury, Ex parte, Walden, In re*, Mont. & C. 625; 4 Deac. 202; 9 L. J., Bk. 7; 3 Jur. 1108.

A demurrer will not lie to a bill for specific performance of an agreement to buy land on the ground that the present mental incapacity of a necessary party to the conveyance to join therein or to concur in a parol variation of the original written contract appears on the face of the bill. Whether an attorney can act under a power of attorney during the mental incapacity of the principal, quære. *Beaufort* (*Duke*) v. *Glynn*, 1 Jur. (N.S.) 888; 3 W. R. 463. *S. C.* on appeal, 3 W. R. 502.

By Bankruptcy.]—But a power of attorney to execute the indorsement of sale upon the register of a ship when she returns home is not revoked by the bankruptcy of the party giving the power. *Dixon* v. *Ewart*, Buck. 94; 3 Mer. 327.

In 1828 the plaintiff mortgaged freehold property to B., and in 1832, being about to reside abroad, he gave a full power of attorney to the defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the plaintiff settled accounts with the defendant, shewing a large balance due to the defendant, which the plaintiff agreed to secure by a mortgage of his real estates when required. In 1845 the plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the defendant continued to receive the rents and profits. In 1849 the defendant took a transfer himself of B.'s mortgage, to which the plaintiff was not a party. In 1865 the defendant wrote a letter to the plaintiff expressing his readiness to settle all accounts. In 1877 the plaintiff's bankruptcy was annulled, and the plaintiff brought an action against the defendant claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The defendant pleaded the Statute of Limitations:—Held, that on the plaintiff's bankruptcy the defendant ceased to be the agent and attorney of the plaintiff, and did not become the agent of the assignee; and that even if the assignee would have been entitled to call upon the defendant to account, the plaintiff did not, on the annulment of the bankruptcy, succeed to the assignee's right; that, the plaintiff's estate as mortgagor having ceased on the bankruptcy, the letter written to him in 1865 could not operate as an acknowledgment either of his title, or that of the assignee, to the equity of redemption, so as to take the case out of the Statute of Limitations; that, as the assignee was barred by the statute, the plaintiff was also barred, notwithstanding the annulment of the bankruptcy. The action was therefore dismissed with costs. *Markwick* v. *Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361—C. A.

As a general rule a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of it as against the trustee under his subsequent bankruptcy. *Snowball, Ex parte, Douglas, In re*, 41 L. J., Bk. 49; L. R. 7 Ch. 534; 26 L. T. 894; 20 W. R. 786.

But if, after the act of bankruptcy, but before

an adjudication, property of the bankrupt is conveyed under the power to a bonâ fide purchaser without notice of the act of bankruptcy, he may hold the property as against the trustee. *Ib.*

A., having an interest in a fund, executes to the trustee of the fund a power of attorney to sue in respect of it, and afterwards takes the benefit of the Insolvent Act; his interest in the fund is thereby devested out of him, and the power of attorney is recalled. *Dawson* v. *Sexton*, 1 L. J. (O.S.) Ch. 185.

J. R.

PRINCIPAL AND SURETY.

[By J. RITCHIE.]

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A. NATURE OF CONTRACT.

1. Operation of the Statute of Frauds.

a. What Promises within.

To Debtor.]—A promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another, within the statute, which applies only to promises made to the person to whom another is answerable. *Eastwood* v. *Kenyon*, 11 A. & E. 438; 3 P. & D. 276; 9 L. J., Q. B. 409; 4 Jur. 1801.

To Stranger.]—Where one advances money at the request of another (and on his promise to repay it) to pay the debt of a third party, the payment creates no debt as against such third party, if it was not made at all on his credit, and therefore the liability of the party on whose request and promise it was made, is original, and not collateral; and his promise is not a promise to "answer for the debt of another" within the Statute of Frauds. *Pearce* v. *Blagrave*, 3 C. L. R. 338.

To Pay Debt of Another.]—A promise to pay the debt of another is within the statute, and void, if not in writing. *Fish* v. *Hutchinson*, 2 Ld. Ken. 537; 2 Wils. 94.

So the parol promise to pay the debt of another, and also to do some other thing, is void. *Chater* v. *Beckett*, 7 Term Rep. 201; 4 R. R. 418.

And the plaintiff cannot separate the two parts of such a contract. *Ib.*

In a letter written by the defendant to the plaintiff relating to a proposed mortgage, the following words are not a sufficient guarantee within the Statute of Frauds: "I will take any responsibility myself respecting it, should there be any." *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361; 28 L. J., C. P. 301; 6 Jur. (N.S.) 73.

A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate, and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees, and the son's solicitor wrote on his behalf to the claimants, agreeing to pay 300*l.* in satisfaction of the losses:—Held, that this letter was not within the Statute of Frauds, as an agreement to answer the debt, default, or miscarriage of another; and that it was not invalid for want of consideration. *Orrell* v. *Coppock*, 26 L. J., Ch. 269; 2 Jur. (N.S.) 1244; 5 W. R. 185.

The plaintiff, the grantee of a bill of sale, having taken possession of the goods, the defendant, the brother of a grantee under a subsequent bill of sale, reimbursed the plaintiff part of the money he had paid to satisfy a distress for rent on the goods and gave him his I O U for the residue upon an undertaking of the plaintiff not to sell or remove the goods:—Held, first, that the plaintiff was entitled to recover upon the I O U under a count upon an account stated; secondly,

that the defendant's promise was not a promise to pay the debt of another, and, therefore, did not require to be in writing, under the 4th section of the Statute of Frauds. *Bain* v. *Harris*, 1 L. T. 40; 8 W. R. 79.

As to engagement to pay the debt of another, requiring writing under the Statute of Frauds. *Carr*, *Ex parte*, 3 Ves. & B. 110; 13 R. R. 158.

To Pay upon Completion of Work.]—A board of health had been formed in a town, L. being its chairman. M., a contractor, had under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the inhabitants did not make these connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working materials, when L. said to him, "What objection have you to making the connections?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment": and L. replied, "M., go on and do the work, and I will see you paid." M. did the work, and the board refusing to pay, sued L. for the amount:—Held, that the words of L. were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the Statute of Frauds. *Lakeman* v. *Mountstephen*, 43 L. J., Q. B. 188; L. R. 7 H. L. 17; 30 L. T. 437; 22 W. R. 617.

When the promise is made to answer for the debt or default of a third person, and there is no actual, but only a supposed liability on the part of that third person, the promise is equally void, whether it is in writing or not. But where the promise is made in respect of a future contemplated liability on the part of a third person, such a promise is within the 4th section of the Statute of Frauds. *Ib.*

A. having commenced certain business for B., which he had undertaken, refused to proceed without a promise from C. to pay the further expenses:—Held, that C. was not liable on such a promise without a note in writing. *Barber* v. *Fox*, 1 Stark. 270.

W. undertook to complete the carpenter's work in H.'s house and find all materials; W. being delayed for want of credit or funds to procure timber, it was supplied by M. on H.'s signing the following undertaking: "I agree to pay M. for timber to house in A. C. out of the money that I have to pay W., provided that W.'s work is completed":—Held, that this was not a guarantee to pay if W. should fail, but a direct undertaking to pay when the work should be completed." *Dixon* v. *Hatfield*, 2 Bing. 439; 10 Moore, 42; 3 L. J. (o.s.) C. P. 59; 27 R. R. 686.

H. was employed to do work on certain houses, and the defendant was employed as surveyor over him, and to receive moneys to be paid to H. for such work; and, in consideration that the plaintiff would provide and deliver to H. such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such moneys received by him as should become due to H. for that purpose:—Held, that the defendant's promise was an original and not a collateral one. *Andrews* v. *Smith*, 2 C. M. & R. 627; 1 Tyr. & G. 173; 5 L. J., Ex. 80.

Upon Sales.]—Though a tradesman is induced to send goods upon credit to another, by a promise made in these words, "If you do not know him, you know me, and I will see you paid"; yet this is void by the statute, not being in writing. *Matson* v. *Wharam*, 2 Term Rep. 80; 1 R. R. 429. S. P., *Peckham* v. *Furia*, 3 Dougl. 13.

A parol promise to pay for goods sold to B., if B. did not pay for them, though made before delivery of the goods, is a collateral undertaking within the statute. *Jones* v. *Cooper*, Cowp. 227; Lofft, 769; 2 Term Rep. 80; 1 R. R. 429.

A count averring that A. made a bill of sale of goods to the plaintiff in consideration of a debt of 122*l.* 19*s.* due from A. to the plaintiff, and that the plaintiff being about to sell the goods, the defendant undertook to pay him the debt, if he would forbear to sell, does not shew with sufficient distinctness that it is a promise to pay the debt of another, so as to bring the case within the statute. *Barrell* v. *Trussel*, 4 Taunt. 117.

A. introduced B. to C., an upholsterer, and A., in B.'s premises, asked C. if he had any objection to supply B. with some furniture, and that if he would, he would be answerable. C. asked A. how long credit he wanted, and A. replied, "he would see it paid at the end of six months." C. agreed to it, and A. gave him the order, and the goods were supplied accordingly. At the end of six months, B. not having paid the amount. C. applied to A. for payment, and he paid the money. The entry in C.'s books was, "Mr. B. per Mr. A.":—Held, that the jury was warranted in finding that the undertaking on the part of A. was not a collateral undertaking. *Simpson* v. *Penton*, 2 C. & M. 430; 4 Tyr. 315; 3 L. J., Ex. 126.

A. sold goods to B., who, being unable to pay, transferred them to C., who promised A. to pay for them:—This is a new sale to C., and not a mere promise by C. to pay the debt of B. *Browning* v. *Stallard*, 5 Taunt. 450.

A. applied to B. for goods, who asked for a reference; A. referred him to C., who on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished, and on being told, said, "You may send them, and I'll take care they are paid for at the time." He was afterwards written to, to accept a bill for the amount, to which he replied that he was not in the habit of accepting bills, but that the money would be paid when due. After this, B., the seller, wrote to C. about the goods, and spoke of them in his letter as goods which C. had guaranteed; and the attorney of the assignees of B. (who afterwards became bankrupt) wrote to A. for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B., and without knowledge of the circumstances under which the debt was contracted:—Held, that on this evidence C. was not primarily liable, but only as a guarantor of the debt of A. *Rains* v. *Story*, 3 Car. & P. 130.

Sale of Shares.]—The defendant and P. agreed for the sale by P. to the defendant of the "put

or call" of fifty foreign railway shares, at a certain price per share premium, at any time on or before the 18th of February, 1844. Before that day the defendant agreed to resell the option to the plaintiff, and to guarantee the performance of the agreement by P. On the 16th February the plaintiff called the shares (i.e. required the delivery of them, pursuant to the agreement); but it was at the same time verbally agreed between him and the defendant and P., that they should be delivered by P. to the plaintiff not on the 18th February, but on the 2nd March, at Paris:—Held, that this was not an agreement by the defendant to be answerable for the default of P., but an original promise by the defendant for the delivery of the shares by P., for which a note in writing was not required by the Statute of Frauds. *Hargreaves* v. *Parsons*, 13 M. & W. 561; 14 L. J., Ex. 250.

Promise to be answerable for Loss on Business Introduced.]—The plaintiffs, a firm of stock-brokers, by a verbal agreement with the defendant, undertook to transact ordinary business and be answerable upon the Stock Exchange for customers whom the defendant should introduce, upon the terms that the defendant should receive half of the commission earned upon, and be liable to the plaintiffs for half the losses arising from, such transactions. Owing to the default of a customer a loss was incurred by the plaintiffs, the half of which they sought to recover under the above agreement:—Held, that the promise to be answerable for the losses was the ulterior consequence only to the above agreement, the main object of which was to regulate the terms of the defendant's employment in respect of transactions in which he was interested; that, therefore, the contract was one of indemnity and not a promise to guarantee the debt of another person; and that s. 4 of the Statute of Frauds did not apply. *Sutton* v. *Grey*, 63 L. J., Q. B. 633; [1894] 1 Q. B. 285; 9 R. 106; 69 L. T. 673; 42 W. R. 195—C. A.

Promise to pay Bills.]—A., an agent for some manufacturers, sold to B., who likewise acted as an agent, a quantity of shoes, and received bills of exchange in payment; B., being pressed to indorse them, refused, but wrote a letter to A., in which he inclosed the bills, and added, "that should they not be honoured when due, he, B., would see them paid":—Held, that this was a sufficient agreement, within the statute, to bind B. to pay for the goods in default of his principal. *Morris* v. *Stacey*, Holt, N. P. 153.

In an action on a bill of exchange where the defendant had indorsed it as surety for the acceptor:—Held, that as the action was brought on the bill, and not on the guarantee, the agreement to become surety could be proved by parol evidence. *Wilkinson* v. *Unwin*, 50 L. J., Q. B. 338; 7 Q. B. D. 636; 46 L. T. 123; 29 W. R. 458—C. A.

Promissory Notes.]—A. at the request of and on a verbal offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note, which he was afterwards compelled to pay:—Held, that the offer to indemnify A. was not an agreement within the Statute of Frauds, s. 4, and, therefore, need not be in writing, and that A., having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate. *Wildes* v. *Dudlow*, 44 L. J., Ch. 341; L. R. 19 Eq. 198; 23 W. R. 435.

To Discount Bills.]—The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co., being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3*l.* per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. & Co.'s bill without recourse; in other words, buy the bill of him:—Held, that this was a contract to answer for the debt or default of another, within the Statute of Frauds. *Mallett* v. *Bateman*, 1 H. & R. 109; 35 L. J., C. P. 40; L. R. 1 C. P. 163; 12 Jur. (N.S.) 122; 13 L. T. 410; 14 W. R. 225—Ex. Ch. *See further Cases*, post, cols. 1151 et seq.

Credit, to whom Given.]—The defendant having employed a builder to erect some houses, and given a guarantee for a supply of materials to the builder to a certain amount, and afterwards an order for a further supply, and more materials having been supplied on the order of the builder, the defendant being constantly on the premises:—Held, that it was for the jury whether he had so acted as to lead the plaintiff to believe that the latter supply was to be on his credit. *Smith* v. *Rudhall*, 3 F. & F. 143.

A tradesman delivered goods to A., at the request and credit of B., who said, before the delivery, "I will be bound for the payment of the money, as far as 800*l.* or 1,000*l.*" This promise of B. not being in writing, is void, if it appears that credit was given to A. as well as to B. *Anderson* v. *Hayman*, 1 H. Bl. 120; 2 R. R. 734. And see *Croft* v. *Smallwood*, 1 Esp. 121.

A mother took her son to school, and saw the master; but no evidence was given of what passed at this time; afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—Held, that the Statute of Frauds did not apply, and it was proper to leave it to the jury to say, under those circumstances, whether the original credit was not given to the uncle. *Darnell* v. *Fealt*, 2 Car. & P. 82.

Forbearance to Sue.]—A promise by the defendant to pay the debt of a third person whom the plaintiff had sued, in consideration of staying proceedings in the action, is within the statute. *Fish* v. *Hutchinson*, 2 Wils. 94; 2 Ld. Ken. 537.

A promise by a party to execute a bail-bond on a writ to be sued out against A., in consideration of the plaintiff forbearing to arrest A. on a writ already sued out, is not a promise to answer for the debt of another under the statute. *Jarmin* v. *Algar*, 2 Car. & P. 249; R. & M. 348.

A. having wrongfully, and without the licence of B. ridden his horse, and caused its death, a promise by a third person to pay the damage thereby sustained, in consideration that B. would not bring any action against A. is a collateral promise within the statute, and must be in writing. *Kirkham* v. *Marter*, 2 B. & Ald. 613; 1 Chit. 382; 21 R. R. 416.

A guarantee for payment of the debt and costs in an action pending against a third person unless paid by a certain day, was in writing, but did

not stipulate for forbearance of the action. An action having been brought on the guarantee, the declaration alleged a stay of further proceedings in the first action as the consideration for the promise:—Held, that no such consideration appeared on the written instrument, or could necessarily be implied from it, as to satisfy the statute. *Cole* v. *Dyer*, 1 Tyr. 304; 1 C. & J. 461; 9 L. J. (o.s.) Ex. 109.

The plaintiff's agent wrote to the defendant:—"I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow." The defendant in reply: "I undertake to pay 500*l.* on the account between my late brother, Mr. O. D. Hughes, and your client on or before this day three weeks." The plaintiff did not expressly agree to forbear suing, but did in fact forbear for three weeks:—Held, that the correspondence, together with the plaintiff's actual forbearance for three weeks to sue, constituted a good and binding promise to pay on the part of the defendant. *Wynne* v. *Hughes*, 21 W. R. 628.

A promise to pay damages by a third person, in case the plaintiff will withdraw a record for trial is not within the statute. *Read* v. *Nash*, 1 Wils. 305.

A suit in chancery was pending between A. and B., which C. conducted for A., as A.'s attorney. An agreement made between B. and C., with the consent of A., purporting that in consideration of the suit being put an end to, B., the defendant in equity, promised to pay C., the attorney, the costs due to him from A., the plaintiff in equity, is an agreement by B., the defendant, to pay the debt of another, and, therefore, it ought to be in writing. *Tomlinson* v. *Gell*, 1 N. & P. 588; 6 A. & E. 564; W. W. & D. 229; 6 L. J., K. B. 139.

Forbearance to Distrain.]—A promise to pay rent to a landlord going to distrain, by a person who is in possession of the goods under a bill of sale, by which the landlord is induced to forego his distress, is not a contract within the statute, and, therefore, good without being in writing. *Williams* v. *Leper*, 2 Wils. 302; 3 Burr. 1806.

An auctioneer, employed to sell goods on certain premises, for which rent was in arrear, was applied to by the landlord for the rent, the landlord saying it was better to apply so than distrain. The auctioneer answered, "You shall be paid; my clerk shall bring you the money":—Held, that an action lay on this promise without any note in writing. *Bampton* v. *Paulin*, 4 Bing. 264; 12 Moore, 497; 5 L. J. (o.s.) C. P. 168.

A., being indebted to his landlord for half a year's rent of a farm, due on the 25th of March, an auctioneer was about to sell the goods of A. on the premises in the month of August. On the day of the sale the landlord came there to distrain for his rent. The auctioneer, in consideration that the landlord would not distrain, verbally promised to pay, not only the rent due but the rent that would become due at the Michaelmas following:—Held, that the promise to pay the accruing rent was a promise founded on a new consideration distinct from the demand which the landlord had against A., and therefore void by the Statute of Frauds; and that the promise being entire and in the commencement void in part, was void altogether. *Thomas* v. *Williams*, 10 B. & C. 664; 8 L. J. (o.s.) K. B. 314.

The defendant, in consideration of the plaintiff's withdrawing a distress for rent, undertook to pay the sum due for rent out of the sale of the produce of the effects:—Held, that it was a positive engagement to pay if the goods were sufficient; and therefore, in an action on the guarantee, proof that the goods produced the amount of rent, entitled the plaintiff to recover although there were prior claims. *Stephens* v. *Pell*, 2 C. & M. 710; 4 Tyr. 267; 3 L. J., Ex. 214.

A landlord, having authorised a distress for rent, is responsible for the necessary expenses; and although the plaintiff was sent by the defendant to take possession of the goods distrained, and he promised to pay him, the latter will not be liable without a note in writing. *Colman* v. *Eyles*, 2 Stark. 62.

Discharge from Execution—Persons.]—Where a defendant taken on a ca. sa. is discharged out of custody by consent of the plaintiff, the debt itself is extinguished; and therefore a promise by a third person to pay that debt on condition of that discharge is an original promise, and not within the statute. *Goodman* v. *Chase*, 1 B. & Ald. 297; 19 R. R. 322.

A declaration alleged that the plaintiff recovered against S. 3,007*l.* 12*s.*, and sued out a ca. sa., indorsed to levy 2,611*l.* 7*s.* 3*d.* and interest on 2,578*l.*, besides sheriff's poundage and officer's fees; by virtue of which writ the sheriff arrested S., and detained him in custody; and thereupon, and whilst S. was in custody, in consideration that the plaintiff would procure his release, on payment of poundage and officer's fees, he, the defendant, promised the plaintiff to pay to him 500*l.*, part of the damages and interest, within one month, and to give a bond for payment of the remainder in five years:—Held, that the contract was not one required to be in writing by the Statute of Frauds. *Butcher* v. *Steuart*, 11 M. & W. 857; 1 D. & L. 508; 12 L. J. Ex. 391; 7 Jur. 774.

M. having obtained in a county court a warrant of commitment against H., in default of payment of 34*l.*, H. was arrested upon this warrant by the plaintiff. M. at the same time gave instructions to the plaintiff to release H., on payment of 17*l.* The defendant thereupon verbally promised plaintiff that if he would release H. he would pay him 17*l.*, or redeliver H. into his custody on the following Saturday. The plaintiff accordingly released H.; but the defendant neither paid the money nor redelivered H., in accordance with the undertaking:—Held, that for this default the plaintiff might recover; for that the promise was not one to answer for the debt, default, or miscarriage of another person, within the statute. *Reader* v. *Kingham*, 13 C. B. (N.S.) 344; 32 L. J., C. P. 108; 9 Jur. (N.S.) 797; 7 L. T. 789; 11 W. R. 366.

An undertaking, that if the plaintiff would discharge A. out of custody, the defendant would pay the debt at all events, is not such a guarantee to pay the debt of another as is required to be in writing; but an undertaking that if the plaintiff would discharge A. and take his bill for the debt, the defendant, without indorsing it would pay in case A. dishonoured it, must be in writing. *Maggs* v. *Ames*, 4 Bing. 474; 1 M. & P. 294; 6 L. J. (o.s.) C. P. 75.

—— **Property.**]—B. holding A.'s warrant of attorney for 340*l.*, signed judgment thereon, and sued out a fi. fa. A. having other creditors, his brother-in-law, C. looked into his accounts, and with the assent of B. and the rest of the creditors,

had all A.'s property conveyed to him, upon his undertaking to pay A.'s creditors in full B. relinquished his execution against A.; but, after waiting some years for payment of his debt, was eventually obliged to sue C. On objection that his promise was to answer for the debt, default, or miscarriage of another, and should, therefore, have been in writing:—Held, that it was an original promise, and not within the Statute of Frauds. *Bird* v. *Gammon*, 3 Bing. (N.C.) 883; 5 Scott, 213; 3 Hodges, 224; 6 L. J., C. P. 258.

Although a promise on a consideration not to sue out execution on a judgment against another is at its commencement by parol, yet if it afterwards is acknowledged in writing to a third party, it is not within the statute. *Longfellow* v. *Williams*, Peake's Add. Cas. 225.

Promise to pay Debt on Assignment.]—A promise in writing to pay a debt to be transferred from the promisor's account to that of a third party, his agent, is valid as a guarantee, and parol evidence to identify the debt is admissible. *Brunton* v. *Dullens*, 1 F. & F. 450.

Where A., being indebted to B. & Co. for goods sold, upon being released from his liability, assigned to the latter a debt which was due to him from C. & Co.; and notice of the assignment was given to a partner in the house of C. & Co., who promised in the name of the firm to pay the debt to B. & Co. out of the partnership funds:—Held, in an action by B. & Co. against C. & Co. for money had and received, that the promise was not within the statute. *Lacy* v. *M'Neile*, 4 D. & R. 7.

A. was indebted to B., and C., who resided abroad, was indebted to A. A. proposed to assign to B. the debt owing from C. to him, which B. agreed to accept. A. wrote to C.'s agents in this country, "As soon as you have funds belonging to C. pay on my account to B. 291*l.* 19*s.*, and I will credit C., having received his order to this effect." C.'s agents verbally promised B. to pay him, as they had funds of C. in hand. A. afterwards ordered C. to pay to another creditor the debt owing from C. to A., and C. gave an undertaking to pay that creditor, with a memorandum stating, that, as it was alleged that a payment had been made by some person to A. on account of C., it was declared that, should C. prove such payment to have been made, the amount should be deducted. C. having refused to pay the debt to this latter creditor, on the ground that the agents were liable to pay it to B.:—Held, that C.'s promise to pay was not a promise to pay the debt of a third person within the statute. *Hodgson* v. *Anderson*, 5 D. & R. 735; 3 B. & C. 842.

A. being insolvent, a verbal agreement, entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10*s.* in the pound, in satisfaction of their debts, which they agreed to accept, and to assign their debts to B., is not within the statute, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. *Anstey* v. *Marden*, 1 Bos. & P. (N.R.) 124; 2 Smith, 426; 8 R. R. 713.

A., who was agent for the plaintiff, being desirous of retiring, the defendant applied for the agency. A. was indebted to the plaintiff, and also claimed a commission for introducing customers. It was agreed that the plaintiff should allow A. 25*l.* on that account, and that the defendant on taking the agency should allow the plaintiff to retain six months' salary, which amounted to 52*l.* In an action by the plaintiff for money received by the defendant as such agent, to which he pleaded a set-off for six months' salary:—Held, that this was not an undertaking to answer for the debt of another. *Walker* v. *Hill*, 5 H. & N. 419.

Where a person assigns a debt or contract to which he is entitled, and guarantees to the assignee the due discharge of it, his guarantee is not within the statute, because the debt or liability guaranteed is due to himself and not to the assignee, and the statute intends only promises to answer for debts and defaults in respect of which the promisee himself is the creditor. *Hargreaves* v. *Parsons*, 13 M. & W. 561; 14 L. J., Ex. 250.

Promise to Pay Debt on being Appointed Administrator.]—One promises, if the widow of an intestate would permit him to be joined with her in letters of administration, he would make good any deficiency of assets to pay debts:—Held, the promise was binding, and not within the Statute of Frauds. Distinction where a promise is to pay the original debt on the foot of the original contract, and where it it is a new consideration; the former is within the Statute of Frauds, the latter is not. *Tomlinson* v. *Gill*, Ambl. 330.

Promise on Abandonment of Lien.]—If a tradesman, having goods in his possession, upon which he has a lien, parts with the goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds. *Houlditch* v. *Milne*, 3 Esp. 86; 6 R. R. 815.

A broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of the acceptances as they became due, upon the brokers giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant:—Held, that this was not a promise for a debt or default of another within the Statute of Frauds; and that the broker might recover against the defendant, as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. *Castling* v. *Aubert*, 2 East, 325.

A., through the agency of B., a broker, sold a parcel of linseed to C., who, through the same broker, sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order upon the faith of his engagement that D. would pay A. for the seed. D., on the following day, sent the broker a cheque for 900*l.* on account, the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A., under his contract with C., was 971*l.* 15*s.* 6*d.* In an action by A., against D., to recover the difference between that sum and the 900*l.* cheque:—Held, that the agreement by D.'s clerk was not a contract or a promise to pay the debt of a third person, within the Statute of Frauds, the seed, the giving up the delivery order for which was

the consideration for that promise, being the property of D., subject only to A.'s lien for the contract price. *Fitzgerald* v. *Dressler*, 7 C. B. (N.S.) 374; 29 L. J., C. P. 113; 5 Jur. (N.S.) 598; 7 W. R. 190.

—— **Charterparty—Retention of Ship.**]—The owners of a ship hired on charterparty by S. refused to let her sail till certain disputes about the freight between them and S. were settled by S. giving security; whereupon the defendant, in consideration that the owners would let S. sail without giving security, undertook to get M. to sign a guarantee for the payment of the freight set forth, and deliver it to the owners within a week:—Held, that this was not an undertaking for the debt, default, or miscarriage of another within the statute. *Bushell* v. *Bevan*, 4 M. & Scott, 622; 1 Bing. (N.C.) 103; 3 L. J., C. P. 279.

—— **Stop on Freight.**]—A declaration stated that the plaintiff, a shipbroker, was retained by the shipowner to procure a charter for a ship, on the terms that the plaintiff should collect the freight, and thereof retain his commission; that the plaintiff did procure a charterparty; that the defendants, in consideration of the plaintiff's abandoning his right of collecting the freight, promised to pay him his commission. The facts were that the plaintiff agreed with the shipowner to procure a charter for the ship, and that he should be authorised to collect the freight on the supposed voyage, as a security for his commission. The ship having sailed and returned, the defendants, as brokers of the then owners, put a stop on the freight. A written agreement, on which the action was brought, was afterwards made, and signed by the plaintiff, the defendants, and the charterers, that the stop should be taken off the freight, that the commission on the charterparty payable to the plaintiff should be paid to him by the defendants, and that no person signing that agreement should put any stop on the freight:—Held, that the agreement was an agreement to answer for the debt of another, within the statute, and not a transfer of liability. *Gull* v. *Lindsay*, 4 Ex. 45; 18 L. J., Ex. 354.

Indemnity against Debt of Another.] — A partner in a firm agreed to indemnify the firm against certain debts owing by a named person to the firm:—Held, that this contract was not a promise to answer for the debt of another person within s. 4 of the Statute of Frauds. *Hoyle, In re, Hoyle* v. *Hoyle*, 62 L. J., Ch. 182; [1893] 1 Ch. 84; 2 R. 145; 67 L. T. 674; 41 W. R. 81—C. A.

A promise to be liable primarily or in any event for a debt for which another person is already or is to become liable, irrespective of the question whether or not that person fails to satisfy that liability, is an indemnity and not a guarantee, and need not be in writing. *Thomas* v. *Cook* (infra) approved. *Guild* v. *Conrad*, 63 L. J., Q. B. 721; [1894] 2 Q. B. 885; 9 R. 746; 71 L. T. 140; 42 W. R. 642—C. A.

Indemnity on Prosecution of Action.] — A promise by the indorser of an unpaid note to indemnify the owner if he will proceed to enforce payment against the other parties on the note, must be in writing, or it is void under the Statute of Frauds. *Winckworth* v. *Mills*, 2 Esp. 484.

Where a party desires an action brought against another person to be defended, in which action he is concerned, and may be benefited by the event; and such action is defended, and the party fails, he is liable to pay the expenses of the defence: nor is it within the Statute of Frauds in such case requisite to have a note in writing. *Howes* v. *Martin*, 1 Esp. 162.

An occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes:—Held, that this was not a promise required by the Statute of Frauds to be in writing. *Adams* v. *Dansey*, 6 Bing. 506; 4 M. & P. 245; 8 L. J. (O.S.) C. P. 165; 31 R. R. 480.

Becoming Bail.] — If the plaintiff becomes bail for a stranger, in consideration of the defendant's request, and of the defendant promising to indemnify the plaintiff against the consequences, no action lies upon such promise, unless it is in writing. *Green* v. *Cresswell*, 10 A. & E. 453; 2 P. & D. 430; 9 L. J., Q. B. 63; 4 Jur. 169.

The plaintiff having promised to indemnify G. against the consequences of a bail-bond into which G. had entered at the plaintiff's request, and G., being forced to make a payment in consequence, it was agreed between the plaintiff and the defendant that the plaintiff should obtain the money by discounting a bill drawn by the plaintiff, and accepted by the defendant. The plaintiff sued the defendant on the bill, and he pleaded that it was accepted for the plaintiff's accommodation:—Held, that a jury might find for the defendant on this issue, although the plaintiff was not liable on his promise to indemnify, it not being in writing. *Cresswell* v. *Wood*, 10 A. & E. 460.

To co-Surety.]—A promise by one co-surety to indemnify another is not within the 4th section of the Statute of Frauds, and need not be in writing. *Thomas* v. *Cook*, 3 M. & Ry. 444; 8 B. & C. 728; 7 L. J. (O.S.) K. B. 49.

b. Sufficiency of Note or Memorandum.

Generally.]—A memorandum written by the plaintiff's clerk, in the presence of the defendant, that "the latter had called to say that he would be responsible for goods delivered to Mr. H.," is not a sufficient undertaking within the Statute of Frauds. *Dixon* v. *Broomfield*, 2 Chit. 205.

The defendant addressed the following letter to the plaintiff relating to a proposed mortgage of leasehold property: "I saw Mr. L. this day, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair terms; but do as you please about it. I will take any responsibility myself respecting it, should there be any." After the letter had been received, the plaintiff had an interview with Mr. L., and on the faith of such letter lent 400*l.* to A. on the leasehold security:—Held, that the letter was not a sufficient guarantee within the Statute of Frauds, as the whole promise could not be made out without reference to parol evidence. *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361; 28 L. J., C. P. 301; 6 Jur. (N.S.) 73.

I O U.] —The defendant, having verbally agreed to pay a debt of a third party, provided the plaintiff delivered up certain leases on which he claimed a lien, gave an I O U for the amount, upon which the leases were given up:—Held, that there being no release of the debt, there was no consideration for the I O U, and that as a

guarantee it was bad, as it did not constitute a memorandum in writing to satisfy the Statute of Frauds. *Nokes* v. *Thompson*, 2 W. R. 78.

Bill of Exchange.] — Where the contract between a creditor, debtor and surety is contained in a bill of exchange, in an action by the creditor against the surety on the bill no other evidence save the bill is required to satisfy the Statute of Frauds, if the obligation appearing on the face of the bill is the precise obligation the surety has agreed to undertake. *Holmes* v. *Durkee*, 1 Cab. & E. 23.

Indorsement.]—Where A. by letter entered into an agreement with B., who acknowledged its terms by writing a memorandum at the foot of a copy of the letter, and signing it; and afterwards C. became guarantor for B. to A. by an indorsement on the back of the copy of the same letter, referring to the terms of the agreement therein contained:—Held, in an action on the guarantee, that the reference by the indorsement to the terms of the agreement as forming part of one transaction, was a sufficient memorandum of the consideration within the statute. *Stead* v. *Liddard*, 8 Moore, 2; 1 Bing. 196; 1 L. J. (o.s.) C. P. 52.

The plaintiff, at the request of the defendant, sold to C. some wine, to be paid for by bills, and received from the defendant the following guarantee, signed by him: "Upon your handing me your two drafts upon C. for 200*l.* and 146*l.* at six months from this date, I undertake to get them accepted by him, and to see that they are duly paid." It was afterwards discovered that the draft for the sum mentioned as for 146*l.* should have been for 150*l.*; and accordingly the plaintiff drew bills for 200*l.* and 150*l.*, which the defendant got accepted by C., and gave to the plaintiff, and then wrote across the guarantee as follows: "I have received the two drafts (one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*), both accepted by C." The plaintiff signed this receipt, but not the defendant. The plaintiff having declared on the instrument as a contract, in consideration that the plaintiff would, at his own expense, procure stamps for and draw two bills, one for 200*l.* and the other for 150*l.*, at six months, and deliver them to the defendant, he would get them accepted and see them paid:—Held, that the instrument was a valid memorandum of the contract declared on, within the Statute of Frauds, since the indorsement, having been made for the purpose of correcting the mistake, and being written by the defendant on the same piece of paper as the original undertaking, must be considered as authenticated by the signature of the defendant. *Black* v. *Gomperts*, 7 Ex. 862; 21 L. J., Ex. 278.

Reference to other Documents.]—Action on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for Scott Brothers, for moneys advanced by the plaintiff to them; that after the judgment recovered, the plaintiff settled with Scott Brothers, and that there was nothing due upon the judgment for moneys advanced. Replication, that a deed was executed between the plaintiff and Scott Brothers, whereby, after reciting the judgment and various disputed accounts, an agreement was made between the plaintiff and Scott Brothers, for the settlement of all disputes, by which it was agreed that the plaintiff should advance 800*l.* to a banking company, which he had guaranteed to them, and 200*l.* to Scott Brothers, and that the debt from Scott Brothers should be fixed at 1,000*l.*, and that the agreement should be without prejudice to the security of the judgment against the defendant. Averment, that after the making of the deed, and before the execution by the plaintiff, in consideration that the plaintiff would execute it, and would advance 800*l.* and 200*l.*, the defendant promised that the judgment should stand security for the repayment of 1,000*l.* and interest. Averment of performance by the plaintiff, and that 800*l.* and 200*l.* had been advanced, but never repaid. Rejoinder traversing the promise as alleged. To prove this issue, the plaintiff put in the following letter from the defendant, and another surety, dated before the execution of the deed by the plaintiff: "We hereby consent to the within deed being executed by and between the parties without prejudice to the rights and remedies of the plaintiff, under his judgment for 10,000*l.* to recover 1,000*l.*" This letter had been annexed to the deed, and was intended to have been sent therewith to the defendant for signature, but the letter alone was sent, and the defendant signed it without seeing the deed. Semble, that this was not a promise to pay the debt of another within the Statute of Frauds; but that if it was, there was a sufficient memorandum in writing, as the letter signed by the defendant incorporated so much of the deed as formed the consideration of his promise. *Macrory* v. *Scott*, 5 Ex. 907; 20 L. J., Ex. 90.

Where the defendant undertook to guarantee to the assignees of a bankrupt the payment of 100*l.* due to the estate of the bankrupt from S. for articles delivered to the latter for the use of his trade, so that the guarantee should not be put in force against the defendant for two whole years from its date; and the defendant, previously to the guarantee, wrote a letter to the assignees proposing the terms on which it was to be given, and afterwards recognised it:—Held, that the correspondence and guarantee were to be taken together, and constituted a sufficient consideration for the promise, although it was objected that no consideration was expressed on the face of the guarantee itself. *Coe* v. *Duffield*, 7 Moore, 252.

The defendants, who were in partnership as railway contractors, under the name of W., A. & Co., contracted with a railway company to do certain works. U. and R. made a sub-contract with the defendants to do part of the work, and for that purpose, requiring coals to make bricks, A., without the knowledge or assent of his co-partners, signed in the name of the firm, and delivered to the plaintiffs a guarantee, not addressed to any person, for payment of coals to be supplied to U. and R. The plaintiffs having pointed out the omission, a clerk of W., A. & Co., by the direction of A., wrote to the plaintiffs, stating that the guarantee was intended for them. The clerk also, without the knowledge of the other partners, wrote to the plaintiffs certain letters amounting to evidence of an account stated in respect of the amount due on the guarantee:—Held, that the guarantee and subsequent letter constituted a sufficient note in writing within the statute. *Breitel* v. *Williams*, 4 Ex. 623; 19 L. J., Ex. 121.

The defendants wrote to the plaintiff by letter dated September 15th: "Burton, Balderson. Dear sir,—We hereby guarantee the safety of the above investments": and by letter dated

September 16th. "We acknowledge to have received from you the sum of 710*l.* as under: a mortgage on the estate at T., the property of Mr. Burton, 360*l.*; a mortgage on the estate at F., the property of Mr. Balderson, 350*l.*" The plaintiff advanced money through the defendants on mortgage of the property, and subsequently sued them as guarantors of the mortgage:—Held, that the two letters could be read together and were a sufficient memorandum of the contract within s. 4 to the Statute of Frauds, and that the defendants guaranteed that the loan would be repaid. *Sheers* v. *Thimbleby*, 76 L. T. 709—C. A.

Guarantee addressed to no one.]—A guarantee not addressed to any one will enure to the benefit of those to whom and for whose use it is given. *Walton* v. *Dodson*, 3 Car. & P. 162.

Payment of Consideration, by whom.]—"I hereby guarantee you the payment of the proceeds of the goods you have consigned to my brother, and also any future shipments you may make in consideration of 2*s.* 6*d.* paid me," is a sufficient memorandum within the statute to make the subscriber liable to the vendor, notwithstanding it does not expressly disclose by whom the 2*s.* 6*d.* was paid. *Dutchman* v. *Tooth*, 5 Bing. (N.C.) 577; 7 Scott, 710.

The intendment will be, that it was paid by the party to whom the memorandum was given. *Ib.*

See further, CONTRACT.

2. STAMP.

Necessity of.]—Where the consideration did not appear on the face of the guarantee, a stamp was held nevertheless necessary. *Whitfield* v. *Moojen*, 1 F. & F. 290.

Relating to Sales of Goods.]—A broker, when he bought goods for his principal, agreed for a half per cent. to indemnify him from any loss on the resale; the agreement, if reduced to writing, need not be stamped, because it is a contract relating to the sale of goods. *Curry* v. *Edenser*, 3 Term Rep. 524.

So a guarantee for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception in the stamp act as a contract relating to the sale of goods, and does not require to be stamped. *Warrington* v. *Furbor*, 8 East, 242; 6 Esp. 89. S. P., *Watkins* v. *Vince*, 2 Stark. 368.

Charterparty.]—A guarantee for the due performance of a charterparty does not require to be stamped as a charterparty or an agreement for the charter of any ship, or any memorandum, letter, or any other writing between the captain or owner of any ship and any other person, for or relating to the freight or conveyance of goods, on board such ship, within 5 & 6 Vict. c. 79, s. 2. *Rein* v. *Lane*, 8 B. & S. 83; 36 L. J., Q. B. 81; L. R. 2 Q. B. 144; 15 L. T. 466; 15 W. R. 345.

Collateral Purposes.]—A declaration stated, as the consideration of a promise, the giving up of a certain guarantee; plea, that the plaintiff did not give up the guarantee:—Held, that the guarantee might be given in evidence, though unstamped. *Haigh* v. *Brooks*, 3 P. & D. 452; 10 A. & E. 309; 9 L. J., Q. B. 194.

H., being a tenant to E., G. signed the following document: "August 2nd. According to Mr. H.'s request, the land at B., under Mr. E., I will be bound for until next Lady-day, rent 48*l.*" This document being tendered in evidence in an action by S. against H. for money paid to the landlord:—Held, that it required an agreement stamp. *Glover* v. *Hackett*, 2 H. & N. 487; 26 L. J., Ex. 416; 3 Jur. (N.S.) 1083; 5 W. R. 881.

Bond to Sheriff—Addition of Obligor after Execution — New Stamp.] — The addition of another obligor in a bond given to the sheriff after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond nor make a new stamp necessary. *Matson* v. *Booth*, 5 M. & S. 223.

3 PARTIES.

Relationship of Parties Generally.]—There are three kinds of cases between which it seems important to distinguish. (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. *Duncan, Fox & Co.* v. *North & South Wales Bank*, 50 L. J., Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763—H. L. (E.)

A. and B. desiring to borrow money of a bank, the bank refused unless C. would join to secure them; C. agreed to join, and A., B. and C. drew a cheque, and the money was paid to them:—Held, that this was a joint, and not a joint and several liability; and that C. was in the nature of a surety only. *Other* v. *Iveson*, 3 Drew. 177; 3 Eq. R. 562; 24 L. J., Ch. 654; 1 Jur. (N.S.) 568; 3 W. R. 332.

Signature by Agent.]—By 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, and not by an agent. The plaintiff sued J. and G. jointly for a false representation with respect to the solvency of Sir William Russell. J. was sued as the public officer of a banking company formed under 7 Geo. 4, c. 46, and G. was the manager of one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to Sir William Russell's credit. The manager wrote a letter addressed to the manager of the banking company, requesting information whether Sir William Russell was responsible to the extent of 50,000*l.* G. replied in his own name, signing his letter as manager, and giving a favourable account of Sir William Russell's responsibility. The plaintiff, in consequence of this letter, supplied Sir William Russell with goods, for which he never was paid, in consequence of his insolvency. The statement made by G. was false to his knowledge. The banking company had no

knowledge, otherwise than through G., that such letter had been written, and gave him no express authority to write the letter; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—Held, that the signature of G. to the letter could not be considered the signature of the banking company itself. *Swift* v. *Jewesbury*, 43 L. J., Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319—Ex. Ch.

The signature of an authorised agent is not a sufficient signature within 4 Geo. 4, c. 14 (Lord Tenterden's Act), s. 6, whereon to charge a party making a false representation. *Williams* v. *Mason*, 28 L. T. 232; 21 W. R. 386.

C. M. and A. M. were trading as M. & Son. A. M., the son, wrote to the plaintiff a letter signed M. & Son, in which he represented G. to be solvent. This letter was shewn to and tacitly ratified by C. M., the father. G. proving insolvent:—Held, that, notwithstanding the ratification of the letter by C. M., the letter was not signed by the "party to be charged," within the meaning of the above statute, so as to make him liable for any false representation therein. *Ib.*

Joint and Several Guarantees.]—A. and B. gave a joint and several guarantee to be responsible for the printing account of a company; B. afterwards became the secretary of the company; A. was sued separately on the guarantee, and pleaded equitably, that he gave it on the faith that some other person than B. should be secretary, which the plaintiff well knew, and assented to, and that he had never consented that B. should be secretary:—Held, bad. *Burridge* v. *Child*, 10 Jur. (N.S.) 106.

A declaration by A. against B. upon a guarantee is supported by proof of a document drawn up in the plural number, and concluding, "as witness our hands," but signed by B. alone. *Norton* v. *Powell*, 4 Man. & G. 42; 11 L. J., C. P. 202.

A., as principal, and three sureties, B., C. and D., executed a bond to E. for the fidelity of A. in certain duties for which he was employed by E., the bond being in the following form: "We, A., B., C. and D., are held and firmly bound to E. in the sum of 50*l.* each, to be paid to E., his executors, administrators, and assigns, to which payment, well and truly to be made, we hereby bind us, and each of us, our and each of our heirs, executors and administrators, and every of them, by these presents":—Held, that the bond was the separate bond of each obligor, binding each to pay the sum of 50*l.* in the event of default by the principal; and that, therefore, the payment of 50*l.* by B., one of the obligors, after breach, was no answer to an action on the bond against another obligor, C. *Armstrong* v. *Cahill*, 6 L. R., Ir. 440.

A firm of bankers took a continuing guarantee for advances to a customer in the form of a joint and several bond from two sureties. One of the sureties died, and after notice thereof the bank made further advances to the customer:—Held, that the surviving surety was liable to the bank in respect of such advances. *Beckett* v. *Addyman*, 51 L. J., Q. B. 597; 9 Q. B. D. 783—C. A.

The defendants had given the plaintiffs a guarantee, which, after stating the consideration, was in the following form: "We undertake and guarantee that the 400*l.* and interest shall be duly paid to you when the acceptance arrives at maturity, in the proportion of 200*l.* each." This was signed by both the defendants:—Held, that they were not liable jointly for the whole amount. *Fell* v. *Goslin*, 7 Ex. 185; 21 L. J., Ex. 145.

Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent:—Held, to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. *Robinson* v. *Gee*, 1 Ves. 251.

Action by one of several Parties.]—E., as attorney for the executors of M., having sold an estate, to a share of the proceeds of which W. was entitled, as legatee of M., and the defendant claiming W.'s share of such proceeds under an agreement with W., the executors paid the amount to the defendant on receiving from him a guarantee, addressed to E., and also to the executors of M., to indemnify them and each of them against any action by W.:—Held, that they might sue on this guarantee without joining E. *Place* v. *Delegal*, 4 Bing. (N.C.) 426; 1 Arn. 185; 6 Scott, 249; 7 L. J., C. P. 227.

F. covenanted with the three plaintiffs to complete certain houses by a day fixed, on three several parcels of land mortgaged to the three plaintiffs respectively, and they covenanted to advance money to enable him to do so. In consideration of this arrangement the defendants jointly and severally guaranteed to the plaintiffs that F. should duly fulfil his covenant; and it was agreed that their joint and several liability should not exceed 100*l.* F. having made default:—Held, that the three plaintiffs were entitled to recover in a joint action on this guarantee, in respect of damages sustained by any one of them, to the extent of 100*l.* *Pugh* v. *Stringfield*, 27 L. J., C. P. 225; 6 W. R. 487. And see *S. C.*, 4 C. B. (N.S.) 364.

Where a man covenants with two or more jointly, yet if the interest and cause of action of the covenantees be several, and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages, notwithstanding the words of the covenant are joint. *Palmer* v. *Sparshott*, 4 Man. & G. 137; 4 Scott (N.R.) 743; 11 L. J., C. P. 204.

By Partners.]—One partner has no incidental authority to bind another in the name of the firm by a guarantee of the debt of a third person; and therefore it is necessary in such case to give some evidence of authority from him who did not sign for his subsequent recognition. *Duncan* v. *Lowndes*, 3 Camp. 478; 14 R. R. 815.

But a subsequent parol acknowledgment of the other partner is evidence of such an authority. *Ib.*

A partner may give a guarantee where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it. *Nolte, Ex parte*, 2 Glyn & J. 295.

A., B. and C. were railway contractors in partnership, and had entered into a contract to do certain work for a railway company. D. had entered into a sub-contract to do part of the work, for which part bricks were required; and it was necessary that D. should have coals to burn the bricks. In order to induce the plaintiff to supply D. with coals, A., without the previous knowledge or subsequent assent of his co-partners, entered into a guarantee, in the name of the firm, to secure the payment of the price

of the coals to be supplied to D. by the plaintiff:—Held, that B. and C. were not liable on the guarantee. *Brettel* v. *Williams*, 4 Ex. 623; 19 L. J., Ex. 121.

By Directors of Company.]—Where some only of a body of directors have given a guarantee, they are primarily liable, unless the other directors adopt it. *Dover, Deal, and Cinque Ports Ry., In re, Londesborough (Lord), Ex parte*, 1 Eq. R. 271; 1 W. R. 363.

To Member of Firm.]—A guarantee for goods addressed to one of two partners may be declared on as given to both, if it appears that the partner to whom it was addressed did not carry on any separate business. *Walton* v. *Dodson*, 3 Car. & P. 162.

Where a guarantee was given personally and individually to one of several partners in a firm:—Held, that an action should be brought in the names of all the firm, as it appeared that the guarantee was intended for the benefit of all. *Garrett* v. *Handley*, 7 D. & R. 144; 4 B. & C. 664; 1 Car. & P. 483; 27 R. R. 405.

If a plaintiff has been applied to to lend money to A., and the plaintiff requests a firm of which he is a member to do so, and they advance the money, debiting A. in their books, the plaintiff cannot maintain an action against a third person, who has guaranteed the repayment of the money to be advanced to A. by the plaintiff. *Ib.*

A., a member of a firm of A. Brothers, of South America, went to Hong Kong, to enforce a debt due by B. & Co., of that place, to his firm. Upon B. & Co. being threatened with proceedings, they applied to C. & Co. for assistance. C. & Co. agreed to advance B. & Co. the money to pay their debt by remitting the amount to A. & Co., and afterwards, in pursuance of this agreement, and in consideration of A.'s not proceeding to sue B. & Co., gave an undertaking in writing whereby C. & Co. promised to remit the amount to A.'s agent in London at the expiration of six months, whereon A. gave B. & Co. a receipt in full for the debt due to the firm of A. & Co. C. & Co. afterwards repudiated their obligation to remit the amount to A. & Co. A. brought an action against C. & Co.:—Held, that the contract being entered into with A. personally, upon his undertaking not to sue B. & Co., constituted a personal agreement; and that A. was entitled to sue C. & Co. in his own name, without joining his partners in the action. *Agacio* v. *Forbes*, 14 Moore, P. C. 160; 4 L. T. 155; 9 W. R. 503.

Guarantee to Mortgagee—Right of Transferee of Mortgage to Sue—Amount Recoverable.]—In 1879 the defendants wrote to the plaintiff, by letter dated September 15: "Burton, Balderson. Dear Sir,—We hereby guarantee the safety of the above investments"; and by letter dated September 16: "We acknowledge to have received from you the sum of 710*l.* as under: a mortgage on the estate at T., the property of Mr. Burton, 360*l.*; a mortgage on the estate at F., the property of Mr. Balderson, 350*l.*" The plaintiff A. advanced to Burton on mortgage of the estate at T. the sum of 360*l.*, through the defendants. In 1891 the plaintiff A. conveyed and transferred to the plaintiff B., in consideration of 300*l.*, the benefit of the mortgage. In 1896 the plaintiffs sued the defendants to recover the sum of 360*l.* from them as guarantors of the mortgage:—Held, that the plaintiff B. could not sue upon the guarantee, and the plaintiff A. could recover only 60*l.* *Sheers* v. *Thimbleby*, 76 L. T. 709—C. A.

Guarantee to Inhabitants of Town.] — The defendant, on occasion of there being a great run upon a banking house, went to the bank and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency; and afterwards the defendant signed the following written paper: "I do hereby authorise G. B. to assure the inhabitants of Pembroke and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the Milford Bank as far as the sum of 30,000*l.* will extend to pay":—Held, that, the bank having afterwards stopped payment, the defendant was not liable upon this undertaking to an action by an individual holder who had taken the notes after notice of such undertaking, but before the stoppage. *Phillips* v. *Bateman*, 16 East, 356—Ex. Ch.

Evidence as to.]—A letter addressed by the defendant to Mr. G., who was the plaintiff's attorney, stating that "the bearer, D. Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid," and signed by the defendant, is evidence to charge him with the debt due from Williams to the plaintiff, upon parol proof of its amount, and that Mr. G., to whom it was addressed, was the attorney of the plaintiff, and received the letter in that character from Williams, the bearer, and not as the principal and creditor. *Bateman* v. *Phillips*, 15 East, 270.

—— **Authority of Agent.**]—The managing clerk of the firm, without the knowledge of B. and C., wrote letters to the plaintiff containing evidence of an account stated respecting the amount due under a guarantee:—Held, that, as the giving the guarantee was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B. and C. *Brettel* v. *Williams*, 4 Ex. 623; 19 L. J., Ex. 121.

Evidence that a son had in three or four instances signed bills of exchange for his father is sufficient, in an action on a guarantee, to warrant the production and reading an instrument which purports to be a guarantee by the father in the handwriting of the son. *Watkins* v. *Vince*, 2 Stark. 368.

4. When Concluded.

What is an Acceptance of Offer.]—The defendant being desirous of having goods shipped to R. & Co., his agents in India, applied by letter on the 9th July, 1868, to the plaintiffs, who were manufacturers of edge tools, carrying on business at Sheffield, asking the price of certain tools to be sent out to India to the firm of R. & Co. The plaintiffs in reply stated their lists of prices, and that their terms were cash settlement in England

within a few weeks. On the 11th of the same month the defendant wrote to them as follows: "I shall be very glad that you should come to an arrangement with R. & Co. that they should be your agents there; but that requires direct correspondence between you and them. I am quite willing to guarantee the first shipment." The same day the plaintiffs inclosed a list of prices, and requested a confirmation of the order, which the defendant accordingly sent. The goods, amounting in value to 800*l.*, were accordingly shipped to R. & Co. in India. Other shipments followed. The sum of 300*l.* only having been paid by R. & Co. in respect of this first shipment, the plaintiffs in July, 1871, wrote to the defendant, "We sincerely hope it may not be necessary to act upon your letter of the 11th July, 1868." In two letters which the defendant subsequently wrote to the plaintiffs he never disclaimed his liability, but on the 26th September, 1871, he wrote, "As the event on which I expressed my willingness to guarantee never took place, it never became effective." R. & Co. having stopped payment, and there being 530*l.* still due upon the first shipment of goods, the plaintiffs sued the defendant upon his guarantee:—Held, that there was an express offer of a guarantee, and an intimation of acceptance. *Sorby* v. *Gordon*, 30 L. T. 528.

A written proposal to pay a moiety of the debt of another, if the creditor will, at a specified time of meeting, accept the proposal and discharge the debtor, is not binding unless the creditor accedes to the terms in writing. *Gaunt* v. *Hill*, 1 Stark. 10.

A written undertaking was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone) to the following effect: "I understand that A. & Co. have given you an order for rigging. I can assure you, from what I know of A.'s honour and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit," which paper was handed over by A. to the plaintiffs, together with a guarantee from another house, which they required in addition; and the goods were thereupon furnished:—Held, that the paper did not amount to a guarantee, there being no notice given by the plaintiffs to the defendant that they accepted it as such, nor any consent of the defendant that it should be a conclusive guarantee. *M'Iver* v. *Richardson*, 1 M. & S. 557.

Guarantee in the following form: "F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to B." Signed G. T. B. wrote this memorandum, and added "witness to G. T., J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on a guarantee:—Held, that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover. *Mozley* v. *Tinkler*, 1 C., M. & R. 692; 5 Tyr. 416; 1 Gale, 11; 4 L. J., Ex. 84.

In an action on a guarantee, the plaintiff gave in evidence a letter in the handwriting of the defendant, but without date, in which the latter stated, "I have no objection to guarantee the payment of the rent as far as each quarter during Mr. T. Want's continuance in possession"; he also proved that T. Want rented certain premises from him. This is not sufficient without shewing that the plaintiff accepted the defendant's offer. *Symmons* v. *Want*, 2 Stark. 370.

In an action on articles of agreement under which a banking company was to make advances to a firm, to be guaranteed by the defendants at a limited rate of interest, and in consideration of the guarantee the banking company was to release a debt due from the firm, the performance of the agreement extending over several years, a plea, that it was not executed on behalf of the company, "nor otherwise agreed to" by them (it appearing that the defendants brought it to the company, executed it, and left it with them, who had acted upon it by making the advances at the specified rate of interest, but had never executed it):—Held, that the plea was not supported, and that the company was entitled to recover. *Liverpool Borough Banking Co.* v. *Eccles*, 4 H. & N. 139; 28 L. J., Ex. 122.

Time for.]—In an action for goods sold, the defendant pleaded that the defendant and M. agreed with the plaintiffs that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. Replication denying the agreement, and the acceptance of the guarantee. It was proved by Mr. L., the plaintiffs' attorney, that he had asked him to propose to the plaintiffs to accept his guarantee, and that, Mr. L. having consented to do so, M. signed a guarantee, which was on the next day sent by Mr. L. to the plaintiffs, who kept it three weeks, and then returned it:—Held, that if the plaintiffs did not return the guarantee within a reasonable time, they must be taken to have accepted it; and that, unexplained, three weeks was an unreasonable time. *Pope* v. *Andrews*, 9 Car. & P. 565.

Representation as to Credit of Another—Evidence.]—C. representing that he was acting for the stepbrother of the other defendant, D., bought a business and lease of premises in his own name, and carried on the business for about three years, and then assigned to the defendant D., who referred the persons, the plaintiffs among others, who supplied goods on her orders, to C. for a reference, who certified that she was able to pay. C. then got D. to assign all to him by a bill of sale for an alleged debt:—Held, that the judge at the trial was right, on this evidence, in telling the jury that there was no evidence to fix C. with liability to pay plaintiffs for goods so supplied to D. *Block* v. *Cox*, 2 L. T. 517—Ex. Ch.

Mistake.]—Under a judicial sale of real estate in St. Lucia, L., professing to act as attorney for W. and wife, resident in France, purchased the estate on their behalf. The purchase-money was to be paid, according to the ordinance in force in that island, by instalments, and D. became surety, in solido, for payment of the second instalment. The deed for the purchase and the notarial deed were executed by one of the trustees, who was resident in the colony, and by such deed it was stipulated that the sale should be confirmed and ratified by the two trustees resident in England within six months. By a deed poll, the sale to W. and his wife was confirmed and ratified by the trustees in England. Default was made in payment of the second instalment. It was afterwards discovered that the power of attorney to L. was confined to W. alone, and contained no authority from his wife

when the trustees discharged the wife from the contract:—Held, that D. was not liable as surety, as the sale professed to be to W. and wife by the three trustees, while in fact the sale was to W. only, and as such was an ineffectual and void sale. *De Brettes* v. *Goodman*, 9 Moore, P. C. 466.

The plaintiffs' agent entered into a contract to supply bricks to a builder at certain prices "to be taken within four months from the date thereof. Month's account, and bill at five months from date thereof, the due performance of this contract by" the builder being guaranteed by the defendant. This was signed by the defendant, but he and the plaintiffs' agent both understood and agreed that he was thereby guaranteeing only the acceptance of bills by the builder. The plaintiffs always believed the defendant had guaranteed the payment of the bills, and heard nothing of the agreement of their agent with the defendant. The agent had received no authority from the plaintiffs to assent to such a guarantee as the defendant intended, and the plaintiffs supplied the bricks on the faith of the guarantee, as they interpreted it:—Held, that the contract was a guarantee for the payment of these bills, and that this was not such a mutual mistake between the parties as to constitute an equitable ground of defence to an action upon the guarantee. *Haymen* v. *Gover*, 25 L. T. 903.

Subsequent Ratification.]—In an action for a balance due upon a note, it appeared that the amount had been advanced by the payee to one of the makers, on his undertaking that three other persons, of whom the defendant was one, would sign it with himself as his sureties. Two of the three did sign it, and the money was advanced. The defendant, when afterwards applied to, declined to sign it for some time, declaring that he had not authorised a note for so large an amount; but ultimately he signed it, and made payments upon account:—Held, that he was liable upon it for the balance. *Dodge* v. *Pringle*, 29 L. J., Ex. 115.

5. On Acceptance or Payment of Bills or Notes.

Effect of Acceptance.]—The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. *Duncan, Fox, & Co.* v. *North and South Wales Bank*, 50 L. J., Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763—H. L. (E.)

Extent of acceptance of bills by a surety. *M'Fee* v. *Morris*, 7 Jur. 387.

Proof or Guarantee by Parol.]—In an action on a bill of exchange, where the defendant had indorsed it as security for the acceptor:—Held, that, as the action was brought on the bill, and not on the guarantee, the agreement to become surety could be proved by parol evidence. *Wilkinson* v. *Unwin*, 50 L. J., Q. B. 338; 7 Q. B. D. 636; 46 L. T. 123; 29 W. R. 458—C. A.

A. wanting money, he and the defendant applied to the plaintiff to draw a bill, to be accepted by A., and indorsed by the defendant, and the defendant promised the plaintiff that she should not be called upon. The jury found that A. and the defendant were both principals in the transaction:—Held, that the plaintiff, having paid the bill, was entitled to receive the amount without proof of a promise in writing under the Statute of Frauds. *Batson* v. *King*, 4 H. & N. 739; 28 L. J., Ex. 327.

A., at the request of and on a verbal offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note, which he was afterwards compelled to pay:—Held, that the offer to indemnify A. was not an agreement within the Statute of Frauds, and need not be in writing, and A., having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate. *Wildes* v. *Dudlow*, 44 L. J., Ch. 341; L. R. 19 Eq. 198; 23 W. R. 435.

A., as agent for some manufacturers, sold to B., who likewise acted as an agent, a quantity of shoes, and received bills of exchange in payment; B., being pressed to indorse them, refused, but wrote a letter to A., in which he inclosed the bills, and added, "that, should they not be honoured when due, he (E.) would see them paid":—Held, that this was a sufficient agreement to bind B. to pay for the goods in default of his principal. *Morris* v. *Stacey*, Holt, N. P. 153.

Discounting Bills.]—The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3*l.* per cent. upon the amount of the invoice, he would pay the plaintiff cash and take C. & Co.'s bill without recourse; in other words, buy the bill of him:—Held, that this was a contract to answer for the debt of another, and must be in writing. *Mallett* v. *Bateman*, 1 H. & R. 109; 35 L. J., C. P. 40; L. R. 1 C. P. 163; 12 Jur. (N.S.) 628; 13 L. T. 410; 14 W. R. 225—Ex. Ch.

M. drew bills upon the B. and A. Company; and a banking company, under an agreement with M., guaranteed the acceptors (also a company) that they would supply them with funds to meet the bills. S. discounted the bills, being informed by M. of the guarantee of the banking company, but he gave no notice to the banking company or to the acceptors. Afterwards the banking company and the acceptors suspended payment and were wound up. M. also executed a deed of composition with his creditors:—Held, that S. had no equity to rank as a creditor of the banking company in respect of the guarantee. *Barned's Banking Co., In re, Stephens, Ex parte*, L. R. 3 Ch. 753; 19 L. T. 198; 16 W. R. 1162.

"Renewal"—Variation—Discharge of Surety.]—The holder of two bills about to fall due agreed with the drawer (F.) to renew them if the testator guaranteed the new bills, and the holder wrote to the testator to that effect; the testator replied, "I hereby guarantee the payment by F. of two bills you intend to renew for him, one for 1,048*l.* 10*s.* 5*d.* and the other for 462*l.* 6*s.* 6*d.*, due respectively 28 inst. and 4 prox." Two bills were drawn by the holder on F. at three months, both dated the same day, for amounts differing from the former bills, but for the same amount in the aggregate. These bills were not

met:—Held, that the word "renew" was not used in the technical sense by the testator, but that he meant to guarantee the payment of the amount of the old bills, and that nothing had happened to discharge him from his guarantee. *Barber* v. *Mackrell*, 2 R. 72; 68 L. T. 29; 41 W. R. 341—C. A.

Principal or Surety.]—Where two persons give a joint note for the debt of one, it is necessary, in order to give the other the rights of a surety as against the creditor, to show that he was only a surety, that the creditor knew him to be so, and that he accepted him as such. *Strong* v. *Foster*, 17 C. B. 201; 25 L. J., C. P. 106; 4 W. R. 151.

A person appearing on the face of an instrument to be a principal debtor, jointly with another, cannot at law set up, as against third parties that he was only a surety. *Ib.*

A., being a customer of a bank, got B. to join him in a note to the bank, and sent the note to the bank, intimating that he had got B. to join him in it, but the note was not entered in A.'s account. After it became due, A. had a balance at the bank larger than the amount of the note. In an action on the note, by the bank against B., he pleaded that he was only surety, and was accepted as such by the bank; that the bank gave A. time for the payment of the note, and forbore to enforce payment, and the bank might have obtained payment from A. if they had not given him time:—Held, that even if B. could say in equity that he was surety, the plea was not proved, that it did not appear that he was accepted as surety, that there was no evidence that time had been given to A. so as to discharge B., and that the bank did not, by refraining from appropriating A.'s balance to the payment of the note, discharge B. from his liability on it. *Ib.*

A bonâ fide holder of a bill or note cannot be prejudiced in the rights which he has, according to the terms of the instrument, by knowledge that the acceptor or maker is surety for another, and where there is no specific agreement at the time when he takes the instrument to receive it from the acceptor or maker as a surety only. *Manley* v. *Boycot*, 2 El. & Bl. 46; 22 L. J., Q. B. 265; 17 Jur. 1118.

If one maker of a note signs as surety only for the other, and the payee has notice of this when he takes the note as security for money advanced to the principal, he cannot give time to the principal without the consent of the surety. If he does so, the surety is discharged in equity, although the payee has never agreed to treat him otherwise than as a principal liable upon the note, for an equity arises from the relation of principal and surety, and notice thereof to the payee, and if the surety is sued on the note after such time given, he may set up the defence by a plea on equitable grounds. *Greenough* v. *M'Clelland*, 2 El. & El. 424; 30 L. J., Q. B. 15; 6 Jur. (N.S.) 772; 2 L. T. 571; 8 W. R. 612—Ex. Ch. S. P., *Taylor* v. *Burgess*, 5 H. & N. 1; 29 L. J., Ex. 7; 5 Jur. (N.S.) 1317; 1 L. T. 12; 8 W. R. 27.

Action by payee against maker of a note. Plea, on equitable grounds, that the note was made by the defendant jointly with H. as the surety only of H., and was delivered to the plaintiff, and accepted by him, upon an express agreement that the defendant should be liable thereon as surety only for H., and that the plaintiff at the time the note was made had knowledge of the same having been so made by him as such surety; and that the plaintiff, without the consent of the defendant, gave H. time for the payment of the note:—Held, that the defendant was entitled to judgment, on the ground that the plea sufficiently stated that the relation of principal and surety existed between the defendant and the principal debtor inter se, and that the plaintiff had knowledge of that fact when the note was made and received by him, and when he gave time to the principal debtor. *Pooley* v. *Harradine*, 7 El. & Bl. 431.

One of the makers of a joint note may show that he was a mere surety for the other party, and so known to the plaintiff, the payee of the note; and that the plaintiff has taken a composition from the principal debtor. *Hall* v. *Wilcox*, 1 M. & Rob. 58.

A. and B. gave a joint promissory note, upon which money is lent by C. to them, and by them to D. B. becomes a bankrupt, and A. is obliged, after the bankruptcy, to pay the note:—Held, that he is not a surety for B., but that A. and B. are principal debtors or co-sureties, and therefore that A. could not prove for a moiety of the note against B.'s estate. *Porter, Ex parte*, 4 Deac. & C. 774; 2 Mont. & Ayr. 281; 4 L. J., Bk. 86.

Joint or Several Liability.]—A surety, who as such was indebted together with his principal upon a joint note, received from the holder a letter, stating that the holder was about to make the principal a bankrupt, but could not proceed without joining the surety, and asking whether the surety would join the principal in a fresh note payable jointly and severally. The surety's solicitor answered that the surety would in a post or two pay the amount and interest due on the joint security:—Held, that the contract was not changed, and that the surety had, neither at law nor in equity, rendered himself severally liable. *Jones* v. *Beach*, 2 De G. M. & G. 886; 22 L. J., Ch. 425.

Quære, whether the dicta in *Thorp* v. *Jackson* (2 Y. & Coll. 561) can be supported, and whether a joint loan creates in equity a joint and separate liability. *Ib.*

Appropriation of Balance of Current Account to Payment of Note.]—The plaintiffs lent 1,000*l.* to B., one of their customers, upon the security of a joint and several promissory note, payable on demand, made by B. and the defendant, a solicitor, and also upon the deposit of the deeds of a house of which B. was the owner, together with a memorandum signed by B. that the deeds were deposited as security for any general balance not exceeding 1,000*l.*, which might then or thereafter be due to the plaintiffs from him. The memorandum contained an undertaking by B. to execute a legal mortgage of the house, but this undertaking was not carried out. Subsequently, in March, 1875, an arrangement was entered into without the knowledge of the defendant, between the plaintiffs and B., whereby it was agreed that the plaintiffs should not press for repayment of the loan, but that B. should pay instead a higher rate of interest than that on which the loan was originally made, and this higher rate was afterwards debited to B. in his current account. The loan and current account were always kept distinct, and for some months subsequent to this arrangement the plaintiffs always had a balance exceeding 1,400*l.* to the credit of B. The plaintiffs having pressed for

the execution of a legal mortgage with the usual power of sale, the defendant's partner, on behalf of and in the name of his firm, prepared a legal mortgage to the plaintiffs, another solicitor acting for B. This mortgage, which was executed by B., secured the payment to the plaintiffs of any sum not exceeding 1,500*l.* which might thereafter be due to the plaintiffs upon B.'s general account, with interest at 6 per cent., and also contained a covenant for payment three months after demand, and a power of sale in case of default. In an action brought upon the promissory note against the defendant, after default made by B. :—Held, that the defendant had signed and was liable upon the promissory note as principal, and that as there was no evidence to show that the plaintiffs had agreed to accept the defendant merely as surety, he was not entitled to be treated as such. *York City and County Banking Co.* v. *Bainbridge*, 43 L. T. 732 ; 45 J. P. 158.

The defendants signed a note as security for a loan from a club of which they were members. By the rules certain payments were made at every monthly meeting for particular purposes : —Held, that the defendants, who signed as sureties for the other defendant, had no right to set off these monthly payments by the principal, as made on account of the sum secured by the note. *Wright* v. *Hickling*, 36 L. J., C. P. 40 ; L. R. 2 C. P. 199 ; 15 L. T. 245.

Presentment Unnecessary.]—Where a party guarantees the payment of a promissory note, if it is not duly honoured and paid by the maker according to its tenor and effect, he is liable on his guarantee, if the note is not paid by the maker when due, without any presentment to him for that purpose. *Walton* v. *Mascall*, 13 M. & W. 452 ; 2 D. & L. 410 ; 14 L. J., Ex. 54.

A. guaranteed to B., that if B. would furnish C. with goods on credit, and draw upon C. from time to time for the price of them, A. would pay for the goods. B. supplied C. accordingly, and drew upon him, for the price of the goods, a bill which C. accepted, but did not pay at maturity. In an action against A. by B. for the value of the goods, he was not able to prove presentment of the acceptance to C. for payment, nor notice of dishonour to A. :—Held, that it was not requisite for B. to produce such proof ; for since A. was not a party to the bill, but only a collateral security, he was not entitled to take advantage of the provisions of the law merchant respecting transactions on bills of exchange or promissory notes ; nor could he set up any laches on the part of B. with respect to the bill in question, unless he had sustained special damage thereby. *Hitchcock* v. *Humphrey*, 6 Scott (N.R.) 540 ; 5 Man. & G. 559 ; 12 L. J., C. P. 235 ; 7 Jur. 423.

Interest.]—A party who guarantees the due payment of a bill of exchange by the acceptor is liable for interest upon it, if it is not paid when due. *Ackerman* v. *Ehrensperger*, 16 M. & W. 99 ; 16 L. J., Ex. 3.

Lending Acceptance.]—Where a plaintiff lent his acceptance to a defendant :—Held, that the term implied a contract of indemnity, and might be declared on as such. *Reynolds* v. *Doyle*, 1 Man. & G. 753 ; 2 Scott (N.R.) 45 ; 1 Drink. 1.

Bill Brokers—Custom as to implied Authority from Acceptor to make themselves Liable to their Bankers.]—It being proved to be the common and almost invariable practice of bill brokers in the city of London, not to indorse each bill of exchange which they have discounted for a customer when they rediscount it with their bankers, but to give to the bankers a general guarantee for all bills which they rediscount with them :—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. *Bishop, Ex parte, Fox, In re*, 50 L. J., Ch. 18 ; 15 Ch. D. 400 ; 43 L. T. 165 ; 29 W. R. 144—C. A.

See also Cases under BILLS OF EXCHANGE.

When Delay Discharges Surety.]—*See* post, B. 9, cols. 1260 et seq.

6. CONSTRUCTION AND EFFECT.

a. Generally.

For the Court.]—In an action on a guarantee, alleged to be contained in a letter and telegram in which there were no words of doubtful trade meaning, and the extrinsic facts not being in controversy :—Held, that the question, whether the words used amounted to a contract of guarantee, was for the determination of the court alone. *Bank of Montreal* v. *Munster Bank*, Ir. R. 11 C. L. 47.

Form of Instrument.] — The following words were held not to constitute a contract to guarantee : "Our friends H. and M. have purchased a cargo from G. Last year there was delay and trouble owing to bills of lading coming in different lots, and through more than one source, and without insurances being perfected. If you obviate a repetition of this now you will oblige us much. On presentation of cash order, and all documents at Union Bank, payment will be promptly made. Excuse this trouble." *Ib.*

A. & Co. bought certain wools of B. & Co., payable by the buyers' acceptance at eight months ; but before the sale was completed, B. & Co. requiring some security in consideration of 1*l.* per cent. obtained the following instrument from C., signed by him : "Gentlemen,—In consideration of 1*l.* per cent. I hereby guarantee the due and correct payment of half the amount of 136 bales of wool sold to A. & Co., as per contract," &c. Before the bill given to A. & Co. fell due, a fiat in bankruptcy issued against C., and shortly afterwards against A. & Co., and no dividend was declared under either fiat. The bill was duly presented, and remaining unpaid : —Held, that the instrument was a guarantee. *Willis, In re*, 4 Ex. 530 ; 19 L. J., Ex. 30.

Where A. wrote an order to B. to deliver two pipes of spirits to C., and it was objected that it did not amount to a guarantee, but was a mere order for the delivery of goods, without any promise to pay for them :—Held, that the effect of the order was either to make A. the principal debtor for or in the place of C., or to make him

answerable for the debt, if C. should make default. *Langdale* v. *Parry*, 2 D. & R. 337; 1 L. J. (o.s.) K. B. 70.

A recommendation by letter of the education of infants, with an assurance that the writer was willing to go himself towards its object as far as a certain sum, construed to be a promise to pay that sum for the purpose. *Dowell* v. *Wilson*, Coop. t. Brougham, 504.

Mortgage Debt—Statute of Limitations.]—In January, 1881, A. executed a mortgage to secure an advance of 2,000*l.* and interest, which contained the usual covenants for payment of the principal and interest. On 9th May, 1882, B. executed a document in which he was expressed to "guarantee" to the mortgagee "repayment of the sum of 2,000*l.* and interest for the same." A. paid off 600*l.* of the mortgage debt and also the interest down to July, 1891. The mortgagee in October, 1891, called upon B. to pay the balance remaining due with interest under his guarantee, and upon his refusal to do so the mortgagee in May, 1892, brought an action against him to recover the same:—Held, upon the construction of the document of 9th May, 1882, that B. made himself answerable for the repayment of the 2,000*l.* and interest in accordance with the terms of the mortgage; that as the mortgagee did not bind himself not to sue A., he must be treated as having agreed to abstain from suing for a reasonable time; that such time expired long before the commencement of six years before the action was brought, and that therefore the mortgagee's claim against B. was barred by the Statute of Limitations (21 Jac. 1, c. 16). *Henton* v. *Paddison*, 3 R. 450; 68 L. T. 405.

Letter by Solicitor—Personal Liability.]—The defendant, an attorney, wrote the following letter to the plaintiff: "Sir,—Mr. W. has handed me your letter of the 3rd respecting the non-payment of the bill for 91*l.* due on Saturday. I am now making arrangements for an advance to Mr. W., to enable him to pay this and other claims upon him; and if you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up." The plaintiff had no further communication with the defendant, and on the receipt of the letter was not aware that the defendant was an attorney:—Held, in an action against the attorney as surety for the amount of the bill of exchange, that this letter did not render the defendant personally liable. *Allaway* v. *Duncan*, 16 L. T. 264; 15 W. R. 711.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready and hereby offer to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter. *Bentley, Ex parte*, 2 Deac. & C. 578; 2 L. J., Bk. 39.

Agreement to Answer Draft of Principal—Liability on Draft drawn at request of Principal.]—An agreement by C. & Co. to answer the draft of S. for repairs, will not give any right to another person in whose favour a draft or bill is drawn on C. & Co. at the request of S. to proceed against C. & Co., there being no consideration between the drawee and C. & Co. *Rattenbury* v. *Fenton*, 3 Myl. & K. 505; 3 L. J., Ch. 203.

Semble, that if the agreement had gone on to state in whose favour the draft was to be drawn, there would have been an equity raised. *Ib.*

There is no consideration between the purchaser and the vendor's creditor to entitle the latter to recover from the purchaser the amount of repairs done to the subject matter of the sale. *Ib.*

Clause giving time to Makers.]—A document, in the form of a joint and several promissory note by a principal debtor and a surety for 5*l.* payable by instalments, with the proviso that, in case of default in payment of any one of the instalments, the whole amount remaining unpaid should become due, concluded with the following clause, namely: "Time may be given to either without the consent of the other and without prejudice to the rights of the holders to proceed against either party, notwithstanding time may be given to another":—Held, that the clause was a mere consent or licence that time may be given to the principal debtor, and that if time be so given the surety will not avail himself of that as a defence. *Yates* v. *Evans*, 61 L. J., Q. B. 446; 66 L. T. 532; 56 J. P. 565.

Contract that Notes be held as Security only.]—The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay 6*l.* 10*s.* a quarter to the payee; and on payment of the 200*l.*, all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee for two quarters, but having paid these sums to E., the cestui que trust (as the latter admitted), the payee brought his action upon the notes against the maker:—Held, in error, reversing the judgment of the queen's bench, that the agreement could not be pleaded in bar to the action upon the note, but might be the subject of a cross-action. Held, in equity, that the agreement must be construed as a contract by the brother to provide for E. the annuity of 25*l.* or the gross sum of 200*l.*, as a substitute for the two notes, and by the payee that the two notes should thenceforth be only as security for the performance of such contract; and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother; that the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuity of cross-actions which the rule of law occasioned, but on the ground that this court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement, without depriving another party altogether of such benefit. *Beech* v. *Ford*, 7 Hare, 208.

Deed of Surety—Effect of.]—The deed of a surety does not extinguish the simple contract debt of the principal. *White* v. *Cuyler*, 6 Term Rep. 176; 1 Esp. 200; 3 R. R. 147.

b. Continuing Guarantees.

Termination of—Effect of Death and Notice.]—A continuing guarantee is not ipso facto revoked by the death of the guarantor. But notice of the death of the guarantor and of the existence of a will, given to the holder of the guarantee, is constructive notice of the determination of the guarantee as to future advances. *Coulthart* v. *Clementson*, 49 L. J., Q. B. 204; 5 Q. B. D. 42; 41 L. T. 798; 28 W. R. 355.

A. desiring to become an underwriting member of Lloyd's, B. gave a guarantee to the committee of that body on behalf of A., in which he held himself responsible "for all his engagements in that capacity":—Held (affirming the decision of Fry, J.), that the guarantee was not determined by the death of the guarantor or by notice of his death. *Calvert* v. *Gordon* (3 M. & Ry. 124) followed. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452—C. A.

A firm of bankers took a continuing guarantee for advances to a customer, in the form of a joint and several bond. One of the sureties died and, after notice thereof, the bank made further advances to the customer. Held, that the remaining surety was liable for such advances. *Beckett* v. *Addyman*, 51 L. J., Q. B. 597; 9 Q. B. D. 783—C. A.

A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—Held, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death. The death alone did not determine the guarantee. *Harris* v. *Fawcett*, 42 L. J., Ch. 502; L. R. 8 Ch. 866; 29 L. T. 84; 21 W. R. 742.

A. having guaranteed thus: "To C. D. I request you will credit E. F., and in consideration thereof I guarantee the running balance":—Held, that this promise was not revoked by A.'s death without notice to C. D. from the executor. *Bradbury* v. *Morgan*, 1 H. & C. 249; 31 L. J., Ex. 462; 8 Jur. (N.S.) 918; 7 L. T. 104; 10 W. R. 776.

When a guarantee is terminable by notice by the guarantor "or his representatives," but is otherwise silent as to its continuance after the death of the guarantor, his legal personal representatives are meant, and notice of the death of the guarantor given to the obligees otherwise than by such legal personal representatives is not sufficient to determine the guarantee. *Coulthart* v. *Clementson* (5 Q. B. D. 42) discussed. *Silvester, In re, Midland Ry.* v. *Silvester*, 64 L. J., Ch. 390; [1895] 1 Ch. 573; 13 R. 448; 72 L. T. 283; 43 W. R. 443.

S. guaranteed the account of T. at a bank by two guarantees, one for 150*l.*, the other for 400*l.* By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you"; the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. died, leaving T. and another executors. The bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation, when it also was overdrawn:—Held, that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank was entitled to prove against the estate of S. for the amount of the old overdraft, less the amount of the dividend which they had received on it in the liquidation. *Sherry, In re, London and County Banking Co.* v. *Terry*, 53 L. J., Ch. 404; 25 Ch. D. 692; 50 L. T. 227; 32 W. R. 394—C. A.

—— **Death of Joint Guarantor—Estoppel by Conduct.**]—A joint guarantee is not determined by the death of one of the guarantors if the survivors give no notice that they will not be answerable. Three directors of a company gave a joint guarantee to a bank to secure the balance of the company's account to the amount of 2,000*l.* The company was afterwards wound up and reconstructed, but the bank was only told that the company had changed its name, and the account was continued as before:—Held, in an action by the bank to recover 2,000*l.* due on the account, that the guarantors were estopped by their conduct from denying that the guarantee remained in force. *Ashby* v. *Day*, 54 L. T. 408; 34 W. R. 312—C. A.

—— **Withdrawal.**]—Semble, that a general guarantee under seal may, under certain circumstances, be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. *Burgess* v. *Eve*, 41 L. J., Ch. 515; L. R. 13 Eq. 450; 26 L. T. 540; 20 W. R. 311.

Upon a bond conditioned for a collecting clerk truly accounting for and paying over moneys received by him from time to time, and at all times during his continuance in the service, the obligor cannot discharge himself from further liability by giving notice on a particular day that from thenceforward he will not remain surety. *Calvert* v. *Gordon*, 3 M. & Ry. 124; 7 B. & C. 809; 7 L. J. (O.S.) K. B. 77.

Nor can the personal representative of the obligor discharge himself by such notice. *Ib.*

A surety may protect himself, by stipulating in the guarantee that he shall be at liberty to determine his liability at the expiration of a specified time after notice. *Ib.*

A company, by deed, guaranteed the defendants, upon their gross annual returns, against loss in their business, during the term of two years, by purchasers of goods becoming bankrupt. The guarantee was subject to the following condition: "Every guarantee shall be made for a specified term, but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member

interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same" :—Held, that in the event of no notice being given, the guarantee became a renewed contract for any one period of two years from the expiration of the original term, and was not from time to time renewable. *Solvency Mutual Guarantee Co.* v. *Froane*, 7 H. & N. 5 ; 31 L. J., Ex. 193 ; 7 Jur. (N.S.) 899.

To an action on the deed of guarantee, the defendants pleaded that, at the expiration of the original term, the guarantee was rescinded : —Held, no objection to the plea that it did not state that the guarantee was rescinded by deed. *Ib.*

To an action on the agreement for the guarantee for nonpayment of the money falling due on the renewal of the original term, it is a good plea that the defendant had exonerated the plaintiff from giving notice of an intention not to renew, and the agreement was mutually rescinded, and that no claim had been made since the expiration of the original term in respect of the agreement as renewed. *Ib.*

A guarantee to secure moneys to be advanced to a third party on discount, to a certain extent, "for the space of twelve calendar months," is countermandable within that time. *Offord* v. *Davies*, 12 C. B. (N.S.) 748 ; 31 L. J., C. P. 319 ; 9 Jur. (N.S.) 22 ; 6 L. T. 579 ; 10 W. R. 758.

Discharge in Bankruptcy.]—The unconditional discharge of a debtor in liquidation does not release his sureties, although they do not assent to, but protest against his discharge. *Ellis* v. *Wilmot*, 44 L. J., Ex. 10 ; L. R. 10 Ex. 10 ; 31 L. T. 754 ; 23 W. R. 214. S. P., *Jacobs, Ex parte, Jacobs, In re*, 44 L. J., Bk. 34 ; L. R. 10 Ch. 211 ; 31 L. T. 745 ; 23 W. R. 251 ; and *Glegg* v. *Gilbey*, 46 L. J., Q. B. 325 ; 2 Q. B. D. 209 ; 35 L. T. 927 ; 25 W. R. 311.

The defendant gave the plaintiff a guarantee, to the extent of 200*l.*, but revocable at his option on giving him notice in writing ; and afterwards became bankrupt, and obtained his certificate of conformity, under the 12 & 13 Vict. c. 106, but did not give notice to determine the guarantee : —Held, that the certificate was no bar to claims under the guarantee. *Boyd* v. *Robins*, 5 C. B. (N.S.) 597 ; 28 L. J., C. P. 73 ; 5 Jur. (N.S.) 715 ; 7 W. R. 78—Ex. Ch.

What are Continuing.]—P., who had annually given C. a guarantee expressly limited for a year, by each of which P. guaranteed the amount "for the time being due" from F. to C. for coals sold to him, gave C., during the currency of the last of these annual guarantees, a guarantee which, after reciting that F. was indebted to C. in 2,205*l.* 3*s.* 9*d.*, in addition to his liability upon two acceptances of P. for 750*l.* each, indorsed by F. to C., and that C. was pressing for the immediate payment of the 2,205*l.* 3*s.* 9*d.*, was as follows : "Now I do hereby in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of and agree to become responsible for any sum of money for the time being due from F. to you, whether in addition to the 2,205*l.* 3*s.* 9*d.* or not" :—Held, that this was a continuing guarantee, and extended to a debt due from F. to C. for goods supplied after the guarantee had been given, and that there was therefore a good consideration for such guarantee. *Coles* v. *Pack*, 39 L. J., C. P. 63 ; L. R. 5 C. P. 65 ; 18 W. R. 292.

—— **Amounts Due.**]—A father gave his son a promissory note for 2,000*l.*, which was indorsed by the son, and discounted by a banking company, who took from the father an agreement under seal, that in consideration of their discounting the note, certain deeds of the father's deposited at the same time should remain a security for all the money due or to become due from the son to the company on any account whatsoever. At the date of the agreement the son owed the company 3,000*l.* upon a running account, and the amount was subsequently increased to 5,000*l.* The father having died :— Held, that the agreement was a continuing guarantee, and that the bank was entitled to prove against the father's estate, not only for the 2,000*l.*, the amount of the note, but for all sums due to them from the son. *Burgess* v. *Eve*, 41 L. J., Ch. 515 ; L. R. 13 Eq. 450 ; 26 L. T. 540 ; 20 W. R. 311.

Where a bond which, on the face of it, appears to be a simple money bond, is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances. *Walker* v. *Hardman*, 4 Cl. & F. 258 ; 11 Bligh, 292. See *Pease* v. *Hurst*, 5 M. & Ry. 88 ; 10 B. & C. 122 ; 8 L. J. (O.S.) K. B. 94.

Primâ facie, a continuing guarantee limited in amount to secure a floating balance is, as between surety and creditor, a guarantee of so much only of the debt as does not exceed the sum named in the limitation, for it is to be presumed that the surety does not contemplate the creditors allowing the debtor to become indebted to him beyond that amount. No such presumption arises where the debt, in respect of which the bond is given, is an ascertained amount exceeding the sum named in the limitation. *Ellis* v. *Emanuel*, 46 L. J., Ex. 25 ; 1 Ex. D. 157 ; 34 L. T. 553 ; 24 W. R. 832.

—— **"Advances"—Parol Evidence.**]—G., knowing that his son C., who was a stock-broker in London, required advances for the purpose of his business, gave to a bank a letter of guarantee, undertaking to guarantee any advances made to C. to the extent of 1,000*l.* After the death of G., the bank sought to prove on his estate in respect of four items :—1, a promissory note of C. to the bank for 440*l.* dated the 30th August, 1880, at six months ; 2, a sum of 32*l.*, balance due on a bill of exchange drawn by D., and accepted by E., dated the 6th October, 1880, at six months ; 3, a promissory note for 490*l.* of B. to the bank, dated the 18th October, 1880, at six months, and 4, 7*l.* 6*s.* 6*d.*, the overdraft of C.'s current account. The promissory note for 440*l.* had been renewed more than once, and this note, and the renewals, and the bill of exchange had been placed to the credit of C.'s account with the bank while current, and transferred to the debit side of his account when due, discount being charged in cases of renewal to C.'s account. C. drew upon the bank to the full amount for which he was thus credited. C.'s name was not on the bill of exchange, but the bank cashed it on his guarantee, and the proceeds were placed to C.'s credit. The promissory note for 490*l.* represented a note given to the bank by B. some years previously to the date of G.'s

guarantee, the amount of which had been then advanced to C. No entry of this note or its renewals appeared in C.'s current account, although the amount of the discounts on it were charged:—Held, (1), that to aid in the construction of the guarantee, parol evidence was admissible of the circumstances under which it was given; (2), that under the circumstances, the guarantee was a continuing guarantee, extending to advances made after its date; (3), that "advances" was not confined to cash advances or overdrafts, but included the proceeds of bills or notes discounted by the bank, and placed to C.'s credit; (4), that the right of the bank to sue on bills and notes being suspended during their currency was not a giving of time within the rule which discharges a surety; but that, whether each renewal was equivalent to a fresh and independent advance or not, the amount advanced by the bank to C. was within the guarantee; (5), that the bank could not sustain against G.'s estate a claim upon the note for 490*l.* *Grahame* v. *Grahame*, 19 L. R., Ir. 249.

—— **Until Notice.**]—The plaintiffs (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to the defendants, declined to let D. have certain goods which he had then bought of them without a telegram from the defendants that they would be answerable for them. They sent such telegram, and D. had the goods, and in due time paid for them. By the post of the same day on which the telegram was dispatched, the defendants sent to the plaintiffs a letter, in which, after referring to the telegram, and stating that they had done business with D. for five years, and had never known anything dishonest in his transactions, they wrote, "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you. When to the contrary, we will write you":—Held, that this letter was a continuing guarantee for the amount of goods D. should buy of the plaintiffs until they should hear from the defendants to the contrary. *Nottingham Hide, Skin, &c., Co.* v. *Bottrill*, 42 L. J., C. P. 256; L. R. 8 C. P. 694; 29 L. T. 134; 21 W. R. 739.

Action against one of the obligors of a joint and several bond. By the condition which recited an agreement by a banking firm, to discount bills, and otherwise to advance to one of the obligors any sums of money not exceeding at any one or more time or times 200*l.* upon security, the bond was to be void, if the obligors, or any or either of them, should pay to the banking firm, and any other person who should become a partner in the firm, all such sums not exceeding 200*l.*, as the firm or any future partner should advance the obligor on bills, &c., which he might from time to time draw upon or get discounted by them, within three months after notice to pay such sums:—Held, first, that the bond was a continuing security. *Batson* v. *Spearman*, 3 P. & D. 77; 9 A. & E. 298.

Held, secondly, that an averment that 200*l.* was due, and that notice thereof had been given to the defendant, was no notice to him to pay, and so the nonpayment by him no breach of the condition shown. *Ib.*

—— **Until Payment.**]—R. & Co. being about to open an account with the Union Bank, the defendant and one Black signed the following guarantee:—"In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1,000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months." 1,000*l.* was placed by the bank to the credit of R. & Co.'s drawing-account, and R. & Co. were debited with 1,000*l.* in a loan account. R. & Co. from time to time drew cheques against, and paid money to the credit of, their drawing account. Over 1000*l.* was thus paid in by R. & Co., and they were not debtors on the drawing account when it was finally closed. The loan account remained unaltered. The bank sued the defendant for 1,000*l.* on the guarantee, and after the commencement of the action Black paid the bank 500*l.* in discharge of his liability. The defendant did not plead this payment:—Held, that the guarantee was a continuing one, and that the defendant's liability was not discharged by the payments made by R & Co. *Laurie* v. *Scholefield*, 38 L. J., C. P. 290; L. R. 4 C. P. 622; 20 L. T. 852; 17 W. R. 931.

—— **Limited Credit.**]—Certain of the creditors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died, and his estate was under the administration of the court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation:—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.* and interest at four per cent. from the date of the testator's death. *Booth, In re, Browning* v. *Baldwin*, 40 L. T. 248; 27 W. R. 644.

Other Cases.]—The defendant gave to the plaintiff, a cattle dealer, a guarantee in the following words:—"50*l.* I, J. M., of &c., will be answerable for 50*l.* sterling that W. Y., of &c., butcher, may buy of Mr. J. H.":—Held, a continuing guarantee to the extent of 50*l.*, as it appeared from the circumstances under which the guarantee was given that the parties contemplated a continuing supply of stock to W. Y. in his trade of a butcher. *Heffield* v. *Meadows*, L. R. 4 C. P. 595; 20 L. T. 746.

Where, by a written guarantee, A. becomes bound to B. for any debt C. may contract with him, not exceeding 100*l.*, the guarantee is not extinguished by one dealing between B. and C. to that amount, but extends to any debt of 100*l.* which C. may afterwards owe to B. *Merle* v. *Wells*, 2 Camp. 413.

A guarantee by the defendant to the plaintiff "for any goods he hath or may supply W. P.

with, to the amount of 100*l.*," is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to W. P. until the credit is recalled, although goods to more than 100*l.* have been before supplied and paid for. *Mason* v. *Pritchard*, 12 East, 227 ; 2 Camp. 436 ; 11 R. R. 369.

B. being indebted to the firm of W. & P. gave them a memorandum of charge on leasehold premises, subject to a prior mortgage. The memorandum charged the premises "with the payment of 100*l.* for goods delivered, or to be delivered, to me by you to that amount." The prior mortgage was afterwards transferred to the defendant. Between the date of the memorandum of charge and the transfer of the prior mortgage, W. & P. had delivered goods to B., and received cash from him on account to 120*l.* ; but on the balance of account, just before the transfer the sum of 81*l.* 4*s.* 4*d.* was due to W. & P. :—Held, that the security given by the memorandum of charge of 100*l.* and payment thereon did not expire upon the delivery of goods to the amount, but was a continuing security. *Weston* v. *Empire Assurance Corporation*, 19 L. T. 305.

An undertaking to be answerable to a given amount for any goods supplied by A. to B., after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. But as soon as A. alters the credit on which he supplies the goods to B., the surety is discharged. *Bastow* v. *Bennett*, 3 Camp. 220.

"I hereby agree to guarantee the payment of goods, to be delivered in umbrellas and parasols to I. and E. S., according to the custom of their trading with you, in 200*l.* ;" and the custom of trading between the plaintiff and I. and E. S. being to make up monthly accounts of goods delivered, and for I. and E. S. to give acceptances for the amount of each monthly account, is a continuing guarantee. *Hargrave* v. *Smee*, 3 M. & P. 573 ; 6 Bing. 244 ; 8 L. J. (o.s.) C. P. 46 ; 31 R. R. 407.

"In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of 200*l.*" is a continuing guarantee, and the defendant is liable upon it, although, after it was given, goods to a greater amount than 200*l.* have been supplied to, and paid for by, V. *Mayer* v. *Isaac*, 6 M. & W. 605 ; 9 L. J., Ex. 225 ; 4 Jur. 437.

The following guarantee, "In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debt with you to the amount of 60*l.* Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you," is a continuing guarantee. *Martin* v. *Wright*, 6 Q. B. 917 ; 14 L. J., Q. B. 142 ; 9 Jur. 178.

"In consideration of your extending the credit already given to my son, and agreeing to draw upon him at three months from the 1st of the following month for all goods purchased up to the 20th of the preceding month, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you on his account for goods supplied," is a continuing guarantee. *Hitchcock* v. *Humphrey*, 6 Scott (N.R.) 540 ; 5 Man. & G. 559 ; 12 L. J., C. P. 235 ; 7 Jur. 423.

"In consideration of the plaintiff having agreed to stay all further proceedings at law against the defendant, I hereby undertake, and promise and agree with the plaintiff, that, if J. B. M. shall die in the lifetime of his father, I will, within six months after his father's decease, pay the plaintiff 165*l.*," is a guarantee continuing, and may be declared on as executory. *Tanner* v. *Moore*, 9 Q. B. 1 ; 15 L. J., Q. B. 391 ; 11 Jur. 11.

A bond conditioned to indemnify and save harmless the obligees, for "such sums as they in their banking business should within ten years advance or pay, or be obliged to advance or pay for on account of their accepting, discounting, &c., any bill of exchange, notes, &c., which A. should from time to time draw upon or make payable at their house ; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c., on the credit of A., or on his account ; and also all such wages and allowances for advancing, paying, &c., such bills, &c., advances, payments, &c., engagements, and accommodations, not exceeding 5,000*l.* in the whole, together with interest on such advances, &c."—guarantees running accounts, and is not satisfied by the first payment of 5,000*l.* *Williams* v. *Rawlinson*, 3 Bing. 71 ; 10 Moore, 362 ; R. & M. 233 ; 3 L. J. (o.s.) C. P. 164 ; 28 R. R. 584.

The following guarantee, "Whereas W. C. is indebted to you in a sum of money, and may have occasion for further purchases from you ; as an inducement to you to sell him such goods, and continue your dealings with him, I agree and undertake to guarantee you in 100*l.*, payable to you in default on the part of W. C. for two months," is a continuing guarantee. *Allan* v. *Kenning*, 2 M. & Scott, 769 ; 9 Bing. 618.

The defendant's son being indebted to the plaintiffs for goods supplied to the amount of 170*l.*, which was made up of several small monthly accounts, was pressed for payment or security. He thereupon paid 9*l.* in cash, and gave a promissory note for 61*l.*, and a guarantee by the defendant in the following terms : "In consideration of the credit given by the H. G. Co. to my son for coal supplied by them to him, I hold myself responsible as a guarantee for the sum of 100*l.*, and, in default of his payment of any accounts due, I bind myself to pay the H. G. Co. whatever may be owing, to an amount not exceeding 100*l.*" The supply of goods having been subsequently continued, and a further debt contracted, exceeding 100*l.* :—Held, that the defendant was liable to pay 100*l.* towards the price of the goods supplied to his son after the date of the guarantee. *Wood* v. *Priestner*, 36 L. J., Ex. 127 ; L. R. 2 Ex. 282 ; 15 W. R. 912—Ex. Ch. Affirming, 15 L. T. 317.

A guarantee in the following words, "I hereby agree to be answerable for the payment of 50*l.* for T. Lerigo, in case T. Lerigo does not pay for the gin which he receives from you, and I will pay the amount," is not a continuing guarantee. *Nicholson* v. *Paget*, 1 C. & M. 48 ; 3 Tyr. 164 ; 5 Car. & P. 395 ; 2 L. J., Ex. 18.

A written memorandum to guarantee the payment of A. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff, is not a continuing guarantee to that extent for goods to be supplied at any time to A. until the credit is

recalled, but is applicable only to the first quarterly payment after it is given. *Melville* v. *Hayden*, 3 B. & Ald. 593; 22 R. R. 495.

A bond entered into by A. and B. to the plaintiff, to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding 3,000*l.*, which should at any time thereafter be advanced by the plaintiff to A., is not a continuing guarantee to the extent of 3,000*l.* for advances made at any time, but only a guarantee for advances once made to the extent of 3,000*l.* *Kirby* v. *Marlborough* (*Duke*), 2 M. & S. 18; 14 R. R. 573.

"I hereby agree to be answerable to K. for the amount of five sacks of flour, delivered to T., payable in one month, November 18th. T. G.," is a guarantee for flour, not exceeding five sacks delivered at one time, and not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks. *Kay* v. *Groves*, 6 Bing. 276; 3 M. & P. 634; 4 Car. & P. 72; 8 L. J. (O.S.) C. P. 9.

A guarantee for the payment of coals to the amount of 50*l.*, for which the defendant would be answerable at any time, is not a continuing guarantee. *Bovill* v. *Turner*, 2 Chit. 205.

Amount of Liability on.]—*See* post, col. 1189.

c. Conditional Guarantees.

Nature of Condition.]—A bank having advanced certain sums to a company, made a further advance upon the personal security of three of the directors. Five of the guarantors for the amount secured by an earlier bond signed an agreement that they would join the three directors in guaranteeing repayment to the bank of the further advance in equal proportions with the three directors. One of the five who signed this agreement stated by his affidavit that his signature (if he did sign) was obtained "on the express engagement and understanding" that the agreement should be signed by all the guarantors for the sum secured by the bond:—Held, that the words, "express understanding," were utterly unmeaning, and that the court would never pay any attention to a statement that something was done on an express engagement, unless the engagement was spoken to in a manner which was admissible in evidence. *Dallas* v. *Walls*, 29 L. T. 599—C. A.

Prosecution of Servant for Embezzlement.]—By an agreement and a policy of insurance the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of 1,000*l.*, which he might sustain by reason of any such fraud or dishonesty of A. in connection with his employment by the plaintiff as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, but at the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or his estate of any money which the company shall have become liable to pay":—Held, by Lords Blackburn and Watson (Lord Selborne, C., diss.), that the prosecution of A. for embezzlement was a condition precedent to the plaintiff's right of action upon the policy. *London Guarantee and Accident Co.* v. *Fearnley*, 5 App. Cas. 911; 43 L. T. 390; 28 W. R. 893; 45 J. P. 4—H. L. (Ir.)

Completion in accordance with Contract—Surveyor's Certificate.]—The respondent advanced money to the appellant on a guarantee to be repaid "on the completion of six houses in accordance with a contract between himself and T." One of the terms of the contract was that the houses were to be built to the satisfaction of a surveyor, and payment was to be made upon his certificate. No such certificate had been given. In an action on the guarantee, brought by the respondent against the executors, the jury found that, as a matter of fact, the houses were completed:—Held, that the respondent was entitled to recover, notwithstanding the absence of the certificate. *Lewis* v. *Hoare*, 44 L. T. 66; 29 W. R. 357—H. L. (E.)

—— **Deviation.**]—C. & Co., before their bankruptcy, guaranteed to A. the payment of 300*l.* for the erection of a sugar-mill for D. on the production of a certificate from the engineer that the mill was erected according to the terms of a specification; A. produced a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of D.; upon which C. & Co., without making any objection to such deviation, informed A. that it was not in their power to pay the money:—Held, that A. might prove the 300*l.* under a fiat issued against C. & Co. *Ashwell, Ex parte*, 2 Deac. & C. 281.

Condition that Notice of Dishonesty should be given.]—Two guarantors, by their agreement, contracted to guarantee the plaintiff against loss sustained from any act of fraud or dishonesty by a rate collector, or from any failure on his part to collect and pay into the bank of Ireland the rates to be collected by him, and produce to the plaintiff, as collector-general, the receipt of the bank for such payment, or from any failure on his part to deliver to the plaintiff true accounts of the moneys collected, and lists of the persons in arrear, "provided that the plaintiff should, within ten days after the discovery by him of any fraud or dishonesty of the 'said persons employed,' and of any matter in respect of which any claim may be intended to be made, give notice in writing, at the office of the society, as far as the case will admit, of all the particulars thereof; and after any such discovery, the guarantee herein contained shall, as to loss by any act of fraud or dishonesty, subsequent thereto, be at an end":—Held, that the proviso required notice to be given of such fraud or dishonesty only as would form the foundation of a claim under the guarantee and did not impose upon the plaintiff an obligation to give notice if he discovered that fraud or dishonesty had occurred on the part of the person employed, before the guarantee was entered into or the employment under himself commenced. *Byrne* v. *Muzio*, 8 L. R., Ir. 396.

Notice of Arrears.]—The defendants were sureties for the repayment, by weekly instalments, of money borrowed by A. of a loan

society. One of the rules of the society provided "that if any member becomes more than four weeks' payments in arrear, the committee immediately inform the sureties of the same, and have power to institute legal proceedings against them." A. died, being more than four weeks' payments in arrear, but no application was made to the sureties until two years afterwards:—Held, that the rule was no part of the contract between the society and the sureties, and that the omission to give notice in pursuance of it did not afford an equitable defence to an action against the sureties. *Price* v. *Kirkham*, 3 H. & C. 437; 34 L. J., Ex. 35; 11 L. T. 314.

On Condition of Others joining.]—The defendant signed a guarantee upon a condition, orally agreed to, that M. should also sign as a co-security. M. did not sign, and subsequently, and without notice of the condition, the guarantee was signed by the plaintiff, who, having been obliged, upon the default of the principal debtor, to pay the whole debt, sought to recover contribution from the defendant in the ordinary course for money paid to his use:—Held, that condition was a good defence to the action. *Barry* v. *Moroney*, Ir. R. 8 C. L. 554—Ex. Ch.

A surety, who has contracted to become so on the understanding that he is to be co-surety with another, is wholly released in equity if the intended co-surety does not execute. *Evans* v. *Bremridge*, 2 Kay & J. 174; 25 L. J., Ch. 102; 2 Jur. (N.S.) 134. Affirmed, 8 De G. M. & G. 100; 25 L. J., Ch. 334; 2 Jur. (N.S.) 311; 4 W. R. 350.

In an action against a surety on an equitable plea, founded on the non-execution of the security by a co-surety:—Held, that there must be evidence of an agreement by the plaintiff with the defendant that such co-surety should execute, or that the defendant executed on the faith of the other's doing so, and where the proposal of another surety came from the plaintiff, and was not at the time made a condition by the defendant, the defence failed. *Traill* v. *Gibbons*, 2 F. & F. 358.

A surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his. *Cooper* v. *Evans*, 36 L. J., Ch. 431; L. R. 4 Eq. 45; 15 W. R. 609.

To a declaration stating that T. was the lessee of certain tolls, and that S. and the defendant agreed to join with T. in a bond, conditioned for payment of the rent under the lease; and alleging as a breach that the defendant refused to join T. in the bond; the defendant pleaded, first, that at the time of tendering the bond to him S. had not executed the same, nor was he present ready to execute it jointly with the defendant; and secondly, that S. died before the commencement of the suit, and that before his death the bond was not tendered to the defendant for execution, nor was he requested to execute it:—Held, that the pleas were bad. *Horne* v. *Ramsdale*, 9 M. & W. 329; 11 L. J., Ex. 100.

The defendant in two letters, addressed to C. J., the brother of the plaintiff's intestate, R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join in a security for the repayment of money to be advanced to the defendant for carrying on a suit in chancery; and in the second he again urged, that they should lend their names for this purpose, and added, "I should consider it a matter of favour to myself, if your brothers will join, and I will see that they come to no harm." C. J., in consequence, joined in the security:—Held, that the letters amounted to an actual guarantee, on which the defendant was liable to the plaintiff; and not merely to a representation, with a view to the parties doing an act against the consequence of which they should afterwards be protected. *Jones* v. *Williams*, 7 M. & W. 493; 9 D. P. C. 252; 10 L. J., Ex. 120.

That Life Insurance should be Effected.]—By a mortgage deed between the mortgagor and two others, as sureties, and the mortgagee, after reciting that the mortgagor was possessed of certain hereditaments, and of a policy of insurance on his life for ——*l.*, and that the mortgagee had agreed to lend him 1,000*l.* to be secured as therein provided, and that "upon treaty for the loan, it was agreed that the repayments should be further secured by the sureties joining in the deed"; the mortgagor mortgaged the hereditaments and the policy of insurance for ——*l.*, and all moneys assured or to become payable under it, as security for the debt. There were covenants by the mortgagor and the two other sureties to pay the interest, and to pay the premiums on the policy and any sums necessary for effecting another, if it should become void. There was a power of sale by the mortgagee of the hereditaments and the policy. The mortgagor covenanted that if the mortgagee should be unable to execute the power of sale, or if the proceeds should not be sufficient, he would pay the deficiency to the amount of 300*l.* To an action on this covenant it was pleaded that no policy was effected; and that one of the sureties had not executed the deed:—Held, first, that it was a condition precedent that a policy should have been effected. *Coyte* v. *Elphick*, 22 W. R. 541.

Held, secondly, that in the absence of express provision it was not a condition precedent that the other surety had signed. *Ib.*

To supply Deficiency on "Sale" being completed.]—Where defendants, on consideration that plaintiffs would advance 1,200*l.* to a third person upon mortgage of certain leasehold premises, promised that if after any sale of the said premises duly made under the power of sale to be contained in the mortgage deed, the purchase-money should not be sufficient to satisfy the principal sum, interest, expenses, &c., they would immediately make good to the plaintiff such deficiency:—Held, that the word "sale" meant a sale completed. *Moor* v. *Roberts*, 4 C. B. (N.S.) 830.

To Pay out of "Receipts."]—A contract, by way of guarantee, to pay over to the creditor moneys received as the proceeds of the property of the debtor, is conditional, not only upon the receipt of money, the proceeds of such property, but on the receipt of such money properly payable to him, and does not apply to money received only subject to a prior claim of a third party, and which, therefore, is not payable to the creditor. *Jupp* v. *Richardson*, 26 L. J., Ex. 261.

Giving Satisfactory References.]—By a written guarantee in consideration that the plaintiffs would stay execution upon a judgment against T., until a day named, the defendant undertook that the balance of debt and costs should be

paid to the plaintiffs on or before that day, and if not paid by T., the defendant undertook to pay it, and, in consideration of the undertaking, the plaintiffs agreed to stay execution until that day if the defendant gave M. satisfactory references as to his ability to pay the amount, but not otherwise; and if the references were not satisfactory, the guarantee to be given up within a week:—Held, that, assuming the plaintiffs might waive the stipulation as to satisfactory references, it being a condition inserted for their benefit, they could not enforce the guarantee against the defendant until they had given him notice of the waiver. *Morten* v. *Marshall*, 2 H. & C. 305; 33 L. J., Ex. 54; 9 Jur. (N.S.) 651; 8 L. T. 462.

Supply of a Certain Quantity of Goods.]—A declaration stated, that in consideration that the plaintiff, at the request of the defendant, would sell and deliver to S. on credit, goods of the price to an extent not exceeding 100*l.*, the defendant promised the plaintiff, that if S. did not pay for the same, he would do so on receiving three months' notice requiring payment. At the trial, the following guarantee was proved: "In consideration of your supplying S. with goods to the extent of 100*l.*, I undertake to pay you for the same, if he does not, on receiving three months' notice:"—Semble, that there was a variance between the declaration and the guarantee proved; but assuming the true construction of the guarantee to be, that the defendant was not to be liable until 100*l.* worth of goods had been supplied, the declaration might be amended accordingly. *Dimmock* v. *Sturla*, 14 M. & W. 758; 15 L. J., Ex. 65.

Advance—"Work to be done as Security."]—H. & Sons being engaged, under a written contract, in the erection of certain engineers' work for N., for which iron and brass castings were required, and Hill, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218*l.* for goods already supplied, and refusing to continue to supply without obtaining payment or security for that sum, N. consented to give H. a guarantee in the following terms: "May 22, 1861. Mr. J. N. agrees to pay Mrs. Hill, ironfounder, on H. & Sons' account, 218*l.*, being the amount owing to her by them, together with interest, in six months from the above date, providing he has work done as security for the same." In an action by the representatives of Hill against N. on this guarantee:—Held, that, it was a condition of N.'s liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to them; and that the plaintiffs could not recover without producing the contract between H. & Sons and N., under which the work was done. *Hill* v. *Nuttall*, 17 C. B. (N.S.) 262.

To induce Hill to go on with the castings in the meantime, the following memorandum was drawn up and signed by her, by H. & Sons, and by N.: "May 22, 1861. M. Hill agrees to make and deliver castings required for N.'s shed, as usual, and N. to pay for the same in monthly payments on H. & Sons' account:"—Held, that the representatives of Mrs. Hill were entitled to recover from N. the price of castings delivered to H. & Sons under this agreement, without showing that they were used by them in the work done for N. *Ib.*

Indemnity as to Costs—Further Proceedings.]—A plaintiff, having been sued by C. on a cause of action, as to which he would have had an action over against the defendants, and they against other parties, and C. having been nonsuited in the former action, but having tendered a bill of exceptions, the plaintiff entered into a written agreement with the defendants, reciting that C. would consent to forego further proceedings if he was not called upon for costs by the now plaintiff on the nonsuit, and that they should pay an equal proportion of the costs, and that he should indemnify them from all further costs:—Held, that this was conditional on C.'s going no further, for that otherwise there would be no consideration; and that C. having moved for a new trial, the defendants were not liable. *Crick* v. *Warren*, 2 F. & F. 348.

A declaration stating that the plaintiffs commenced an action against A. to recover a sum due to them from A., and another action against B., as a party liable in respect of the same debt; that in consideration that the plaintiffs would consent to stay the proceedings in the action against A. until a given day, and would proceed to trial with the action against B. at a certain sitting, or as soon after as the practice of the court would admit of, the defendant promised that he would indemnify the plaintiffs against all costs and expenses connected with the action against B., whether the same should be decided in favour of the plaintiffs or of B., and that he the defendant would pay the same costs and expenses when requested by the plaintiffs; that the plaintiffs did stay the proceedings in the action against A., and that they duly proceeded to trial with the action against B., and obtained a verdict thereon; that the verdict was afterwards set aside, and a new trial ordered, upon payment of costs by B.; that the plaintiffs again set down the cause for trial; that by the direction and at the request of the defendant, the record was withdrawn; and that the plaintiffs incurred and paid costs and expenses in connection with the action, and assigning for breach the defendant's refusal to reimburse them,—discloses a good cause of action, the final determination of the action against B. not being a condition precedent to the plaintiffs' right to sue for costs, and the consideration being satisfied by the plaintiffs staying proceedings against A. and going to trial against B. *Wilson* v. *Bevan*, 7 C. B. 673; 18 L. J., C. P. 244.

Forbearance to Sue.]—Where A. at the request of W. & D., in consideration of the plaintiff having furnished goods to them, and of the plaintiff forbearing to take proceedings against them, guaranteed to the plaintiff a certain sum on the 13th December next:—Held, that forbearance till the 13th December was a condition precedent to the plaintiff's right to sue A.; and that the guarantee was not general as to the time of forbearance, and that forbearance for part of the time gave the plaintiff no right of action. *Rolt* v. *Cozens*, 18 C. B. 673; 25 L. J., C. P. 254; 2 Jur. (N.S.) 1073.

7. Consideration.

a. Generally.

Classification of Guarantees.]—Guarantees may be divided into two classes, the one in which the consideration is entire and the other in which

the consideration is fragmentary, supplied from time to time, and therefore divisible. (a) An instance of the first is where a person enters into a guarantee that in consideration of the lessor granting a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. (b) In the other, where the consideration is supplied from time to time, it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. Instances of the second class are more familiar. They are, where a guarantee is given, to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied—per Lush, L.J. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140 ; 16 Ch. D. 290 ; 43 L. T. 481 ; 29 W. R. 452.

Statement of.]—In an agreement in writing to pay the debt of another, the consideration must be either stated in express words, or to be implied with certainty from the terms used. *Jarrett* v. *Williams*, 5 B. & Ad. 1109.

—— **Between Creditor and Surety.**]—Undertaking in writing to guarantee the debt of another is sufficient, within the statute of frauds, without stating any consideration as between the creditor and the surety. *Gardom, Ex parte*, 15 Ves. 286.

Lease.]—A declaration set out an agreement, whereby the plaintiff agreed to let, and T. to take, a house at a yearly rent, and the defendant thereby also agreed to see the rent paid by T., or to pay it for him :—Held, that the consideration for the defendant's promise was the letting of the house, and that it sufficiently appeared on the face of the agreement. *Caballero* v. *Slater*, 14 C. B. 300 ; 23 L. J., C. P. 67.

Supply of Goods.]—An undertaking by A., at B.'s request, to supply such goods to C. as C. may require, and A. may think fit to supply, is not a sufficient consideration to support a promise. *Westhead* v. *Sproson*, 6 H. & N. 728 ; 30 L. J., Ex. 265 ; 7 Jur. (N.S.) 502 ; 4 L. T. 408 ; 9 W. R. 695.

A guarantee in writing to pay for any goods which the vendor delivers to a third person, is good within the statute, as containing a sufficient description, as well of the consideration of the promise (namely, the delivery of the goods when made), as of the promise itself. *Stadt* v. *Lill*, 9 East, 348 ; 1 Camp. 242. S. P., *Warrington* v. *Furbor*, 6 Esp. 89 ; 8 East, 242.

The plaintiff, being a merchant abroad, was in the habit of dealing with J. S., and having shipped goods for him to the amount of 1,026*l.*, and suspecting his solvency, requested the defendant to enter into a guarantee for the payment of the above sum ; when he wrote a letter addressed to the plaintiff, stating, "that J. S. having accepted a bill drawn on him by the plaintiff for 1,026*l.*, he gave his guarantee for the due payment of the same, in case it should be dishonoured by the acceptor" :—Held, that this was a sufficient agreement to bind the defendant for the payment of the goods. *Boehm* v. *Campbell*, 3 Moore, 15.

A memorandum in the following terms : "I undertake to pay R. J. the sum of 6*l.* 4*s.*, for a suit of clothes, ordered by D. P.,"—is a guarantee which discloses, on the face of it, a sufficient consideration to support the promise. *Jarvis* v. *Wilkins*, 7 M. & W. 410 ; 10 L. J., Ex. 104 ; 5 Jur. 9.

A declaration stating that, in consideration that A. would sell and deliver goods to B., the defendant promised A. to guarantee to him the payment of the amount of or the balance unpaid to A. for any goods then sold and delivered, and to be thereafter sold and delivered to, and of any money lent or to be lent to or paid for, C. by A., to the extent of 1,000*l.*, and that A. should be at liberty at any time thereafter to call upon B. for the payment of the 1,000*l.*, which might be applied by A. as A. thought proper, either in payment or part payment of any debt which might be due, or have been due to A., and should not have been paid by C., discloses a sufficient consideration for the promise. *Boyd* v. *Moyle*, 2 C. B. 644.

A guarantee as follows : "In consideration of your agreeing to supply S. with goods upon credit in the way of your trade (the amount to be in your own discretion), I hereby guarantee you the due and regular payment of such sum or sums as he may now or at any time, and from time to time hereafter owe to you. My liability under this guarantee is to be limited to principal sum in running account of 100*l.*,"—discloses a sufficient consideration. *White* v. *Woodward*, 5 C. B. 810 ; 17 L. J., C. P. 209 ; 12 Jur. 439.

Joint Sale—Part Payment.] — A declaration that B. and the defendant, joint owners of a horse and mare, agreed that the defendant should sell them, and pay one moiety of the proceeds to the plaintiff as the agent of B., who was abroad ; that the defendant sold the horse to C. for 60*l.*, and the mare for 30*l.*, and did not receive the price of the horse, but took from the purchaser of the mare a note for 30*l.*, which the defendant indorsed to the plaintiff, as the agent of B., and the amount of which was received by the plaintiff as such agent ; that the defendant afterwards requested the plaintiff, upon his own responsibility, to pay the defendant one moiety of the 30*l.* in the plaintiff's hands as such agent, and the plaintiff paid the defendant 5*l.* ; that the defendant again requested the plaintiff, on his own responsibility, to pay the defendant 10*l.*, the residue of the moiety of the 30*l.*, which the plaintiff was willing to do, provided the defendant, in consideration of the 5*l.* and the sum of 10*l.* when paid, would undertake either to deliver to the plaintiff a bill of exchange for 23*l.* 3*s.* (being B.'s moiety of the proceeds of the sale of the horse, less the forfeits in respect of the same) drawn by the defendant upon and accepted by C. at two months, or pay the plaintiff 23*l.* 3*s.* in cash within two weeks ; and thereupon the defendant delivered to the plaintiff the following undertaking : "In consideration of your having paid me 15*l.* on account of my share of the mare, I hereby undertake to deliver to you a bill for 23*l.* 3*s.*, drawn by me upon and to be accepted by C., at two months, or the above sum in cash within two weeks from this date :"—Held, that the declaration disclosed a sufficient consideration for the defendant's promise. *Surtees* v. *Lister*, 7 H. & N. 1 ; 30 L. J., Ex. 369.

Withdrawing Note.]—Action on the following guarantee : "You will be so good as to withdraw

the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l*." A promissory note for 35*l*., made by the defendant's son, and payable to the plaintiff, was proved at the trial. The guarantee was proved, and a subsequent admission by the defendant that he had to pay the plaintiff 45*l*. due from his son:—Held, that the consideration, viz. the withdrawing of the promissory note was sufficient to satisfy the statute of frauds, though the amount and maker's name were not specified, there being no evidence of any other note to which the agreement could apply. *Shortrede* v. *Cheek*, 1 A. & E. 57; 3 N. & M. 366; 3 L. J., K. B. 125.

Withdrawing Summons.]—A declaration stated that W. was indebted to the plaintiff in 236*l*. 14*s*.; that the plaintiff, according to the Bankrupt Act, 1849, filed an affidavit in bankruptcy against W., and caused a summons to be issued out of the court of bankruptcy, by which W. was required to appear before the court for the purpose of ascertaining whether he admitted the plaintiff's demand, or had a good defence, and which summons was pending at the time of the defendant's promise, and capable of being enforced; that in consideration that the plaintiff would withdraw the summons out of the court, the defendant promised and guaranteed to pay the plaintiff the 236*l*. 14*s*.; and that the plaintiff withdrew the summons out of the court of bankruptcy, of which the defendant had notice. Breach, nonpayment of the 236*l*. 14*s*. Plea, that the defendant had not notice that the plaintiff had withdrawn the summons:—Held, that the words "withdraw the summons" meant the taking some step whereby W. might be exonerated from attending the court, which must be making some communication to him on the part of the plaintiff, or that it meant the taking some step in the court of bankruptcy, in either of which cases notice was not necessary, and, therefore, that the plea was bad. *Alhusen* v. *Prest*, 6 Ex. 720; 20 L. J., Ex. 440.

On Contract of Service.]—A guarantee was given in the following terms: "I hereby guarantee to you the sum of 250*l*. in case Mr. P. should make default in the capacity of agent and traveller to you:"—Held, that the consideration sufficiently appeared on the face of the instrument. *Kennaway* v. *Treleavan*, 5 M. & W. 498; 9 L. J., Ex. 20; 3 Jur. 1034.

A guarantee in the following words: "Entertaining the highest opinion of C.'s integrity of character as well as propriety of conduct, we therefore hold ourselves responsible to you in 500*l*., for his discharging faithfully and honestly any duty assigned to or trust reposed in him; and we are ready to execute bonds to that effect, and for that or any larger amount that may be necessary, whenever you require it,"—expresses a sufficient consideration, by necessary inference, viz. the employment of C. *Lysaght* v. *Walker*, 5 Bligh (N.S.) 1.

An agreement in these words: "I agree to be security to you for J. C., late in the employ of Mr. P., for whatever (while in your employ) you may trust him with, and in case of default, to make the same good,"—discloses a sufficient consideration. *Newbury* v. *Armstrong*, 6 Bing. 201; 3 M. & P. 509; 4 Car. & P. 59; M. & M. 389; 8 L. J. (O.S.) C. P. 4; 31 R. R. 386.

Engagement at Lloyd's.] — The defendant wrote and signed a letter in 1845, addressed to the managing committee of Lloyd's thus: "I engage to hold myself responsible for any debts which my son may contract in your establishment, connected with the same:"—Held, that no consideration appeared upon the face of the document, which was therefore void as a guarantee under s. 4 of the Statute of Frauds. *Baring* v. *Grieve*, 6 W. R. 466.

Assignment of Debts.] — An agreement as follows: "I undertake, on behalf of Mr. Peate (in consideration of Mr. Dicken having this day given me an undertaking to procure Mr. Ward's cheque or note in favour of Mr. Peate for 150*l*., on account of a debt due from Mr. Chambers to Mr. Peate), that Mr. Chambers shall have credit for that sum in his accounts with Mr. Peate, and that Mr. Ward shall stand in the place of Mr. Peate, to that amount; and I further undertake that Mr. Peate shall not personally dispute Mr. Ward's right to deduct that sum from the accounts owing by the colliers of the Black Park colliery to Mr. Chambers," shews a sufficient consideration moving from the plaintiff. *Peate* v. *Dicken*, 1 C. M. & R. 422; 3 D. P. C. 177; 5 Tyr. 116; 4 L. J., Ex. 28.

A., by letter acknowledged to have received from B. 321*l*. 5*s*. By a contemporaneous account taken between these parties, it appeared that 146*l*. 3*s*. 6*d*., part of the 321*l*. 5*s*., was a sum due from C. to B., which A. allowed to be transferred to the debit of his account with B. A. was sued by B. for money lent:—Held, that A. was not liable for the 146*l*. 3*s*. 6*d*., the arrangement amounting to a promise without consideration to pay the debt of another. *French* v. *French*, 2 Man. & G. 644; 3 Scott (N.R.) 121; 1 Drink. 159; 10 L. J., C. P. 220; 5 Jur. 410.

Taking Bills in Payment.] — The plaintiff having pressed W. for payment of a debt, the defendant, W.'s attorney, sent to the plaintiff a bill accepted by W. at two months, inclosed in a letter, in which the defendant said, "W. being disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I send you his acceptance at two months." The plaintiff refused to take the bill, unless the defendant put his name to it; the defendant wrote on the back of the letter, "I will see the bill paid for W.":—Held, that he was responsible, and that the consideration for the guarantee sufficiently appeared. *Emmott* v. *Kearns*, 5 Bing. (N.C.) 559; 7 D. P. C. 630; 7 Scott, 687; 8 L. J., C. P. 329; 3 Jur. 436.

Where the defendant signed and gave a guarantee to the plaintiff, stating that his ship was chartered; and that the charterer having paid one-half the freight, and given the plaintiff his acceptance for the remaining half at four months' date, the defendant engaged to be accountable to the plaintiff for the amount of the acceptance, should it not be paid when due:—Held, that the consideration clearly appeared on the face of such guarantee, as the bill would not have been taken unless thus signed. *Pace* v. *Marsh*, 8 Moore, 59; 1 Bing. 216; 1 L. J. (O.S.) C. P. 69.

When Void in Part.] — A contract to be answerable for a third person for goods furnished and goods to be furnished, which is bad in part for want of a consideration, and good as to the other part where the consideration is expressed,

is not vitiated in toto by the bad part, but will sustain a count framed on the valid part of the undertaking, to which the objection does not apply. *Wood* v. *Benson*, 2 C. & J. 95; 2 Tyr. 98; 1 Price, P. C. 169; 1 L. J., Ex. 18.

Supplying Consideration by Parol Evidence.]—Since the statute 19 & 20 Vict. c. 97, s. 3, though parol evidence may supply the consideration for a guarantee, it cannot be admitted to explain the promise. *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361; 28 L. J., C. P. 301; 6 Jur. (N.S.) 73.

Where the expression "for goods supplied" was used in a written guarantee:—Held, that parol evidence was admissible to show that the parties meant not a past, but a future, supply of goods. *Hoad* v. *Grace*, 7 H. & N. 494; 31 L. J., Ex. 98; 8 Jur. (N.S.) 43; 5 L. T. 359; 10 W. R. 85.

Before 19 & 20 Vict. c. 97.]—By the word "agreement" in the 29 Car. 2, c. 3, s. 4, must be understood the consideration for the promise, as well as the promise itself; and, therefore, where one promised in writing to pay the debt of a third person, without stating on what consideration, parol evidence of the consideration was inadmissible; and, consequently, such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum, and gave no cause of action. *Wain* v. *Warlters*, 5 East, 10; 1 Smith, 299; 7 R. R. 645.

An agreement to pay the debt of another must be in writing, and contain the consideration for the promise, as well as the promise itself; and parol evidence of the consideration could not be received. *Saunders* v. *Wakefield*, 4 B. & Ald. 595; 23 R. R. 409. And see *Goodman* v. *Chase*, 1 B. & Ald. 297; 19 R. R. 322.

There must be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise. *Barrell* v. *Trussell*, 4 Taunt. 117.

To constitute a valid agreement to answer for the debt or default of a third person within the statute, it was not necessary that the consideration should appear in express terms; it was enough if the memorandum was so framed that a person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. *Hawes* v. *Armstrong*, 1 Scott, 661; 1 Bing. (N.C.) 761; 1 Hodges, 179; 4 L. J., C. P. 254. S. P., *Raikes* v. *Todd*, 8 A. & E. 846; 1 P. & D. 138; 1 W. W. & H. 619; 8 L. J., Q. B. 35.

"As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date—January 14, 1833":—Held, that no action lay on this undertaking, inasmuch as no consideration appeared on the face of the instrument. *James* v. *Williams*, 3 N. & M. 196; 5 B. & Ad. 1109; 2 D. P. C. 481; 3 L. J., K. B. 97.

So in a guarantee in the following form:—"1843, June 28th. Mr. P., I will see you paid for 5*l.* or 10*l.* worth of leather on the 6th of December for T. L., shoemaker. Signed, R. R.," the consideration did not sufficiently appear on the face of the guarantee. *Price* v. *Richardson*, 15 M. & W. 539; 15 L. J., Ex. 345.

Action on the following guarantee:—"In consideration of your having this day advanced to our client, Mr. V. D., 750*l.*, secured by his warrant of attorney, payable on the 22nd of August next, we hereby, jointly and severally, undertake to pay the same on default, &c. Dated the 20th of June, 1840." The declaration stated, that, in consideration that the plaintiff would, on the 22nd of June, 1840, lend to V. D. 750*l.*, on the security of a warrant of attorney, payable on the 22nd of August next, and would forbear and give time to V. D. until the 22nd of August, the defendant promised:—Held, that the instrument was sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee, and that no amendment of the declaration was necessary. *Goldshede* v. *Swan*, 1 Ex. 154; 16 L. J., Ex. 284.

A declaration alleged, that L. had requested the plaintiff to sell and deliver to him goods in the way of his business, and the plaintiff, at L.'s request, consented to do so, provided the defendant would guarantee the payment, of which he, before the making of his promise, had notice; that afterwards, and before L. was indebted to the plaintiff for any goods, and when no goods delivered by the plaintiff to L. were unpaid for, and no money was due from L. to the plaintiff on any account whatever, the defendant, by writing addressed to the plaintiff, promised in the words following: "I hereby guarantee the payment of any sum or sums of money due to you from L., the amount not to exceed at any time 100*l.*"; that afterwards the plaintiff supplied goods to L. for reasonable prices, amounting to 100*l.*, and thereby allowed L. to become indebted to him in 100*l.*; that L. had not paid, or the defendant:—Held, that the circumstances stated in the declaration might be looked at to explain the meaning of the instrument. *Bainbridge* v. *Wade*, 16 Q. B. 89; 20 L. J., Q. B. 7; 15 Jur. 572.

Held, also, that the writing so explained showed a good consideration for the defendant's promise, namely, the future advances by the plaintiff to L., so as to satisfy the statute of frauds. *Ib.*

"In consideration of Messrs. E. R. & Co. giving credit to Mr. D. J., I hereby engage to be responsible to and to pay any sum not exceeding 120*l.* due to Messrs. E. R. & Co. by D. J.":—Held, that the words "giving credit" might be shown, by extrinsic circumstances, to apply to a particular credit agreed upon; and that the guarantee, therefore, disclosed a good consideration, and was not bad for uncertainty. *Edwards* v. *Jevons*, 8 C. B. 436; 19 L. J., C. P. 50; 14 Jur. 131.

On the 20th of December, 1833, the following letter was written by the defendant in London to the plaintiff, who had succeeded T. M. in his business in Liverpool:—"When I had the pleasure of seeing you in London, I then told you I had not the least hesitation in becoming surety to you in the amount required for my brother, but, for a protection both to myself and him, I thought it highly necessary I should distinctly understand in what state his affairs were, in order that he may not, by any inadvertence, involve me, at which I am convinced he would grieve as much as myself. I still hold this mind, and before I sign any bond or instrument I must clearly see my way. In the meantime, in order to convince you it is furthest from my thoughts in any way to retard his business or prospects, I will hold myself responsible to you to the amount of 200*l.* in the event of his inability to meet it, with the full understanding that you are to consider this responsibility in the full and liberal light of the

security I before entered into for him with Mr. M., your predecessor, and that, when a full statement of his affairs is laid before me, and such proving satisfactory, I then enter into the security you require; that the said sum of 200*l.* be void and of no effect, and not to be in force or added to the aforesaid security" :—Held, that this letter did not show a consideration in writing, as required by the statute of frauds, either in express terms or by necessary inference, and therefore that it was void as a guarantee. *Bentham* v. *Cooper*, 5 M. & W. 621; 9 L. J., Ex. 114.

So an undertaking as follows: — "Messrs. Morley & Co.,—We hereby promise that your draft on William Clarke, Son & Co., due at Messrs. Mastermans' at six months, on the 27th November next, shall be then paid out of money to be received from St. Philip's Church, say amount 174*l.* 13*s.* 5*d.*—W. Clarke, W. Boothby"—was void, no consideration appearing for Boothby's promise. *Morley* v. *Boothby*, 3 Bing. 107; 10 Moore, 395; 3 L. J. (O.S.) C. P. 177.

The following letter, dated and signed by the defendant, and addressed to the plaintiff:—"I hereby agree to see you paid, within three months from date hereof, the amount of 5*l.*, due to you on account of G. M., jun.," was not sufficient to bind the defendant, the consideration for the promise not being sufficiently expressed. *Clancy* v. *Piggott*, 4 N. & M. 496; 2 A. & E. 473; 1 H. & W. 20; 4 L. J., K. B. 75. S. P., *Jenkins* v. *Reynolds*, 6 Moore, 86; 3 Br. & B. 14.

b. Past or Executory.

For Goods to be Supplied.]—M. supplied a son with some beer, and on his refusing to supply more without a guarantee, the son gave the following guarantee, signed by the father:—"I hereby undertake to pay you for all the beer supplied by you to the Star Brewery, 131, East street, Walworth, on the completion of the purchase, which will take place in a few days":—Held, that the promise was primâ facie a promise to pay for goods to be supplied. *Mockett* v. *Ames*, 23 L. T. 729.

"I hereby guarantee Mr. J.'s account with you for wines and spirits to the amount of 100*l.*" is a guarantee for an existing account, and not for a future supply. *Allnutt* v. *Ashenden*, 6 Scott (N.R.) 127; 5 Man. & G. 392; 12 L. J., C. P. 124; 7 Jur. 113.

A wife being entitled to separate estate, without restraint upon anticipation, in order to obtain credit for her husband, a trader, gave the following guarantee to a wholesale dealer:—"In consideration of you having, at my request, agreed to supply and furnish goods to W. M. C., I do hereby guarantee to you 500*l.* This guarantee is to continue in force for the period of six years, and no longer":—Held, that the guarantee only extended to the price of goods supplied after it was given, and not to debts owing to the guaranteed in respect of previous transactions. *Morrell* v. *Cowan*, 47 L. J., Ch. 73; 7 Ch. D. 151; 37 L. T. 586; 26 W. R. 90—C. A.

A guarantee was given as follows: "I. V. hereby engages to be responsible for liabilities incurred by M. and V. to the extent of 50*l.*" At the time the guarantee was given 41*l.* was due from M. and V. to the plaintiff:—Held, first, that the guarantee contemplated future credit, but only to such an amount as with the existing liability made up 50*l.* *Chalmers* v. *Victors*, 18 L. T. 481; 16 W. R. 1046.

And the amount having been paid off by M. and V.:—Held, secondly, that the guarantee did not cover goods subsequently supplied. *Ib.*

The plaintiffs (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to the defendants, declined to let D. have certain goods which he had then bought of them without a telegram from the defendants that they would be answerable for them. They sent such telegram, and D. had the goods and in due time paid for them. By the post of the same day on which the telegram was despatched, the defendants sent to the plaintiffs a letter, in which, after referring to the telegram, and stating that they had done business with D. for five years, and had never known anything dishonest in his transactions, they wrote: "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure for any account he may have with you. When to the contrary we will write to you":—Held, that the letter was a continuing guarantee for the amount of goods D. should buy of the plaintiffs until they should hear to the contrary. *Nottingham Hide, Skin, &c. Co.* v. *Bottril*, 42 L. J., C. P. 256; L. R. 8 C. P. 694; 29 L. T. 134; 21 W. R. 739.

A guarantee for the payment of goods supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee. *Simmons* v. *Keating*, 2 Stark. 426.

Ambiguous.]—"In consideration of E. R. & Co. giving credit to D. J., I hereby engage to be responsible, and to pay any sum not exceeding 120*l.* due to E. R. & Co. by D. J.," is a good and binding guarantee, the words "giving credit" being equally applicable to future as to past credit. *Edwards* v. *Jevons*, 8 C. B. 436; 19 L. J., C. P. 50; 14 Jur. 131.

The defendant gave to the plaintiffs the following guarantee: "Gentlemen,—As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account":—Held, that the expression "for goods supplied" did not necessarily import a past consideration, and ought to be read "for goods to be supplied." *Hoad* v. *Grace*, 7 H. & N. 494; 31 L. J., Ex. 98; 8 Jur. (N.S.) 43; 5 L. T. 359; 10 W. R. 85.

A guarantee was as follows: "In consideration of the credit given by B. to E., I hereby agree to guarantee the payment of all bills of exchange drawn by B. and accepted by E. Also I hereby agree to guarantee the payment of any balance that may be due from E. to B. This guarantee to include all bills of exchange now running as well as the balance of account at this day." It appeared that at the time of giving the guarantee there were bills running and an account due from E. to B., and future dealings between the parties were contemplated:—Held, that the guarantee extended as well to future as to past transactions. *Broom* v. *Batchelor*, 1 H. & N. 255; 25 L. J., Ex. 299; 4 W. R. 712.

Where the words of a guarantee were capable of expressing either a past or concurrent consideration:—Held, that the latter, which made the instrument valid, was to be adopted. *Steele* v. *Hoe*, 14 Q. B. 431; 19 L. J., Q. B. 89; 14 Jur. 147.

Construction of Several Documents.]—The plaintiffs, on the 24th November, wrote to the defendant, "We are doing business with Messrs. B., and we require a guarantee of 200*l.*, and they refer us to you for one." The defendant replied on the 27th November, "I have no objection to become security for Messrs. B., and subjoin the following memorandum to that effect:—'200*l.* I hereby engage to guarantee to [the plaintiffs] 200*l.* for iron received from them for Messrs. B., as annexed'":—Held, that the contract was to be collected from the three documents read together, and that the consideration for the promise was, that the plaintiffs would continue to supply iron to B. after the 27th November. *Colbourn* v. *Dawson*, 10 C. B. 765; 20 L. J., C. P. 154; 15 Jur. 680.

Mutual Obligation.]—P. being indebted to the plaintiffs, the defendants gave them the following guarantee: "In consideration of your agreeing, at our request, from time to time to supply on credit to P. such goods as he may require, and you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes and may at any time, from time to time, owe to you":—Held, that the guarantee did not contain any binding agreement on the part of the plaintiffs to supply goods to P., and that, as they never did supply any goods to P. after the date of the guarantee, the defendants did not become liable to pay the existing debt of P. *Westhead* v. *Sproson*, 6 H. & N. 728; 30 L. J., Ex. 265; 7 Jur. (N.S.) 502; 4 L. T. 408; 9 W. R. 695.

Payment of Rent—Determination of Tenancy.]—M. being yearly tenant to the plaintiff on the terms of a written agreement, the defendant, in consideration of the plaintiff's continuing M. as such tenant, gave to the plaintiff a guarantee for "the rent of the Leese farm, in the occupation of M." The plaintiff afterwards gave M. notice to quit, but on the payment of arrears of rent withdrew it, before the expiration of the current year. The next year the rent became in arrear, and the plaintiff sued the defendant on his guarantee:—Held, that the old tenancy was determined by the notice to quit; that the guarantee applied only to the tenancy which existed at the time when it was given; and that the defendant was therefore not liable. *Taylour* v. *Wildin*, 37 L. J., Ex. 173; L. R. 3 Ex. 303; 18 L. T. 655; 16 W. R. 1018.

Advances—Past or Future.]—A father gave his son a promissory note for 2,000*l.*, which was indorsed by the son, and discounted by a banking company, who took from the father an agreement under seal that, on condition of their discounting the note, certain deeds of the father's deposited at the same time should remain as security for all money due or to become due from the son to the company on any account whatsoever. At the date of the agreement the son owed the company 3,000*l.* upon a running account, and the sum was subsequently increased to 5,000*l.* The father having died:—Held, that the bank was entitled to prove against the father's estate not only for the 2,000*l.*, the amount of the note, but also for all sums due from the son. *Burgess* v. *Eve*, 41 L. J., Ch. 515; L. R. 13 Eq. 450; 26 L. T. 540; 20 W. R. 311.

A guarantee that, in consideration of advances made and to be made by C. and D., bankers, or by any other persons of whom their firm might from time to time consist, in the way of loan, payments, discount, or otherwise, to F. H. and S. F., H. and G., jointly and severally, thereby guaranteed to C. and D. the repayment of the advances, and to indemnify them against any loss by reason of such advances; their liability not to exceed the sum of 1,000*l.*; the guarantee to be a continuing guarantee, and to be a security to C. and D. to the extent of 1,000*l.* for the whole of any balances which might from time to time, or at any time, become due to C. and D. or to the persons for the time being constituting the firm of the banking house, is a good and binding guarantee for both the past and future advances, such future advances having been made. *Chapman* v. *Sutton*, 3 D. & L. 646; 2 C. B. 634; 15 L. J., C. P. 166.

The defendant being agent to receive rents for A., undertook, upon A. giving him an authority to do so, to repay to the plaintiff out of the first money received on A.'s account anything the plaintiff might be pleased to advance to A. A. gave the defendant this authority: "Please to pay [the plaintiff] 20*l.* by four instalments, namely 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853; and should any money be owing by me to her after that time, please to pay same way, as above":—Held, that the authority was not confined to the payment of the 20*l.*, but authorised the payment of further advances made by the plaintiff to A. *Horlor* v. *Carpenter*, 3 C. B. (N.S.) 172; 27 L. J., C. P. 1.

A creditor cannot avail himself of a security obtained under an agreement for a further advance, which he afterwards refuses. *Mayhew* v. *Crickett*, 2 Swanst. 193; 1 Wils. Ch. 418; 19 R. R. 57.

The plaintiffs declared, that, in consideration that they would lend and advance 5,000*l.* to S. & Co., the defendant would be answerable for and repay them the sums so lent and advanced, and averred that they accordingly advanced the 5,000*l.*, by reason whereof the defendant became liable to pay. The defendant, at the request of the plaintiffs, on the 19th of May, 1815, wrote to them, stating that she would be answerable to the extent of 5,000*l.* for the use of the house of S. & Co. At the time this guarantee was given, S. & Co. were considerably indebted to the plaintiffs. On the 24th of the same month the guarantee was deposited with the plaintiffs as a security, with two bills amounting to 3,528*l.* 16*s.* 2*d.*, which, having been in their hands as securities before, were delivered and redelivered as a security for a new note of 6,500*l.*, and no money passed on that day:—Held, that, as between the plaintiffs and the defendant, no money was advanced to S. & Co. subsequent to the guarantee, so as to give it a retrospective operation. *Glyn* v. *Hertel*, 2 Moore, 134.

In August, 1848, the defendant gave the following guarantee to O.: "I am aware that my uncles, J. and J. F. K., stand considerably indebted to you for professional business, and for cash advanced to them, and that it is not in their power to pay you at the present; and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation, on your part, to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my uncles to a certain extent,

and, therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you, at any time during the next six years, to the extent of 1,000*l.*, whenever called upon by you to pay the same, and after twelve months' previous notice." At the date of the guarantee, J. and J. F. K. were indebted to O. in 513*l.* Subsequently O. advanced large sums of money to J. and J. F. K., and dealings went on till January, 1849, when the debt due from them to O. amounted to 2,184*l.*:—Held, that the guarantee was founded on a sufficient consideration, and that, further advances having been made, and time given, it bound the defendant. *Oldershaw* v. *King*, 2 H. & N. 517; 27 L. J., Ex. 120; 3 Jur. (N.S.) 1152; 5 W. R. 753—Ex. Ch.

The consideration for the promise to guarantee was the keeping the account open, and making further advances. Per curiam, dissentiente Crompton, J. *Ib.*

—— **Evidence.**]—"Messrs. H., in consideration of your being in advance to L. in 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. B.":—Held, that the words of the guarantee did not necessarily imply a past advance, and that the plaintiffs, on a trial, might have offered evidence to show that future advances had been contemplated. *Haigh* v. *Brooks*, 10 A. & E. 309; 4 P. & D. 288.

—— **Implication.**]—A. guaranteed to a banking company "all current obligations in their hands to which B. may be a party, and also all his future obligations and engagements that may come into their hands":—Held, that the latter part of the guarantee, as to the future obligations, implied of itself a consideration, and did not require the specific statement of one in the body of the guarantee, according to the statute of frauds; and that the company might, therefore, on the bankruptcy of A., prove for the amount of their advances to B. subsequently to the date of the guarantee. *Littlejohn, Ex parte*, 3 Mont. D. & D. 182; 7 Jur. 474.

—— **Sufficiency.**]—The following guarantee:—"We, the undersigned, hereby indemnify the National Provincial Banking Company to the extent of 1,000*l.*, advanced or to be advanced to R. P. by the company," R. P. at the time the guarantee was given being indebted to the bank in a sum exceeding 1,000*l.*, does not upon the face of it, or construed with reference to the extrinsic circumstances, disclose a sufficient consideration. *Bell* v. *Welch*, 9 C. B. 154; 19 L. J., C. P. 184; 14 Jur. 432.

"As you are about to enter upon transactions in business with Messrs. C. (with whom you have already had dealings), in the course of which they may be from time to time largely indebted to you, in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you, the payment of any sums of money which that firm, whether it may consist of the same members as at present, or others, now is, or may at any time be, indebted to you, so that I am not called upon to pay more than 2,000*l.*," discloses a sufficient consideration, and covers both past and future debts. *Johnson* v. *Nicholls*, 1 C. B. 251; 14 L. J., C. P. 151; 9 Jur. 429. S. P., *Raikes* v. *Todd*, 1 P. & D. 138; 8 A. & E. 846; 1 W. W. & H. 619; 8 L. J., Q. B. 35.

A bond was vested in a trustee in trust as to income for a married woman for life, for her separate use, with remainder in trust for her issue; and in default of issue, in trust for such persons as the married woman alone, notwithstanding coverture, should by deed, or instrument in writing, to be by her sealed and delivered in the presence of, and to be attested by, two credible witnesses, appoint. The husband being indebted to his bankers, on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her to the effect, that, in consideration of the bankers paying, or having already paid, the cheques of the husband, or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof; and that she deposited, as a collateral security, the bond, which she undertook to assign to the bankers on request:—Held, that the consideration was sufficient, and that the separate life interest of the wife was effectually charged; but that, the letter not having been executed and attested as required by the power, the court would not, under the circumstances, give effect to it as an appointment. *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58. *But see* 19 & 20 Vict. c. 97, s. 3, by which the consideration for a guarantee need not be in writing.

On account of other Debts.]—Guarantee given by the defendant to the plaintiff as follows:—"In consideration of your having resigned the office of deacon at the Baptist church at C., I hereby agree to hold myself responsible to you for the payment of 150*l.* due to the Rev. J. E. by the Baptist church at C., and also the interest, payable every six months, for which you and P. M., deacons of the church, became responsible to the Rev. J. E. by an instrument dated September 25, 1840." That instrument was as follows:—"In consideration of your having resigned the pastoral office over the Baptist church at C., and the church having agreed at the earliest possible period to pay to you 700*l.*, with interest half-yearly until the same be paid, we, the deacons, agree to hold ourselves responsible to you for the carrying out of the said resolution." The 700*l.* had been reduced to 150*l.* by payments between 1840 and 1845. In 1842 a resolution was entered in the church books, and signed by the plaintiff, inviting the defendant to become pastor, on condition that he agreed to be legally responsible to the plaintiff, the present deacon, and any future deacon, for the payment of 500*l.* due to J. E. by the church, and also agreed that the trustees of a fund for the maintenance of the minister should pay to the plaintiff, or other deacon, 100*l.* yearly, for the purpose of liquidating the above debt to J. E., and that the interest of the debt be paid half-yearly from the church funds. The defendant signed a memorandum in the church books that he accepted the invitation on these terms. A declaration stated that, in consideration that the plaintiff, at the request of the defendant, would resign the office of deacon of the Baptist church at C., the defendant promised to hold himself responsible to the plaintiff for payment of 150*l.*, due to J. E. by the Baptist church at C., and interest, being the residue of the 700*l.* remaining unpaid, for which the plaintiff and P. M. had become responsible to J. E.:—Held, that the effect of the guarantee was correctly stated in

the declaration, and that the funds for the support of the minister were intended to be included for the payment of the debt due to J. E. *Steele* v. *Hoe*, 14 Q. B. 431 ; 19 L. J., Q. B. 89 ; 14 Jur. 147.

c. Forbearance to Sue and Abandonment of Claims.

In What Cases.]—The plaintiff's agent wrote to the defendant : " I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow." The defendant in reply : " I undertake to pay 500*l.* on the account between my late brother, Mr. O. D. Hughes, and your client on or before this day three weeks." The plaintiff did not expressly agree to forbear suing, but did in fact forbear for three weeks :—Held, that the correspondence, together with the plaintiff's actual forbearance for three weeks to sue, constituted a good and binding promise to pay on the part of the defendant. *Wynne* v. *Hughes*, 21 W. R. 628. See *Coles* v. *Pack*, 39 L. J., C. P. 63 ; L. R. 5 C. P. 65 ; 18 W. R. 292.

An agreement to forbear for a reasonable time is a good consideration to support a promise to guarantee a debt due from a third person. *Oldershaw* v. *King*, 2 H. & N. 517 ; 27 L. J., Ex. 120 ; 3 Jur. (N.S.) 1152 ; 5 W. R. 753 —Ex. Ch.

A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees, and the son's solicitor wrote on his behalf to the claimants agreeing to pay 300*l.* in satisfaction of the losses :—Held, that this agreement was not void for want of consideration. *Orrell* v. *Coppock*, 26 L. J., Ch. 269 ; 2 Jur. (N.S.) 1244 ; 5 W. R. 185.

A surety, upon being informed that proceedings are contemplated against himself and his principal, states by letter his intention to pay the debt :—Held, after his decease, that the letter was a promise to pay ; and that the forbearance to sue was a sufficient consideration for the promise. *Jones* v. *Beach*, 21 L. J., Ch. 543.

Withdrawal of Petition.]—A guarantee was given in the following terms : " In consideration of your withdrawing the petition you have presented for winding up the A. company we agree to pay all the costs you have incurred in reference to the petition. We further agree to guarantee the payment to you within eighteen months, by the company or the liquidator thereof, of the principal of your debt of 722*l.*" To declaration on this guarantee, alleging as a breach the non-payment of the 722*l.*, the defendants pleaded that after the alleged withdrawal of the petition, and before a reasonable time had elapsed, and within the eighteen months, the plaintiff presented another petition for winding up the company, which prevented the collection of the assets of the company. At the trial the jury found that the presentation of the second petition did not prevent the collection of assets :—Held, that the withdrawal of the first petition was a sufficient consideration for both promises of the guarantors ; that the plea, as proved, afforded no defence ; and that on the finding of the jury the plaintiff was entitled to recover. *Harris* v. *Venables*, 41 L. J., Ex. 180 ; L. R. 7 Ex. 235 ; 26 L. T. 437 ; 20 W. R. 974.

Where Fraudulent.] — In an action on a guarantee for a debt due from S. to the plaintiff the promise alleged being that if the plaintiff would give S. a written acknowledgment that the plaintiff had no legal claim on S., the defendant would be answerable for the amount, with an averment that the plaintiff wrote and sent such acknowledgment to S. Plea, that S. was a trader within the bankrupt acts, and a prisoner in execution for debt, owing 300*l.* and upwards, and was desirous of petitioning the Court of Bankruptcy for an interim order of protection under 7 & 8 Vict. c. 96, s. 6, and in support of such petition of falsely representing himself to the court as owing less than 300*l.*, and that the defendant, at the request of S., gave the guarantee, with the intent on the part of S. and the defendant that S. should be the better able falsely to make such representation, and that the plaintiff knew the corrupt purpose for which the guarantee was given, and with such knowledge accepted it, and assented to write the acknowledgment for the purpose of aiding S. in making the false representation :—Held, on proof of the facts pleaded, that the plaintiff's acknowledgment was not a release under seal, and that the defendant was entitled to a verdict on the evidence. *Coles* v. *Strick*, 15 Q. B. 2.

Statement of Consideration.]—A declaration stated that L. made his promissory note payable to the plaintiff ; that the note being in the plaintiff's hands overdue and unpaid, " in consideration that the plaintiff would forbear and give time to L. for payment of the note, to wit, for a reasonable time, the defendant promised to pay the note in case L. should make default." It then alleged that L. made default, and that the defendant did not pay the amount of the note. At the trial it appeared that the defendant having agreed to guarantee the payment of the note by L., indorsed on the back thereof as follows :—" I guarantee the payment of the within note by L., on the 2nd November next." On that day the note being due and dishonoured, the defendant signed the following memorandum, addressed to the plaintiff :—" Sir,—I request you will hold over the promissory note in your favour, of L., dated 31st July, 1844, for 200*l.*, at three months ; and in consideration of your so doing, I undertake to continue in all respects my guarantee " : —Held, that the guarantee was defective, and that there was no evidence to support the declaration. *Temple* or *Semple* v. *Pink*, 1 Ex. 74 ; 16 L. J., Ex. 237.

B. and C., members of a railway committee, being indebted to A. in a large sum which A. sought to recover by contributions from the committee, and A., having brought an action against B., and having threatened to sue C., D. promised that, in consideration that A. would cease to prosecute the action brought, and would forbear to sue C., he, D., would pay a certain smaller sum to A. In declaring upon this promise it is not necessary to allege that D. was a member of the committee, or that A. had any well-founded claim against the committee, or that the actions brought and threatened related to the committee, or that the plaintiff was ready and willing to accept the smaller sum in satisfaction of the debt owing from B. and C. *Empson* or *Tempson* v. *Knowles*, 7 C. B. 651 ; 18 L. J., C. P. 222.

Abandoning Lien.]—A declaration stated that plaintiff was a shipbroker, and that he was

employed by the owners of a ship to procure for them a charter of that ship upon the terms that he should be entitled to receive the freight, and thereout to satisfy himself his commission, and that he did accordingly procure a charterparty on certain terms; that the ship sailed, and performed her voyage and returned to England; that a change of ownership in some of the shares of the ship accrued before her return: that after her return the plaintiff was about to collect, and would have collected the freight, so as thereout to satisfy himself his commission; that the defendants were the brokers for the new owners, and it became desirable for them to obtain immediate possession of the ship, and they were, therefore, anxious that plaintiff should abandon his right of receiving the freight; that in consideration of the premises, and that the plaintiff would relinquish his right to collect the freight, the defendants promised to pay him his commission: that the plaintiff relinquished his right; but that the defendants would not pay him his commission:—Held, that this was an agreement by the defendants to pay in consideration of the plaintiff abandoning his rights arising from several matters stated by way of inducement, the inducement, as stated, being material; and that the declaration was not supported by proof of an agreement, in consideration of the plaintiff not asserting any lien on the freight, without its appearing whether or not he was entitled to such lien. *Gull* v. *Lindsay*, 4 Ex. 45; 18 L. J., Ex. 355.

In an action on a guarantee, the declaration alleged that, in consideration that the plaintiffs would give up their lien on certain goods of Y., and would take his acceptance for 140*l*., the defendant guaranteed to the plaintiffs payment of the same, and the plaintiffs accordingly gave up to Y. the goods, and took the acceptances of Y. for 145*l*.:—Held, that the declaration disclosed no cause of action. *Pickles* v. *Thornton*, 33 L. T. 658—C. A. *And see cases* ante, col. 1138.

Composition of Debts.]—A declaration stated that A., being indebted to the plaintiffs in 7,093*l*., and being unable to pay the amount, requested them to accept a composition of 10*s*. in the pound on their debt, and to give time for payment, to which they agreed upon having the same guaranteed, and that thereupon the defendant addressed a guarantee to them, to the following effect: "At the request of A., and in consideration of your agreeing to take 10*s*. in the pound for your claim on them, amounting to 7,093*l*., and giving them five years to pay off 3,546*l*., being one-half of the debt, or at the rate of 10*s*. in the pound for the whole, with interest on 3,546*l*., at the rate of 5*l*. per cent. per annum, payable half-yearly, the 3,546*l*. to be paid by the instalments and in the manner mentioned, or to be mentioned, in your agreement with A., I hereby guarantee to the extent of 500*l*. the payment by A. of 3,546*l*., with interest, as mentioned in the agreement"; that the plaintiffs and A. subsequently entered into a written agreement, by which the plaintiffs agreed to accept of A. the composition of 10*s*. in the pound, to be paid by stipulated instalments, on specified days, extending over a space of five years, in consideration of having the payment of the instalments guaranteed by the persons named in the schedule, and in which the defendant's name appeared as guaranteeing to the extent of 500*l*. The agreement contained a proviso, rendering the agreement void, and enabling the plaintiffs to recover the whole of the original debt, in case A. should make default in payment of any instalments on the stipulated days, or should commit any act of bankruptcy on which a fiat should issue. The declaration averred that one instalment became due, that default was made in payment thereof by A., that the plaintiffs applied to the defendant, but that he had not guaranteed the instalment, and that the same remained unpaid:—Held bad on general demurrer, on the ground that, upon the true construction of the guarantee, the consideration of the defendant's promise was that there should be an agreement between the plaintiffs and A., and that the agreement entered into by them did not comply with the terms of the guarantee. *Clarke* v. *Greene*, 3 Ex. 619.

Release, at what Time.]—In an action on a guarantee, the plaintiff, in support of an averment in the declaration, that he had executed a certain indenture, gave in evidence the following document, signed by the defendant: "In consideration of your having by indenture agreed to accept payment of the debt owing to you by A. by the following instalments, that is to say, 10*s*. in the pound, I promise to guarantee the payment of the instalments." There was evidence that when A.'s creditors received the guarantee, he signed the deed at the same time:—Held, that, under the circumstance of the case, the true construction of the guarantee was, "that if at some future time the plaintiff shall have released the debt, the defendant will guarantee the same to him"; and, therefore, that it did not prove the averment in the declaration. *King* v. *Cole*, 2 Ex. 628; 17 L. J., Ex. 283.

d. Other Cases.

Indemnity to Sheriff's Officer.]—A declaration alleged that the defendant issued a fi. fa. on a judgment against M., which the sheriff delivered to the plaintiff, his officer, to execute, and the plaintiff, at the defendant's request, seized goods, believing them to be M.'s, whereupon G. claimed them, and gave notice to the sheriff not to sell them; and in consideration of the premises, and that the plaintiff would pay no attention to the claim or notice, and would proceed to a sale, the defendant promised the plaintiff to indemnify him for so doing; that the plaintiff thereupon paid no attention, and sold the goods, and levied, and, at the defendant's request, delivered the balance to the defendant; that afterwards G., by reason of the premises, impleaded the plaintiff, together with the sheriff, in a county court, for seizing and selling, and recovered against the plaintiff and the sheriff the value of the goods, damages and costs, which the plaintiff being liable (as the defendant knew) to indemnify the sheriff, paid to G., but the defendant did not indemnify:—Held, a good declaration, for that consideration sufficiently appeared, and it was no objection that the plaintiff's disregard of the claim was not shewn with sufficient certainty to have been otherwise than an illegal act, or that the plaintiff, consistently with the allegations, might have sold in the mere performance of his duty, or that it was not sufficiently shewn that G. recovered solely by being entitled to the goods seized, and not by any irregularity in the plaintiff's acts, or how much damage accrued

from the selling, and how much from the seizing, or that the action in the county court was against the sheriff together with the plaintiff. *Elliston* v. *Berryman*, 15 Q. B. 205.

Indemnity against Costs.]—An agreement by the plaintiff, an attorney, the defendant, and B., set forth, that, in consideration of B. having agreed to pay to the defendant his claim against B., and certain costs, out of the proceeds to arise from the recovery by B., in an action of B. against J., the defendant undertook to pay the plaintiff all costs incurred by him in prosecuting the action of B. against J., the plaintiff thereby agreeing with the defendant to bring the same:—Held, that, in an action on this agreement, the consideration was rightly described to be, that the plaintiff, at the request of the defendant, would, with B.'s assent, prosecute the action of B. against J. *Dally* v. *Poolly*, 6 Q. B. 494.

Indemnity against Debt of Wife.]—Covenant by a third person to indemnify the husband against wife's debt, a good consideration. *Compton* v. *Collinson*, 2 Bro. C. C. 377.

Giving Security without Payment.]—A plaintiff having given the defendant promissory notes, and a cognovit for 500*l.*, as a composition for certain claims, the defendant in consideration of the money so secured to be paid, engaged to indemnify him against certain liabilities:—Held, that the security, not the actual payment, was the consideration, and that the plaintiff might sue on the guarantee, though he had not paid the 500*l.* *Ikin* v. *Brook*, 1 B. & Ad. 124; 8 L. J. (O.S.) K. B. 379.

Failure of Consideration.] — Upon the eve of a sale by the sheriff, A. (a stranger) agreed to guarantee the judgment debts, upon the judgment creditor consenting to postpone the sale under the execution. It turned out that the consent of another party was necessary in order to prevent the sale, and in consequence the sale took place. A. gave notice that the consideration having failed, the guarantee was at an end:—Held, that A. was not liable on the guarantee. *Cooper* v. *Joel*, 27 Beav. 313; 1 De G. F. & J. 240; 1 L. T. 351.

8. Extent of Liability.

Generally.]—A guarantee is merely a contract to indemnify upon a contingency; and is in the nature of a claim for unliquidated damages. *Sampson* v. *Burton*, 4 Moore, 515; 2 Br. & B. 89.

A surety bound himself jointly to a banking company in 500*l.*, the condition of the bond being that if the obligors should from time to time pay all and every such sum or sums of money as should become due to the bank for money advanced to surety's co-obligor, and pay interest at 5*l.* per cent. per annum for such sum or sums of money as aforesaid, to be computed as is usual with the banking company in ordinary banking accounts with them; and also the lawful commission, charges and expenses incident to or occasioned by the transactions or matters between the bank and the co-obligor, and should indemnify and save harmless the banking company from all actions, suits and expenses, and all liability whatsoever by reason of the transactions and matters; then the bond was to be void. Provided that the principal moneys to be ultimately recovered on the bond were thereby limited not to exceed 250*l.*, and that the obligors or any of them should not be liable to pay, by virtue thereof, any greater principal sum than 250*l.* But that the bond should be a continuing security to that amount, for the sums from time to time owing as aforesaid, exclusive of interest (to be computed as aforesaid), commission, costs, charges and expenses:—Held, that the surety was liable on this bond only for 250*l.* principal moneys advanced, and interest accrued upon that sum; but not for interest upon any further principal sum advanced by the bank. *Meek* v. *Wallis*, 27 L. T. 650.

Where a bond which on the face of it appears to be a simple money bond is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances. *Walker* v. *Hardman*, 4 Cl. & F. 258; 11 Bligh, 299. And see *Pease* v. *Hurst*, 5 M. & Ry. 88; 10 B. & C. 122; 8 L. J. (O.S.) K. B. 94.

Primâ facie, a continuing guarantee, limited in amount, to secure a floating balance, is, as between surety and creditor, a guarantee of so much only of the debt as does not exceed the sum named in the limitation, for it is to be presumed that the surety did not contemplate the creditor's allowing the debtor to become indebted to him beyond that amount. No such presumption arises where the debt, in respect of which the bond is given, is an ascertained amount, exceeding the sum named in the limitation. *Ellis* v. *Emanuel*, 46 L. J., Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 332—C. A.

Upon a contract to guarantee a bill of exchange for a given sum, the guarantor would not be liable to that extent on a bill given for a larger sum. *Philips* v. *Astling*, 2 Taunt. 206; 11 R. R. 547.

The defendant requested the plaintiff, by letter, to advance B. 2*l.* a week, and engaged "to pay him all moneys he might advance to B., in addition to the 24*l.* which he had already let him have":—Held, that the guarantee was to be read as if it had been "all such moneys," i.e. the 24*l.*, and the amount of the subsequent weekly sums of 2*l.*; and that it did not extend to any other sums he might advance over and above the allowance of 2*l.*, because this allowance was the subject-matter of the letter. *Smith* v. *Brandram*, 2 Scott (N.R.) 539; 9 D. P. C. 441; 2 Man. & G. 244; 5 Jur. 173.

Rateable Contribution.]—Sureties in a recognizance contribute in proportion to the amounts for which they were respectively originally bound. *MacDonaghs, In re*, Ir. R. 10 Eq. 269. *And see* post, cols. 1285 et seq.

Shares—Collateral Securities.] — The defendant and two others agreed to become sureties to the plaintiff for a debt of a fourth person, and all entered into a joint and several covenant for payment of 1,000*l.* and interest; one of the sureties gave on his own account an extra collateral security for the same debt, by assigning an annuity for 60*l.*, which was not paid, but accounted for. The principal debtor also gave a bill of sale to the plaintiff, under which he took possession, and which he afterwards gave up to one of the sureties on receiving bills for 200*l.* from him:—Held that the defendant, as one of the three sureties, was liable for one-third of the amount of the original debt and interest, not-

withstanding the securities given and payments made by his co-sureties; the two other sureties having in effect paid their shares, the defendant was liable to the plaintiff for his share. *Margrett* v. *Gregory*, 6 L. T. 543; 10 W. R. 630.

For Agent—Construction.]—In construing an agreement in the form of a bond in which a surety became liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency:—Held, accordingly, that moneys received by an agent on account of his employers during the time of his agency, but not in pursuance of the particular agency disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligation "that during the whole time the said J. D. B., the agent, shall continue to act as agent aforesaid, in consequence of the above-recited agreement, he shall well and truly account for and pay to us, the employers, all sums of money received by him on our account." *Napier* v. *Bruce*, 8 Cl. & F. 470.

For Apprentice.]—Father, on binding his son apprentice, gives a bond for 1,000*l.* for his son's fidelity; the son embezzles 200*l.*, which the father pays, but desires his master not to trust his son any more with the cash; the master does trust the apprentice again with the cash, and is negligent in calling him to account; the son embezzles 1,000*l.* more; the father is liable, but not to answer more in the whole than 1,000*l.*, including the first 200*l.* *Shepherd* v. *Beecher*, 2 P. Wms. 288.

A. puts his son apprentice to B., and gives bond for his fidelity, and takes a covenant from B. that he would at least once a month see his apprentice make up his cash. The apprentice embezzles the cash, and B. brings an action on the bond. On a bill by A. to be relieved:—Held, that A. should be answerable for no more than B. could prove his servant had embezzled in the first month after the embezzlement began. *Mountague* v. *Tidcombe*, 2 Vern. 518.

For Postmaster—Duration of Guarantee.]—A security bond for a deputy postmaster, for three years, shall extend further; but, semble, if the arrears had been paid up at the end of three years, the surety might have been relieved. *Williams* v. *Jones*, Bunb. 275.

Engagement at Lloyd's.]—Where a father, on his son's entering as an underwriter at Lloyd's, addressed to the managing body a letter whereby he held himself responsible for all his son's engagements in that capacity:—Held, that the guarantee extended to all the son's engagements as underwriter at Lloyd's, whether with members or outsiders. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452—C. A.

The defendant guaranteed to the committee of Lloyd's the debts that S., who had applied to be admitted as a subscriber to Lloyd's, might contract as insurance broker, to enable him to act as such; S. took a partner H.: the defendant thereupon withdrew the guarantee, but on finding S. would cease to be a subscriber, wrote to say that the guarantee should continue in force on the same terms and conditions as therein mentioned; partnership firms are not admitted as subscribers of Lloyd's, but subscribers may have a substitute; H. was made a substitute for S.; their business of brokers at Lloyd's was transacted sometimes by S., sometimes by H. as his substitute, and was on behalf of the firm and its name; debts accrued on these transactions:—Held, that the guarantee applied to such debts. *Leathley* v. *Spyer*, 39 L. J., C. P. 299; L. R. 5 C. P. 595; 22 L. T. 821.

Guaranteeing Profits of Business.] — The vendor of a trading concern guaranteed the net profit of the business sold, and of another business, in which the purchasers were also engaged, at a certain specified sum:—Held, that the guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers for the purpose of carrying on the concern. *Kirby* v. *Wright*, 2 Myl. & K. 131; Coop. t. Brougham, 215.

Guaranteeing Freight of Two Ships—Loss of One.]—The defendant chartered two vessels of 300 tons each for a voyage from Ibralia to London, with full cargoes of petroleum, at 84*s.* per ton. In consequence of their stores at Ibralia having been destroyed by fire, he was unable to furnish any oil; and the owners agreed to cancel the charterparties and to procure other cargoes, upon the defendant guaranteeing each vessel a sum of 900*l.* gross freight home. The homeward cargoes shipped under the substituted contract fell short of the guaranteed sum for each vessel by 343*l.* 6*s.* One of the vessels arrived in safety, the other was lost:—Held, that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel, notwithstanding the loss of one. *Carr* v. *Wallachian Petroleum Co.*, 36 L. J., C. P. 236; L. R. 2 C. P. 468; 16 L. T. 460; 15 W. R. 874—Ex. Ch.

Guaranteeing Payment of Goods—At what Price.]—A surety agreed to guarantee the payment of goods supplied by the plaintiff to B. under a contract with government. At the time the guarantee was given negotiations only were on foot, but soon after the government contract was made with B., and also the sub-contract between B. and the plaintiff. Each contract provided that the articles were to be supplied within given periods; but, in point of fact, the articles were not supplied by the plaintiff to B., or by B. to the government, until long after the fixed period. The government, however, had the option, and waived the delay, and paid B. the contract price. B., not having paid the plaintiff, the plaintiff sued the surety on the guarantee, and the surety sought to shew that the price given by B. in the contract with the plaintiff was a high one, on account of the shortness of the time within which the goods were to be delivered, and that the market price at the time the goods were to be delivered was much lower, and he claimed to set off the difference between the two prices:—Held, that the surety could not set off the difference in price. *Oastler* v. *Pound*, 7 L. T. 852; 11 W. R. 518.

Held, also, that the goods were supplied under the original contract, and that the acceptance after the delay did not constitute a new contract, and that the surety was liable. *Ib.*

Upon Bankruptcy of Principal — Rateable Deduction.]—When prior to the commencement of an action against a surety, whose liability is limited to a portion only of the principal debt, the plaintiff receives dividends from the estate of the principal debtor, under proceedings in liquidation, amounting to 9*s.* 2*d.* in the pound on his entire debts, he is not entitled to recover in such action the whole amount of the surety's liability, but only the balance or difference, after deducting the amount of a dividend of 9*s.* 2*d.* in the pound thereon. *Ellis* v. *Wilmot*, 44 L. J., Ex. 10; L. R. 10 Ex. 10; 31 L. T. 574; 23 W. R. 214.

When a surety has become a party to a bond conditioned for payment of the debt and interest, with a proviso that he shall not be liable for more than a certain sum, and the creditor, under a liquidation of the affairs of the debtor, receives a dividend on the whole of the debt and interest then due, the right of the surety to have a proportion of those dividends applied in reduction of the claim against him depends upon whether the bond amounts to a guarantee of the whole debt, with a limitation of the sum which he is to be called upon to pay, or to a guarantee of a part only of the debt. In the former case he is liable for the whole unpaid balance to the extent of the sum limited in the proviso. In the latter case he is entitled to a deduction pro ratâ in respect of the dividends. *Ellis* v. *Emanuel*, 46 L. J., Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832—C. A.

Where a debt having been partly guaranteed, the debtor becomes a bankrupt, and the creditor proves for a larger amount than that covered by the guarantee, the dividends must be applied in ease of the guarantor, rateably to the whole debt proved. *Raikes* v. *Todd*, 1 P. & D. 138; 8 A. & E. 846; 1 W. W. & H. 619; 8 L. J., Q. B. 35.

A bill having been accepted by a banking company, and indorsed to a holder for value, the company passed a resolution to wind up voluntarily, and the winding-up was ordered to be continued under supervision. After this date the holder received from the drawer a composition of 8*s.* 6*d.* in the pound on the amount of the bills. After this payment the holder lodged a claim with the liquidator for the whole amount of the bills:—Held, that he was entitled to be admitted to prove only for the balance, after deducting the part payment. *Oriental Commercial Bank, In re. Maxondoff, Ex parte*, L. R. 6 Eq. 582; 18 L. T. 450; 16 W. R. 784.

H. gave to B. a guarantee: "I hereby guarantee to you the payment of all goods you may supply to E. H., but so as my liability to you under this or any other guarantee shall not at any time exceed 250*l.*" L. gave a similar guarantee. B. supplied goods to E. H. to the amount of 657*l.* E. H. then became bankrupt. B. proved for the whole sum, and then called on the guarantors, who paid him 250*l.* each. B. having afterwards received a dividend of 2*s.* 1*d.* in the pound on the 657*l.*:—Held, that each of the guarantors was entitled to a part of this dividend, bearing to the whole the same proportion as 250*l.* to 657*l.* *Hobson* v. *Bass*, L. R. 6 Ch. 792; 19 W. R. 992.

The obligee of a bond given by principal and surety, conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of 2*s.* 7*d.* in the pound, may recover against the surety an instalment due, making a deduction of 2*s.* 7*d.* on the amount of such instalments; and the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only rateably in part payment of each instalment as it becomes due. *Martin* v. *Brecknell*, 2 M. & S. 39; 14 R. R. 579; 2 Rose, 156. S. P., *London Assurance Co.* v. *Buckle*, 4 Moore, 153.

"In consideration of your giving credit in the way of your trade to L. M., I guarantee to you the payment of any debt which he may contract with you from time to time as a running balance of account, to any amount not exceeding 400*l.*" The plaintiff, on the faith of this guarantee supplied L. M. with goods to the amount of 800*l.*; and he afterwards, being in insolvent circumstances, assigned all his effects to trustees for the benefit of his creditors. The plaintiff claimed a debt of 625*l.*, as the balance due to him against L. M.'s estate, and received a dividend of 8*s.* 9*d.* in the pound on the whole debt. In an action by the plaintiff against the defendant on his guarantee:—Held, that he was not entitled to deduct the whole sum received as a dividend from the gross amount of the debt, and to hold the defendant liable on his guarantee for the residue of the demand up to the extent of the guarantee; that the dividend received was to be applied rateably to the whole debt, as well the part covered by the guarantee as that which was not; and therefore, that a rateable deduction was to be made for the sum covered by the guarantee. *Bardwell* v. *Lydall*, 5 M. & P. 327; 7 Bing. 489; 9 L. J. (O.S.) C. P. 148.

The plaintiffs had become security for N. and had received bills of lading from him to protect themselves. Defendants were interested in the goods, and in consideration of being allowed to direct the sales, agreed with plaintiffs that, after the account sales were made up, "they would bear one-half of whatever loss might occur." There was a loss of 4,215*l.* N. became bankrupt, and plaintiffs proved against his estate for the whole loss and received a dividend thereon:—Held, that the defendants were not entitled to any deduction from the amount of their guarantee in respect of the sum so received by the plaintiffs. *Liverpool Borough Bank* v. *Logan*, 5 H. & N. 464; 29 L. J., Ex. 249; 2 L. T. 382.

A., wishing to be allowed from time to time to overdraw his account with his bankers, the defendant gave them the following document: "On demand I promise to pay to Messrs. G. & Co. 300*l.*, with interest on same, to secure an advance now or hereafter on a banking account with A." A. became insolvent, and paid, by agreement with his creditors, a composition of 16*s.* in the pound; the bankers, who had advanced much more than 300*l.*, received the dividend on their whole advance, leaving a balance on the whole of more than 300*l.*:—Held, that the promise by the defendant was to repay an advance of 300*l.* and that he was therefore only liable for the balance of 300*l.* after deducting 16*s.* in the pound from that amount. *Gee* v. *Pack*, 33 L. J., Q. B. 49; 9 L. T. 290.

Where a limited guarantee has been given, and the limit has been exceeded by the party guaranteed, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeds the amount of such guarantee. *Thornton* v. *M'Kewan*, 1 H. & M. 525; 1 N. R. 16; 32 L. J., Ch. 69; 11 W. R. 140.

Advances—Purpose of.]—A defendant guaranteed the payment of gold with which the plaintiff should supply a goldsmith for the purposes of his trade; the plaintiff discounted bills for the goldsmith, and gave him for them partly gold and partly money; the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:—Held, that the defendant was not liable under his guarantee for the gold so furnished. *Evans* v. *Whyle*, 5 Bing. 485; 3 M. & P. 130; M. & M. 468; 7 L. J. (O.S.) C. P. 205.

A. gave B. the following guarantee: "I have given C. an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those he may send you for sale on my account, and engage that his bills on me, so transmitted, shall be regularly accepted and paid":—Held, that under this guarantee B. was justified in honouring C.'s draft to the amount of a bill drawn by C. on A. and represented by C. to B. as being drawn on account of A., though such bill was in fact drawn by C. on his own account. *Ogden* v. *Aspinall*, 7 D. & R. 637.

Action against a surety upon a bond conditioned for the due payment by M. of all sums in which he should from time to time become indebted to the plaintiffs for goods supplied him by them in the course of their business. The plaintiffs having drawn a bill upon M. for coals supplied to him, discounted the bill, which was dishonoured. M. went to the plaintiffs, and telling them that he wanted 80*l.* to enable him to take up the bill, asked them to lend him that sum. The plaintiffs thereupon gave him a cheque for 80*l.*, with which, and his own money, he took up the bill:—Held, that this was not in substance a loan by the plaintiffs to the defendant of the 80*l.*, but an advance by them for the specific purpose of taking up the bill, which as between the plaintiffs and M. remained unpaid to that extent; and that consequently, as the plaintiffs might have recovered the 80*l.* from M., as for goods sold, the defendant was liable to pay that sum. *Davey* v. *Phelps*, 2 Man. & G. 300; 2 Scott (N.R.) 564.

—— **Deed of Assignment in respect of—What included in.**]—W. and S. by deed assigned to J. P. all moneys to which they might become entitled from a certain railway company upon trust to secure the due payment of the sum of 5,000*l.*, advanced by J. P., "and also of all other sums which might thereafter become due from W. and S. to the said J. P. whether in respect of principal, interest, discount, commissions, or otherwise howsoever." The 5,000*l.* mentioned in the deed was paid off, but J. P. was afterwards compelled to pay 5,000*l.* under a guarantee for W. and S. The appellants, as execution creditors, afterwards attached a sum of money due from the railway company to W. and S. J. P. gave notice of the assignment to the railway company:—Held, that the deed of assignment included not only advances made by J. P. to W. and S., but also money paid by him under his guarantee for them, and was not affected by subsequent letters offering additional security for the guarantee. *Dumbell* v. *Isle of Man Ry.*, 42 L. T. 745—P. C.

—— **By Bankers.**]—The directors of a company being desirous to allot a sufficient number of their shares to procure the appointment of a settling day on the Stock Exchange, arranged with the manager of a bank to open an account in the name of S., a promoter of the company, to be drawn on by him to an amount not exceeding 30,000*l.*, and for advances made on that account the company gave a guarantee under their common seal. Such an account was opened, and, as arranged with the manager, the money drawn thereon by S. was immediately paid in by him to an account opened at the bank in the company's name as and for the deposits payable by allottees of shares in the company. Those allottees were real persons who had been induced by S. to apply for shares, but they were wholly incapable of paying for them; they had no intention of really becoming shareholders, and immediately handed their letters of allotment and blank transfers to S. The bank directors were ignorant of the object of this scheme, and believed that the money was advanced to S. to be employed by him as the company's agent in their legitimate business. In furtherance of the plot, the manager gave a certificate in the name of the bank that 23,006*l.* had been paid in for the deposits on 11,503 shares in the company, but the application for a settling-day was refused, and shortly afterwards it was ordered that the company should be wound up. Before the winding-up there had been paid in on the company's account a total sum of 24,505*l.* 18*s.* 6*d.* made up of S.'s payments, and of 1,500*l.* which really was the company's money, and their liquidator sued for the 24,505*l.* 18*s.* 6d. as money received for their use. The bank sought to set off 24,506*l.* 8*s.* 4*d.* due to them on S.'s account:—Held, that the bank was liable to the company for 1,500*l.* only, the sum really paid in on their account. *British and American Telegraph Co.* v. *Albion Bank*, 41 L. J., Ex. 67; L. R. 7 Ex. 119; 26 L. T. 257; 20 W. R. 413.

Interest—Balance due from Receiver.]—A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust estate in a large sum, and for some time no steps were taken to have the accounts duly passed:—Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. Semble, that in general the sureties of a receiver are answerable for such interest, as well as for such principal as the receiver himself is liable to pay. *Dawson* v. *Raynes*, 2 Russ. 466; 26 R. R. 9.

Costs—Of Action on Bond.]—Where, in a suit against the principal and sureties to a bond, the sureties were held liable to make good a deficit of principal and interest, and costs were given against the principal, but not against the sureties:—Held, that the sureties were not to be liable for the costs by circuity under the bond. *Berwick Corporation* v. *Murray*, 26 L. J., Ch. 201; 3 Jur. (N.S.) 847; 5 W. R. 208—L. C.

—— **Of Attachment of Receiver.**] — The sureties for a receiver are liable under the recognizance for the costs of an attachment against the receiver for not passing his account, and for all costs incurred in discharging him and appointing a new receiver. *Maunsell* v. *Egan*, 3 Jo. & Lat. 251; 9 Ir. Eq. R. 283.

—— **Of Recovering Balance from Committee of Lunatic.**]—The sureties in the recognizance of the committee of a lunatic for his obeying the orders of the Lord Chancellor, with respect to the lunatic's estate:—Held, liable, on his making default, not only for the balance reported due from him, but also for the costs of the proceedings taken for enforcing the payment of such balance, although they may have had no notice of the default of their principal until after such proceedings taken. *Lockey, In re*, 1 Ph. 509; 14 L. J., Ch. 164.

—— **Forbearing Execution—Lease of House.**]—The plaintiff having recovered judgment against F., the defendant promised, that if the plaintiff would forbear to issue execution against F., she would, on or before a certain day, erect a house, and cause a lease of the same to be granted to the plaintiff; and the plaintiff promised that such lease, when granted, should be in satisfaction of the judgment. In an action against the defendant for not erecting the house, and causing the lease to be granted:—Held, that the measure of damages was the value of the lease, and not the difference between the value of the judgment and the lease. *Strutt* v. *Farlar*, 16 M. & W. 249; 16 L. J., Ex. 84.

—— **Interpleader Proceedings.**]—In 1816, G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. & Co. in London, who were to reimburse themselves their charges, and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in 850*l.*, they and G. applied to B. & Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guarantee: "Messrs. B. & Co., You having expressed some doubts of the propriety of paying G.'s draft on you for 850*l.* in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & Co. thereupon accepted and paid a bill of 850*l.* drawn by G. on them in favour of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner (G. having become bankrupt), gave notice to the East India Company (in whose docks she lay), not to deliver any part of the cargo without his authority. They thereupon sold the cargo, and paid the owner's demand for freight, and, in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill in equity, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the parties, under legal advice, up to 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838, B. & Co. demanded of the defendants the 850*l.* due by the guarantee, with interest, and their share of the expenses incurred in the law proceedings, and, on their refusal to pay, brought an action against them on the guarantee:—Held, that the defendants could not be made liable, under the guarantee, for the expenses incurred by the plaintiffs in the law proceedings. *Colvin* v. *Buckle*, 8 M. & W. 680; 11 L. J., Ex. 33.

See further as to Extent of Liability for Costs, cases post, E., 1 and 2 cols. 1317 and 1323.

Guaranteeing Application of Contract-moneys—Non-receipt.]—The plaintiff, previously to delivering bricks to a government contractor, received from the defendants a guarantee in the following terms: "Please to deliver to Mr. S. for the completion of his contracts at D. and W. yards, 500,000 best bricks, to be delivered at the dockyards at 32*s.* per thousand, and we, as his sureties, consent that the proper officer, Navy-office, Somerset House, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we agree to become guarantors for the payment of the same to you when the amount of the contract is paid." The bricks were delivered, and S. received, with the consent of the plaintiff, a part payment. S. having performed part only of his contract, and failed in the performance of it, other persons were employed by government to finish the contract without the assent of S. or the defendants, and to these persons payment of the remainder of the contract price was paid; after which a balanced account was made out with S., in which he was debited for the sums paid to the parties who finished the contract, and with the sum paid for work partly performed, and received credit for the whole contract work done:—Held, that by the guarantee the defendants undertook only that the money should be paid to the plaintiff when paid in pursuance of the contract, and that the money paid to the parties who finished the contract was not money paid to him. *Hemming* v. *Malin* or *Trenery*, 2 C. M. & R. 385; 1 Gale, 206; 5 Tyr. 887; 4 L. J., Ex. 245; 1 Jur. 893.

Payment out of certain Fund.]—E. S., a widow, being indebted to B. in 199*l.*, and being unable to comply with his demand for payment in full, paid 40*l.* on account, and entered into a written agreement with him, whereby, after reciting her inability to pay the 159*l.*, B. covenanted that in consideration of her regularly paying the interest, 7*l.* 10*s.*, every year during her life (which she thereby agreed to pay), he would forego all claim to the principal sum until after her death, and would not during her life bring any action to recover the same. The three daughters of E. S., also signed the following memorandum at the foot of the agreement: "We, the undersigned, E. F., E. J. S., and L. J. S., daughters of above-named E. S., hereby agree to pay the said sum of 159*l.* to the above-named J. B., his executors or administrators, out of the estate of the said E. S. at her decease." The only property of any kind or sort whatever, real or personal, which at the date of the agreement and thenceforth to the date of her decease, E. S. was possessed of or entitled to, was a life estate or interest in a house and premises called the Talbot Hotel, the reversion in fee of which property was vested in her daughters, and which hotel accordingly at her decease became their absolute property as tenants in common in fee. On the death of E. S., B. brought an action against the daughters on the above undertaking for the payment of the 159*l.*:—Held, that the plain and natural meaning of the words used in the memorandum was that, at E. S.'s death, the daughters would, out of what she might leave behind her available

for payment of her debts, pay B.'s debt, and that the words "the estate of the said E. S." did not name or apply to her life estate in the Talbot Hotel. *Brown* v. *Fletcher*, 35 L. T. 165.

In consideration of the plaintiff forbearing to prosecute a chancery suit against the defendant, it was agreed between them that the defendant should, out of the first moneys he might receive from W., on whom the defendant had claims, hand to the plaintiff 500*l.*; and out of any further moneys he might receive from W. on account of the same contract, the defendant should pay the plaintiff 10*l.* per cent. upon the nett amount which he from time to time might receive, until such percentage paid to the plaintiff should reach 1,300*l.*, and no longer; and that the defendant would not compromise with W., without providing for the plaintiff 1,300*l.*, or so much of it as then might remain due. Only one instalment was received from W.:—Held, that the plaintiff, under this agreement, was not entitled to any percentage beyond the 500*l.* due on the first instalment, though exceeding 500*l.* *Cochrane* v. *Green*, 9 C. B. (N.S.) 448; 30 L. J., C. P. 97; 7 Jur. (N.S.) 548; 9 W. R. 124.

Proceeds realised in Composition.]—C. & Co., being insolvent, compounded with their creditors, by agreeing to pay them a composition of 7*s.* 6*d.* in the pound by three instalments, and execute a conveyance of their real and personal estate to the defendants, in trust to permit them, C. & Co., to carry on the business, subject to the control of the defendants, and to pay thereout to the creditors the three instalments, and in case of full payment to reconvey and reassign the estate to C. & Co.; but upon default of such payment, then in trust to sell, and after deducting out of the proceeds interest, costs and amount of mortgages, to divide the remainder amongst themselves and other creditors. C. & Co. continued accordingly to carry on the business, and opened an account with a banking company, from whom they obtained large advances. The bank applied to, and obtained from the defendants the following guarantee: "C. & Co. having assigned over all their real and personal estate to us, in trust for securing a composition of 7*s.* 6*d.* in the pound to their several creditors executing such deed, and it being necessary to open a banking account for the purpose of carrying on the trade, in order that the stocks and goods on hand may be wrought up and converted into money, for the purpose of paying such dividends, and you having at our request consented to open a banking account for that purpose, and to make advances on such account, or on the credit of the names of C. & Co., or of any person or persons for the time being carrying on that concern; we do hereby promise and engage that any sum or sums of money to become due to you or to the banking company, in respect of such account, shall in the first instance be paid to you out of the nett proceeds of the trust estate, so far as the same will extend to pay." Further advances were made by the bank to C. & Co. subsequent to this guarantee. The defendants subsequently sold the property of C. & Co. under the provisions of the composition deed, and the proceeds were insufficient to pay the creditors the composition of 7*s.* 6*d.* in the pound:—Held, that the meaning of the guarantee was, not that the defendants should be liable to the bank only out of the proceeds realised from the estate of C. & Co. after payment of the composition of 7*s.* 6*d.* to the creditors, but that they were liable, in the first instance, to repay out of the proceeds the whole amount of the advances made by the bank to C. & Co., as well before as after the guarantee. *Wilson* v. *Craven*, 8 M. & W. 584; 10 L. J., Ex. 448.

Receiver of Rents.]—The sureties for a receiver of rents and profits of real estate upon a recognizance drawn in the usual form (R. S. C., appendix L. No. 21) are, notwithstanding the limited wording of the security, answerable up to the amount of their bond for all moneys for which the receiver himself is liable to account. *Graham, In re, Graham* v. *Noakes*, 64 L. J., Ch. 98; [1895] 1 Ch. 66; 13 R. 81; 71 L. T. 623; 43 W. R. 103.

Receipt by Clerks.]—In an action upon a bond, conditioned for the honest and faithful service of a banker's clerk, and for well and faithfully accounting for all moneys which should come to his hands (assigning for breaches, general misconduct, irregular and unbusinesslike conduct, and not faithfully accounting), an arbitrator, to whom the cause was referred, found specially, that, on a certain day, the clerk made an erroneous balance-sheet, failing to exhibit (as it ought to have done) a surplus of 100*l.*, but that it was not proved that that sum came to the hands of the clerk; and also, that, on a certain day, the clerk, having received from a customer 213*l.*, entered it in the books of the bank 113*l.*, thus exhibiting on that day's balance-sheet a false and an unaccounted-for surplus of 100*l.*:—Held, that these facts did not entitle the plaintiff to recover. *Jephson* v. *Howkins*, 2 Scott (N.R.) 605; 2 Man. & G. 366.

A., as surety, entered into a bond for the due and faithful performance by C. of his duty as clerk to a provincial bank. C. being sent by the manager of a bank, at the request of a customer, to his residence about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account, a considerable portion of it being in gold and silver, on his way back dropped the money from his pocket and lost it:—Held, that the money was received by C. in the course of his employment as clerk to the bank, that the surety was liable, notwithstanding the finding of the jury that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted, and that the loss of the money was primâ facie evidence of gross negligence on the part of C. *Melville* v. *Doidge*, 6 C. B. 450; 18 L. J., C. P. 7; 12 Jur. 922.

The surety in a bond conditioned for the good conduct of the principal as a banker's clerk, is not liable for misbehaviour consequent upon his being allowed to become a customer, and to keep an account with the bank. *Stoveld* v. *Upton*, 6 L. J., C. P. 126.

A bond was conditioned for the due payment by the chief clerk of a railway company of all moneys received by him on account of the company. He had allowed the other clerks to be in arrear, and made up the deficiency on one day by appropriating to it a portion of the moneys received on the following day, but had, in fact, paid over the sum equal to the amount received on each day, up to the time of his dismissal:—Held, a breach of the condition, and that the company was entitled to recover as damages the full amount of the deficiency. *L. B. & S. C. Ry.* v. *Goodwin*, 6 Railw. Cas. 177; 3 Ex. 736; 18 L. J., Ex. 337.

Balance—Moneys Passing.]—A. became surety for a treasurer of a poor-law union, and entered into a bond, which was conditioned for the duly paying over to the guardians upon his removal from office, of the balances, moneys, &c., which should be in his possession by virtue of the office. The treasurer was also a corn dealer, and as such had dealings in corn with the overseers of several townships, who were farmers, and whose duty it was to pay over to him the moneys which were required from their respective townships by the guardians. He was in the habit of receiving corn from them, debiting himself with the amount, and crediting them with the amount due from them for rates. His accounts were duly audited; and at the last audit, after his removal from office, it was found that a balance was due to the guardians:—Held, in an action against the surety, that, as between the treasurer and the overseers, money had in effect passed: and, therefore, that the surety was liable. *Belford Union* v. *Pattison*, 1 H. & N. 523; 26 L. J., Ex. 115; 3 Jur. (N.S.) 116; 5 W. R. 121—Ex. Ch.

B. executed a bond, conditioned to be void if G. should honestly, diligently, and faithfully perform and discharge the duties of his office as treasurer of a poor-law union. One of the duties was to pay out of any money for the time being in his hands, belonging to the guardians, all orders drawn upon him. G. was a country banker, issuing his own notes. On the 28th of December the guardians drew several orders for money, some of which having been presented at G.'s bank, 95*l.* were paid in notes of the bank on that day. On the 31st of December the officer of the union presented other orders, and received 200*l.* in notes of G.'s bank. On the same day, the guardians having to transmit money to London, their clerk presented to G. an order for 4*l.* 19*s.* 8*d.*, and obtained from him a banker's draft on a banker in London, which was afterwards dishonoured. G. stopped payment at three o'clock on the 31st of December, and on the 1st of January was declared bankrupt. At the time of the presentment of the orders, G. had in his hands sufficient money of the guardians to pay them:—Held, that B. was not liable to make good either of the three several sums of money to the guardians. *Lichfield Union* v. *Greene*, 1 H. & N. 884; 26 L. J., Ex. 140; 3 Jur. (N.S.) 247; 5 W. R. 370.

Legal Collection.]—*See* infra, 9.

Replevin Bond.]—The liability of sureties in a replevin bond is limited to the amount of the rent in arrear at the time of the distress and costs, and they are not liable for subsequent rent; and, therefore, where on the trial of an action of replevin a verdict was taken by agreement between the plaintiff in the action and the avowant for the penalty of the bond, subject to reference, not only as to the amount of the rent due at the time of the distress, but of the rent then due, and also of certain penal rents, the sureties being no parties to such agreement, and the arbitrator awarded damages to the full amount of the penalty of the bond, the court held, that the sureties were entitled to be relieved from the bond, it appearing that the rent originally distrained for had been fully paid before the trial of replevin. *Ward* v. *Henly*, 1 Y. & J. 285; 30 R. R. 781.

Lost Bond.]—If bond is lost, equity will set it up against surety, as well as principal debtor. *Sheffield* v. *Castleton* (*Lord*), 1 Eq. Abr. 93. See also *East India Co.* v. *Boddam*, 9 Ves. 464; 7 R. R. 275.

In Equity.]—A surety not chargeable in equity further than he can be by law. *Ratcliffe* v. *Graves*, 1 Vern. 196.

Sureties relieved from the penalties of the bond in chancery. *Anon.*, Cary, 12.

A petition by a solvent surety of an insolvent tenant to surrender or reduce the rents of certain premises, which had greatly diminished in value since the lease was made, was dismissed with costs. Semble, the general rule of equity by which a surety is supposed to be favoured more than the principal debtor is erroneous. *O'Neills, In re*, Sau. & Sc. 686.

9. Collectors' Bonds.

Taxes—Formalities.]—A bond with one surety only, taken by commissioners of taxes, under 43 Geo. 3, c. 99, s. 13, is not therefore void. *Peppin* v. *Cooper*, 2 B. & Ald. 431.

A bond, whereby the obligor became bound as collector of duties assessed under 43 Geo. 3, c. 122, might be put in force against one of the sureties, though he was not apprised of the default of the principal collector in not paying over duties collected by him, nor called upon for an indemnity by the commissioners till after the dismissal from office of such collector. *Nares* v. *Rowles*, 14 East, 510.

By 43 Geo. 3, c. 99, s. 13, the district collectors of assessed taxes are required to give security to the commissioners in a sum "equal to the amount of the whole duty assessed and to be collected in each district"; and by 55 Geo. 3, c. 184, bonds given by collectors of assessed taxes and their sureties, for the due payment of moneys collected by them, are exempted from stamp duties:—Held, that the direction of 43 Geo. 3, c. 99, s. 13, was virtually complied with by a security given in such sum as was large enough to include, though it exceeded, the exact amount of duties to be collected for the district; and therefore that such bond was within the above exemption in the Stamp Act. *Collins* v. *Gwynne*, 2 M. & Scott, 640; 9 Bing. 544; 2 L. J., C. P. 49.

Held, also, that such bond was properly given "to the commissioners," and need not be "to his majesty, his heirs and successors." *Ib.*

The 43 Geo. 3, c. 99, s. 13, enacts that the collectors shall give security to the commissioners for duly paying such moneys as shall come to their hands, and for duly demanding the sums assessed, and for duly enforcing the act against defaulters; and by 38 Geo. 3, c. 5, s. 21, the collectors are required to give security to the commissioners for paying to the receiver-general the sums collected by them. A surety was sued on a bond which contained those conditions, and also a condition for accounting and paying to the commissioners:—Held, that this latter condition might be rejected as surplusage, and did not avoid the bond. *S. C.*, 7 Bing. 423; 5 M. & P. 276; 9 L. J. (O.S.) C. P. 130.

—— **Time.**]—A bond made by a defendant's testator as surety for E., with a condition reciting that E. had been and still was collector of the land tax, and all other taxes and duties imposed by several acts of parliament on the inhabitants of a parish, by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by E. from

time to time, and at all times thereafter, to the receiver-general of taxes, of all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament, was confined to the current year for which E. was collector at the date of the bond, although it did not appear on the condition that he was only appointed for a year, it being shewn by plea that the office of collector was an annual office, and held as such by E. at the date of the bond, although by the replication it appeared that E. held the office not only for that year, but thence to the commencement of the action. *Hassell* v. *Long*, 2 M. & S. 363. And see *Curling* v. *Chalklen*, 3 M. & S. 502.

A bond given by a collector and his sureties to the commissioners of land and assessed taxes under 43 Geo. 3, c. 99, is broken if the taxes collected in any one year are not duly paid up by the collector to the account of that year. *Gwynne* v. *Burnell*, 7 Cl. & F. 572; West, 342; 1 Scott (N.R.) 711; 6 Bing. (N.C.) 853.

The breach of the condition of the bond is equally complete, and the sureties are equally liable, though all the moneys collected in the year, for which they are sureties, should be in fact paid in, if any part of them should be appropriated by the collector and received by the commissioners in satisfaction of the arrears of a former year. *Ib.*

Such appropriation of part of the moneys of one year to the payment of the arrears of a former year will not prevent the commissioners from maintaining an action on the bond against the sureties for the year in which the money collected has been so misappropriated. *Ib.*

—— **Illegal Collection.**]—Sureties to a bond given by a person appointed a collector of income-tax under 5 & 6 Vict. c. 35, and conditioned for the payment of all sums assessed and collected, or to be assessed and collected by him for a particular year as such collector, are not liable in respect of sums collected by him without legal authority. *Kepp* v. *Wiggett*, 10 C. B. 35; 20 L. J., C. P. 49; 14 Jur. 1137.

—— **Amount.**]—A bond given as a security for a collector of customs does not extend to a subsequent duty on coals where the collector had a new deputation, and gave security for the duty on coals. *Bartlett* v. *Att.-Gen.*, Park. 277.

So held where no security was given on the second deputation. *Bowdage* v. *Att.-Gen.*, Park. 278.

—— **Enforcing Payment.**]—To an action upon a bond given by a collector of assessed taxes and his sureties, pleas shewing that the commissioners and receiver-general had not taken steps to enforce payment from the collector, as directed by the acts relating to the assessed taxes, are bad. *Wilks* v. *Heeley*, 1 C. & M. 249; 3 Tyr. 291; 2 L. J., Ex. 51.

A plea that the commissioners have not seized the lands of the collector must shew that there were lands of the collector which might have been seized and sold to supply the deficiency. *Ib.*

The seizure and sale of lands and goods of the collector, of the existence of which the commissioners had notice and knowledge, was under 43 Geo. 3, c. 99, s. 9, a condition precedent to their right to put the bond in suit against the surety. *Gwynne* v. *Burnell*, 7 Cl. & F. 572; West, 342; 1 Scott (N.R.) 711; 6 Bing. (N.C.) 853.

But the seizure and sale of lands and goods of the collector, of the existence of which the commissioners had no notice, was not a condition precedent to their right to put the bond in suit against the surety. *Ib.*

If in an action on a bond given by the sureties of a collector of taxes there are breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary on the part of the plaintiff to prove exactly what money he received; for if it is proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to exonerate himself from the residue, the plaintiff will be entitled to recover. *Loreland* v. *Knight*, 4 M. & Ry. 597; 3 Car. & P. 106.

Rates—Condition that Notice of Dishonesty should be given.]—The guarantors, by their agreement, contracted to guarantee the plaintiff against loss sustained from any act of fraud or dishonesty by a rate collector, or from any failure on his part to collect and pay into the Bank of Ireland the rates to be collected by him, and produce to the plaintiff, as collector-general, the receipt of the bank for such payment, or from any failure on his part to deliver to the plaintiff true accounts of the moneys collected, and lists of the persons in arrear, "provided that the plaintiff should within ten days after the discovery by him of any fraud or dishonesty of the 'said persons employed,' and of any matter in respect of which any claim may be intended to be made, give notice in writing, at the office of the society, as far as the case will admit, of all the particulars thereof; and after any such discovery, the guarantee herein contained shall, as to loss by any act of fraud or dishonesty subsequent thereto, be at an end":—Held, that the proviso required notice to be given of such fraud or dishonesty only as would form the foundation of a claim under the guarantee, and did not impose upon the plaintiff an obligation to give notice if he discovered that fraud or dishonesty had occurred on the part of the person employed before the guarantee was entered into or the employment under himself commenced. *Byrne* v. *Muzio*, 8 L. R., Ir. 396.

—— **Power of Suspension of Defaulting Party.**]—Under the 12 & 13 Vict. c. 91, the power of dismissing rate collectors is vested in the lord-lieutenant, but by regulations of the privy council, made under the act, the collector-general is empowered to suspend any collector who, in his opinion, has been guilty of neglect of duty:—Held, that the omission of the collector-general to suspend the collector, after knowledge of fraud and dishonesty on his part during his service and employment, was not a defence to an action on the guarantee, first, because the doctrine of *Phillips* v. *Foxall* (L. R. 7 Q. B. 666) was inapplicable to a guarantee for the fidelity of an officer appointed and removable by the lord-lieutenant; secondly, because the omission to exercise a power of suspension as distinguished from a power of dismissal did not terminate the liability of the sureties. *Ib.*

—— **Surety liable through Overseers' Negligence.**]—The defendant, as surety, gave a bond to the guardians of the poor for the M. Union, conditioned for the due discharge by C. of his

duties as collector of poor-rates for the parish of N. C. absconded, having embezzled part of the rates, and allowed others to be lost by not applying for them. The guardians sued the defendant for the loss. The defendant admitted his liability as to the sums embezzled, but disputed his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N. had discharged their statutory duties with reasonable care the loss would not have occurred:—Held, that the plaintiffs were entitled to recover from the defendant the moneys lost through failure of C. to collect them, for that there had been no negligence on the part of the plaintiffs, and they were not answerable for the negligence of the overseers. *Mansfield Union* v. *Wright*, 9 Q. B. D. 683—C. A. Affirming 46 J. P. 200.

—— **Within what Time.**]—The condition of a bond given to commissioners of sewers by a collector of rates was, that the collector should at all times render a faithful account to the commissioners for the time being of all such sums of money as had already been collected or received, or which thereafter should be collected or received by him, by virtue of any rates for and on account of such commissioners, and should pay to the commissioners for the time being all moneys already received, or which should thereafter be received by him:—Held, that the collector was bound to account for and pay to the commissioners for the time being sums of money collected and received by him by virtue of a rate made by commissioners acting under a commission, which expired before the execution of the bond. *Saunders* v. *Taylor*, 9 B. & C. 35.

Where a bond was conditioned that a collector of church and poor rates should produce a faithful account to the obligees or their successors for moneys which might be received by him, or come to his hands, pursuant to, and in execution of, his office of collector:—Held, that the obligor was not answerable for moneys received by him on account of any year subsequent to that in which the obligees were in office. *Leadley* v. *Evans*, 2 Bing. 32; 9 Moore, 102; 2 L. J. (O.S.) C. P. 108.

A., B. and C. entered into a bond as sureties for D. and E., the condition of which bond recited that D. was on such a day appointed collector of the church rate of a parish, by virtue of which office he was empowered to collect and receive all such moneys as were rated and assessed on the inhabitants by virtue of the rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for D.'s duly accounting for all moneys collected or received by him on account of the above rate, as also on all and every other rate or rates thereafter to be made and collected by him (D.):—Held, that the sureties were only answerable for D. in that single appointment, and not on his appointment in the ensuing year. *St. Saviour's, Southwark* v. *Bostock*, 2 Bos. & P. (N.R.) 175.

A bond given to secure the faithful performance of the office of a collector of parochial rates (who was by act of parliament to be appointed by trustees for a year, and then to be capable of re-election) was conditioned, that, "from time to time, and at all times thereafter, during such time as he should continue in his office, whether by virtue of his said appointment, or of any reappointment thereto, or of any such retainer or employment by or under the authority of the trustees, or their successors to be elected in the manner directed by the act, he should use his best endeavours to collect the moneys received by means of the rates in the then or in any subsequent year," &c.:—Held, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously reappointed. *Augero* v. *Keen*, 1 M. & W. 390; 2 Gale, 8; 1 Tyr. & G. 709; 5 L. J., Ex. 233.

Action on a bond made by C. and his sureties, with a condition reciting the 27 Geo. 2, c. 38, and that C. (four years before the date of the bond) was appointed by the churchwardens and parishioners of D., in pursuance of the statute, collector of the poor-rates to be levied and raised in the parish, and conditioned that C. should account, as often as required, for all moneys so collected and received by him by virtue of the act. Breach for not accounting for moneys collected and received since the bond; pleas, that C. accounted for all the moneys collected and received by him before the bond, and that the office of collector is an annual office, and that C. accounted for all the moneys collected and received by him within the current year of office in which the bond was made:—Held, that both pleas were ill, for, by the words of the statute, the appointment was prospective, to collect future rates, and not retrospective only, and the condition was in the words of the statute without any restraining words; and it was not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appeared by the statute not to be an annual office, though concerning rates which were raised in the course of a year. *Curling* v. *Chalklen*, 3 M. & S. 502.

—— **Plea—No Legal Rate.**]—To an action on a bond given as a security for the due performance of the office of collector of rates, and conditioned for payment of all moneys received "by virtue and for the purposes of a certain act of parliament, and relative to the collectorship of such rates," the defendant pleaded, that no rate was made, or in any way existed, which he could legally, or according to law, collect or get in, or could legally, or according to law, demand or obtain, by virtue of his office, and that he did not, during the continuance of his appointment, legally receive any money by virtue or for the purposes of the act, or relative to the collectorship of the rates:—Held, that the former part of the plea would have been held bad on special demurrer, as a negative pregnant, for not shewing in what way the rate was illegal; but those objections not having been raised, the latter averment afforded a substantial answer to the action. *Webb* v. *James*, 9 D. P. C. 315; 7 M. & W. 279; 10 L. J., Ex. 89.

See also cases post, cols. 1226 et seq.

B. DISCHARGE OF SURETY.

1. ALTERATION OF OBLIGATION GENERALLY.

Creditor depriving Surety of Rights.]—If the principal creditor deprives the surety of any right he would have had against the original

debtor, even though the surety is benefited thereby, the surety is discharged. *Polak* v. *Everett*, 46 L. J., Q. B. 218; 1 Q. B. D. 669; 35 L. T. 350; 24 W. R. 689—C. A.

Although the surety is aware that an alteration is being made in the original contract, he is not bound to express his dissent to the transaction. *Ib.*

N. was indebted to the plaintiffs, and by deed agreed, first, to pay them 3,400*l.* on the 15th of February, 1874; secondly, within a certain time after the allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of 6,000*l.*, and redeem them at par within twelve months from the 1st of January, 1874; and, fourthly, it was agreed between him and the plaintiffs that the book debts due to him, to the nominal amount of 8,000*l.*, should be collected and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N. so far as concerned the redemption of the shares of the value of 6,000*l.* Subsequently an arrangement was made between the plaintiffs and N. by which, for an equivalent in shares and cash, they released to him their interest in the book debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for a deficiency of 2,250*l.* in the amount of shares:—Held, that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him. *Ib.*

In equity upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged. *Watts* v. *Shuttleworth*, 5 H. & N. 235. Affirmed 7 H. & N. 353; 29 L. J., Ex. 229; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132—Ex. Ch.

It is not every alteration of his position by the act of the creditor that discharges the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor. *Tucker* v. *Laing*, 2 Kay & J. 745.

Where the creditor knew that the surety was negotiating a loan for the principal debtor for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money:—Held, that the surety's liability to the creditor was not discharged. *Ib.*

The neglect of the obligee to give notice to the surety that the principal has made default does not discharge such surety; but if the obligee (without the privity of the surety) enters into an engagement with the obligor, and deprives himself of the power of suing him, whereby the surety is prevented from coming into a court of equity for relief, he is then discharged, but not otherwise. *Orme* v. *Young*, Holt, N. P. 84; 17 R. R. 611.

Altering Purpose of Company.]—In 1872 a company was formed to purchase and work a going concern, consisting of railway tyre and steam-roller works, and the vendor accepted part of the purchase-money in fully paid-up shares, called "vendor's shares." The vendor guaranteed to the shareholders a dividend for the first five years upon the called-up capital for the time being at the rate of 10 per cent., and that if in any one of the five years the profits should not equal a dividend of 10 per cent., he would pay the amount required to make the profits equal such dividend; and that, if he did not on demand pay such amount, the company might sell his "vendor's shares," and apply the proceeds in satisfaction of such amount. The business was carried on at a loss from the first, and in 1874 the directors, who had the widest powers of management, shut up the railway tyre department, which comprised four-fifths of the whole concern. In 1875 there were no profits at all, and the directors called upon the vendor under his guarantee to pay an amount sufficient to make up the dividend of 10 per cent., and, on his refusal, commenced an action to enforce payment:—Held, that the discontinuance by the company of one branch of their business did not discharge the vendor from his guarantee, and that the company were entitled to judgment for the sum claimed, together with interest and costs. *Brown & Co.* v. *Brown*, 36 L. T. 272—C. A.

Nature of Tenancy.—In an action against a surety on his bond, whereby he guaranteed the performance of a covenant by his principal, the lessee of a farm and flock of sheep, to deliver up to the plaintiff at the end of the tenancy, with the farm, a like number and quality of sheep regularly heathed and pastured on the farm, it was proved that an alteration had been made in the terms of the letting by the surrender of a small part of the farm and a proportionate reduction of the rent. The jury found that the alteration had not made any material difference in the relation between the parties, so as to affect the capacity of the tenant to perform his covenant: — Held (Brett, L.J., dissentiente), that the surety was discharged. *Holme* v. *Brunskill*, 47 L. J., Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838—C. A.

Any alteration in the form of the agreement between principals discharges the surety, unless it is self-evident that the alteration cannot prejudice the surety; the surety himself being the judge as to materiality. *Ib.*

The surety is discharged where there has been a material alteration, or an alteration of some specific provision of the agreement, but not otherwise. *Ib.*

In a contract by A. to let, and B. to take the milking of cows at so much yearly rent payable quarterly, and by C. to pay the rent, C. is a mere surety; and in an action against him for the rent, A. must prove a literal performance of the contract on his part; as any variation made in such a contract by A. and B. without the consent of C. would discharge him, although his risk was not thereby increased. *Whitcher* v. *Hall*, 8 D. & R. 22; 5 B. & C. 269; 4 L. J. (O.S.) K. B. 167; 29 R. R. 244.

Taking additional Security.]—Merely giving an additional security by a principal will not discharge a surety. *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R. 7 H. L. 348; 31 L. T. 322.

To an action for money lent, the defendant pleaded that the cause of action arose out of disbursements made for and on account of a vessel

belonging to the defendant, and that the master made and sealed a bottomry bond, which was accepted and received by the plaintiff in satisfaction of the promises in the declaration. The plaintiff replied that he did not accept or receive the bond in satisfaction of the promises. At the trial it appeared that the bond was given by the master the day after the transaction as to the advances on the ship's account was closed, and by way of collateral security only:—Held, that the plaintiff's right to sue the owner in respect of the implied contract was not destroyed by the taking such additional security. *Weston* v. *Foster*, 3 Scott, 155; 2 Bing. (N.C.) 693; 2 Hodges, 59; 5 L. J., C. P. 242.

One of the co-sureties of a bond received from his principal a promissory note to the amount of that instrument:—Held, that it was a question for the jury to say quo animo the note was given, and whether it was given in pursuance of an arrangement that the surety should be thereby discharged, or merely by way of collateral security, in which latter case the surety would be liable for contribution on payment of the bond by his co-surety. *Done* v. *Whalley*, 2 Ex. 198.

A creditor took, as security for his debt, bills of exchange drawn and indorsed by a surety, and accepted by the principal debtor. After those bills were dishonoured, the creditor drew accommodation bills on and which were accepted by the principal debtor, but were paid by the drawer when at maturity. On a bill filed by the surety to restrain an action subsequently brought against him on the bills which had been dishonoured, the court allowed the action to proceed, but stayed execution. Quære, whether the surety was discharged by the subsequent transactions which, without his knowledge, took place between the creditor and the principal debtor. *Mackintosh* v. *Wyatt*, 3 Hare, 562.

By a decree in a creditor's suit U. was declared to be a specialty creditor on the estate of R. It appeared that the claim of U. against R. was in respect of a debt due by S., and for which R. had become surety. After the decree U. sued S., and took a judgment by arrangement for payment of the debt by instalments without the knowledge or consent of R.:—Held, that his so doing did not discharge the estate of R. *Jenkins* v. *Robertson*, 2 Drew. 351.

Creditor having, among other securities, a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by a warrant, &c., without prejudice to any security he now holds; injunction granted against suing the surety. *Boultbee* v. *Stubbs*, 18 Ves. 20; 11 R. R. 141.

Composition with reserve of the remedy against sureties valid, but must plainly appear. *Ib.*

A. and B. were indebted to C. on a joint and several promissory note, A. as principal, B. as surety. A. deposited with C. a policy of assurance as a collateral security for the debt. C. died, appointing D. his executrix. A. became bankrupt; D. proved for the balance of the debt against A.'s estate and without communicating with B. surrendered the policy to the insurance office for value:—Held, that B. was not thereby discharged from his original liability. *Coates* v. *Coates*, 3 N. R. 355; 33 L. J., Ch. 448; 10 Jur. (N.S.) 532; 9 L. T. 795; 12 W. R. 634.

If A. take a joint bond from B., C. and D., and then accept the notes of B. and C. in discharge of the bond, D., as a surety, is no longer liable. *Skip* v. *Edwards*, 9 Mod. 438. *S. C.*, nom. *Skip* v. *Huey*, 3 Atk. 91.

Dealings with Principal.]—A. was security for B. on a joint and several bond to Z. Title deeds of B. were deposited with Z. as a collateral security for payment of the debt and interest secured by the bond. A. on a given day, offered to pay Z. the amount due on having B.'s title deeds delivered up to him. This was refused by Z. Subsequently Z. lent B. the title deeds to enable him to come to an arrangement with A., his surety, as to paying off the amount of the bond, on an undertaking to return them to Z., which he had done:—Held, that this was not such a dealing with the principal as discharged the surety from the debt and interest due on the bond. *Bushell* v. *Collett*, 6 L. T. 20.

A surety to the East India Company discharged by payment of a balance to the principal under an erroneous settlement by the officer of the company without their authority or knowledge. *Law* v. *East India Co.*, 4 Ves. 824.

—— **Secret Dealings.**]—Where a surety gave a guarantee to A. for a certain amount of goods to be sold to B., and, by a secret agreement between A. and B., the latter consented to pay 10*s.* per ton beyond the market price of the goods, in satisfaction of an old standing debt due to the former:—Held, that this secret agreement was a fraud upon the guarantor, and discharged his liability. *Pidcock* v. *Bishop*, 5 D. & R. 505; 3 B. & C. 605; 3 L. J. (O.S.) K. B. 109; 27 R. R. 430.

W. and his wife deposited with a banking company the title deeds of real estate, to which the wife was entitled under her father's will, to secure a running account not exceeding 2,000*l.* The father of W. gave the following guarantee to the bank: "I beg to say that the deeds lodged by my son are good for the amount of the arrangement with him, otherwise I will guarantee the same." The father subsequently paid a portion of the amount due on the security, and received back his guarantee:—Held, that the security was not thereby vacated, so as to affect the surety. *Waugh* v. *Wren*, 1 N. R. 142; 9 Jur. (N.S.) 356; 7 L. T. 612; 11 W. R. 244—L. C.

If a banking company agree that, upon receiving the guarantee of a particular person, they will advance a certain sum of money for the purpose of securing to the creditors of a trader a composition, and setting up the trader in business again; and at the same time the company, being themselves creditors of the trader, enter into a secret arrangement with him, by which they secure to themselves repayment of the difference between their composition and the full amount of their debt; this is a fraud upon the guarantor and upon the creditors who execute the composition deed on the faith of the ostensible agreement, and the guarantor may sustain a bill in equity to set aside the guarantee. *Pendlebury* v. *Walker*, 4 Y. & Coll. 424.

On the 15th February, 1831, A. and B. dissolved partnership, A. leaving in the business, to be continued by B., the amount of his share. On the same day B., as principal, and F., as surety, executed a bond for payment to A. of 5,000*l.* on the 15th August following, with interest at 5*l.* per cent. On the 21st February, 1831, without the privity or consent of F., A. and B. agreed that the whole of the debt due by the latter to the

former should, as to 1,000*l.*, be paid within a year, and as to the residue within the five years, by equal half-yearly payments, with interest. In May, 1855, B. was adjudicated bankrupt, and under the bankruptcy A., or his assignee, received dividends. In February, 1856, A. commenced an action against the representatives of F. to recover a large sum and interest, and thereupon a bill was filed to restrain the proceedings, and an injunction was granted. On the hearing the court directed that the injunction should be made perpetual, that A. should enter up satisfaction on the judgment obtained (by consent) against F.'s estate, and that A. should pay all the costs at law and in equity. *Wright* v. *Sandars*, 3 Jur. (N.S.) 504; 5 W. R. 644.

Taking and destroying Bill.]—A bill given for the amount of a guarantee by the person guaranteed and taken by the plaintiff before the expiration of the time mentioned in the guarantee, but afterwards destroyed in the guarantor's presence, is no waiver of the guarantee. *Collins* v. *Owen*, 15 L. T. 327.

Irregular Payments.]—A contractor undertook to perform certain works, and it was agreed that three-fourths of the work as finished should be paid for every two months, and the remaining one-fourth upon the completion of the whole work:—Held, that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done having, without the consent of the sureties, been made to the contractor before the completion of the whole work. *Calvert* v. *London Dock Co.*, 2 Keen, 638; 7 L. J., Ch. 90; 2 Jur. 62.

Mode of Advances Irregular.]—A., as principal, and B., as surety, gave a joint and several promissory note for a sum of money to C., the consideration for which was expressed to be a draft at three months' date. No draft was given by C.; but without the knowledge and assent of B., C. immediately, and without making any deduction by way of discount, advanced the money to A.:—Held, that this was a material variation from the engagement to which B. was party, and that B. was released from his liability. *Bonser* v. *Cox*, 6 Beav. 110; 13 L. J., Ch. 260; 8 Jur. 387—L. C.

To an action by payee against maker of a note, he pleaded that the note was made by him jointly and severally with and as surety for A. to secure the repayment of 20*l.*, advanced by a loan society to A.; that the loan was advanced by the society in the ordinary way of business; that, according to the rules of the society, it was to be repaid by weekly instalments; that discount to the amount of 2*s.* in the pound, and no more, was to be charged by the society to A.; and that the society wrongfully and contrary to the rules, and without the surety's consent, deducted from the loan a larger sum of money than at the rate of 2*s.* in the pound, to wit, 12*s.*:—Held, that the surety was liable. *Brown* v. *Wilkinson*, 13 M. & W. 14; 13 L. J., Ex. 302.

Meaning of "Credit."]—"If you give A. credit, we will be responsible that his payments shall be regularly made":—Held, that the word "credit" meant a fair and reasonable credit, according to the manner in which A. and the persons guaranteed should deal, and did not confine the guarantee to dealings according to the strict customary credit of the trade. *Simpson* v. *Manley*, 2 C. & J. 13; 2 Tyr. 86; 1 Price, P. C. 130; 1 L. J., Ex. 3.

Fraudulent or unreasonable extension of credit, to the prejudice of the guarantors, would raise a question dehors the agreement. *Ib.*

Method of Accounting.]—The plaintiffs, bottle manufacturers, appointed M. their agent for the sale of bottles on commission, and received the following guarantee, signed by the defendant: "I hereby agree to guarantee my brother M.'s intromissions as your agent in Leith, to the extent of 500*l.*" The terms of sale between the plaintiffs and M., at the time of the guarantee, were, that the moneys received should be remitted from time to time, and an account of sales rendered at the end of each month, or when required, and an account current every three weeks. It was soon after agreed between the plaintiffs and M. that the account current should be rendered every six months; and subsequently, in pursuance of an agreement between them, M. from time to time gave his promissory notes to the plaintiffs, payable four months after date, for sums having no relation to the amount due from him, and the plaintiffs, as the notes became due, transmitted M. the difference between the money then in his hands and the amount of the notes. The defendant had no knowledge of, and never inquired as to the original and subsequent terms of dealing:—Held, that the alteration in the mode of accounting and paying did not discharge the surety. *Stewart* v. *M'Kean*, 10 Ex. 675; 3 C. L. R. 460; 24 L. J., Ex. 145; 3 W. R. 216.

Substituted Agreement.]—A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. *Bonar* v. *Macdonald*, 3 H. L. Cas. 226; 14 Jur. 1077.

A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation. B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one-fourth of the losses on discounts. No communication of this new arrangement was made to A.; B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money:—Held, that the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged. *Ib.*

Bond varied by Judgment.]—The defendants, Evans, Digby, and Simson, executed a joint and several bond for 150*l.*, in order to comply with an order of a judge at chambers, under Ord. XIV., directing the defendant Evans, in an action of *Tatum* v. *Evans*, to find security as a condition for leave to defend, the condition of the bond being that it should be void if Evans should pay to the plaintiffs the sum of 75*l.*, or such sum (not exceeding that amount) as the court should

think fit to award. When the case came on for trial, Evans consented to judgment being directed for 750*l.*, to include costs, payable, as to the first 400*l.*, by instalments of 25*l.* per month; the remainder to be paid by instalments of 50*l.* per month, the first instalment to be payable on the 1st March, 1885, the plaintiff to be at liberty to issue execution for any balance of the 750*l.* upon default in payment of any instalments, the defendant to reconvey all his interest in the premises to the plaintiff forthwith. It was also provided that the first payment by the defendant was to be taken in discharge of the sureties pro tanto, but they were not to be fully discharged until payment of 75*l.* It was found as a fact that the defendant Digby consented to the terms of the judgment, but the defendant Simson did not consent:—Held, that the defendant Simson was discharged from liability under the bond. *Tatum* v. *Evans*, 54 L. T. 336.

Insurance of Securities—Insolvency of Insurance Company—Policy varied by Scheme of Arrangement.]—The appellants insured by a policy the principal and interest of debentures of a limited company, the directors of which, respondents in the appeal, by an agreement undertook to repay to the insurers all sums within a prescribed amount which the latter should have paid under the policy. Default was made in payment of the debenture interest, and, the appellants finding themselves unable to meet their liabilities, a resolution for their voluntary winding-up was passed; and a scheme of arrangement was subsequently sanctioned by the court under which, "in lieu of its liabilities under such policies," the rate of interest payable by the appellant corporation was, as from the date of the winding-up resolution, reduced, and the time for payment of principal was extended. A payment of interest was made by the appellants calculated at the original rate up to the resolution for winding-up and at the reduced rate for the period subsequent thereto, and the appellants claimed to be reimbursed by the respondents:—Held, that the respondents were not liable, as the payment was made wholly under the scheme, and not under the policy, and no distinction could be drawn between the amount calculated at the higher and that at the lower rate of interest. *Mortgage Insurance Corporation* v. *Pound*, 65 L. J., Q. B. 129—H. L. (E.)

Amount of Advances.]—To an action against a defendant on his bond, he set out the condition, that J. had agreed to become tenant to the plaintiffs of a public-house; that it was stipulated that he should take from them the ale, wine, &c., to be consumed there; that he should become bound, with a surety, to pay for the same to the amount of 50*l.*, before he should have a fresh supply, as long as he should continue tenant of the plaintiffs; that when he should cease to be their tenant, the surety should be liable to the plaintiffs in such sum not exceeding 50*l.*, as J. might then owe the plaintiffs for ale, &c.; the condition then stated that, if J. should pay the plaintiffs for all ale received from them to an amount not exceeding 50*l.* before he should have a fresh supply, and when he should become indebted to them in that sum, and if he should pay them for all sums which he should owe them for ale, &c., not exceeding 50*l.*, when he should cease to be tenant, the obligation was to be void. The plaintiffs permitted J. to become indebted to them in a larger amount than 50*l.*:—Held, that the defendant was not discharged by reason of the plaintiffs having supplied J. with ale, &c., to an amount exceeding 50*l.* upon credit, but that, in any event, on default of the principal, the defendant was liable to the extent of 50*l.* *Seller* v. *Jones*, 16 M. & W. 112; 16 L. J., Ex. 20.

—— **Notice of Excess.**]—A. executed a bond for 2,000*l.* to a banking company, the conditions whereof recited that C. kept an account with the company, and it was declared that if C. or A., or either of them, should, on demand, pay to the company all sums, not exceeding in the whole 1,000*l.*, which should from time to time be due to the company by C., with interest, the bond should be void. The company sued A. on the bond, alleging, that on 30th June, 1856, there was due from C., as the balance of his account, 996*l.* 12*s.* 11*d.*, which had not been paid by C. or A., though duly demanded, and a further sum for interest. Equitable plea, that the bond was executed by A. solely as surety for C., and so accepted by the company, and that by reason of various verbal and written communications between A. and the company before and at the time of execution, the liability of A. and the advances to C., which were to be secured, were limited to 950*l.*, and A. was to be informed if the account, with interest, should reach 1,000*l.* and not be reduced within a month, and he became surety on such terms only, but the company on each of several occasions made advances beyond 950*l.*, and on each of several occasions the account against C. exceeded 1,000*l.*, and was not reduced within a month, and A. was not informed, whereby he became absolutely released from liability and entitled to equitable relief. Previously to the execution of the bond, A. objected by letter to becoming liable for interest upon an advance of 1,000*l.*, and requested to know whether the 1,000*l.* was to include interest. In answer, the company informed him that the bond was for 1,000*l.*, with interest, but that there was little chance of its exceeding that sum for any length of time, as the company, if it should be over the amount, including interest, at the half-yearly balance, would require it to be reduced to 1,000*l.* or would limit the amount to 950*l.*, which would leave a margin for interest. Afterwards the company executed a memorandum to the effect that C.'s advance should be limited to 950*l.*, and A. should be informed if the account with interest should reach 1,000*l.*, and not be reduced in a month. At this time the advance exceeded 950*l.*; A. then executed the bond. Afterwards the limit of 950*l.* was on many occasions exceeded; also on three occasions the amount of 1,000*l.*, interest included, was slightly exceeded, and not reduced within a month, and A. was not informed of it; also at one half-yearly balance the amount was 1,004*l.* 10*s.* 1*d.*, but was reduced by 12*l.* in two days after:—Held, that the effect of the agreement was, not that A. should be discharged from liability, upon the limit being exceeded, but that 950*l.* should be considered as substituted for 1,000*l.* in the condition. *Gordon* v. *Rae*, 8 El. & Bl. 1605; 27 L. J., Q. B. 185; 4 Jur. (N.S.) 530.

Necessity of retaining Securities.]—A surety is entitled to the benefit of any security which

the creditor has received for the debt, though he has received it after the contract of suretyship; and, therefore, where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security. *Campbell* v. *Rothwell*, 47 L. J., Q. B. 144; 38 L. T. 33.

A., as B.'s surety, indorsed bills drawn by B., to C. Subsequently B. gave C. a lien, in respect of such bills, upon goods of his in C.'s possession. B. having written to C. authorising him to deliver up such goods to D., C. undertook to do so upon D.'s paying him a less sum than the amount of the bills:—Held, that A. was thereby discharged. *Ib.*

A creditor who holds several securities for his debt, partly given by the principal debtor and partly by a surety, must retain all securities given by the principal debtor for the benefit of the surety, and if he neglects to do so, he discharges the surety. *Merchants' Bank of London* v. *Maud*, 18 W. R. 312. See *S. C.*, on appeal, 19 W. R. 657.

—— **Mortgage.**]—A creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. *Pledge* v. *Buss*, Johns. 663; 6 Jur. (N.S.) 695.

The rights of a surety, with respect to securities, extend to securities taken after the contract of suretyship. *Ib.*

The appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or pro tanto from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection:—Held, that on the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby. *Taylor* v. *Bank of New South Wales*, 55 L. J., P. C. 47; 11 App. Cas. 596; 55 L. T. 444—P. C.

Right to Assign Debt and Securities.]—A principal debtor and his surety, being entitled to two shares in a fund in court, assigned them to a creditor to secure a debt. The creditor assigned the debt to the trustees of his marriage settlement, but no notice of the assignment was given to the surety, nor was any stop-order obtained by the trustees:—Held, that the assignment of the debt without notice was no discharge of the surety. *Wheatley* v. *Bastow (Collin's Case)*, 7 De G. M. & G. 261; 3 Eq. Rep. 865; 24 L. J., Ch. 727; 1 Jur. (N.S.) 1124; 3 W. R. 540.

The creditor is no doubt under the obligation of preserving the securities which he takes from the principal debtor, for the surety may entitle himself to the benefit of those securities, and if any of them be lost by the act or default of the creditor the surety may be wholly or partially discharged; but the creditor enters into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them, and if he does so assign them the obligation which attached upon the creditor attaches upon the assignee. The position of the assignee is in no respect altered. The assignee on the other hand acquires by the assignment all the rights of the assignor, and the surety can be in no better position against the assignee than he was in against the assignor—per Turner, L.J. *Ib.*

Bill of Exchange.]—The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. *Duncan Fox & Co.* v. *North and South Wales Bank*, 50 L. J., Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763—H. L. (E.)

The indorser is a surety for the payment to the holder, and having paid it, is entitled to the benefit of any securities to cover it, deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of more securities. The surety's right in this respect in no way depends upon contract, but is the result of the equity of indemnification derived from the contract of suretyship. *Ib.*

Omission to Value Security in Bankruptcy.]—The defendant was surety for the repayment of a sum of money advanced by the plaintiff to the principal debtor. As a further security for the advance, the principal debtor deposited with the plaintiff a policy of life insurance. The principal debtor subsequently became bankrupt, the advance remaining unpaid, and the plaintiff proved against his estate for the full amount of the advance without valuing the policy of life insurance as a security, which was in consequence claimed by the trustee in bankruptcy as part of the bankrupt's estate. It was contended by the defendant in an action against him, as surety, that by not valuing the policy, and so depriving him of the benefit of it, the plaintiff had discharged him from all liability as surety:—Held, that the omission to value the policy was at most a mere neglect or omission on the part of the plaintiff, and as such did not discharge the defendant from all liability as surety, but only to the extent of the value of the policy. *Rainbow* v. *Juggins*, 49 L. J., Q. B. 353; 5 Q. B. D. 138; 28 W. R. 428. Affirmed, 49 L. J., Q. B. 718; 5 Q. B. D. 422; 42 L. T. 346; 29 W. R. 130; 44 J. P. 829—C. A.

On Paying off Mortgage Debt.]—A., B. and C. executed to D. a mortgage of B.'s lands (comprised in the petition for sale), and of C.'s lands, to secure 2,914*l.* 9*s.* 9*d.*, of which 900*l.* was B.'s debt, and the remainder C.'s debt. The mortgage contained a proviso that, as between A., B. and C., A. was a surety only, and that B. and C. respectively were sureties only for portion of the said sum; yet, with regard to D., they were to be considered as principal debtors, so as not to be released by time being given to any other or others of them, or by any act or omission of D., whereby, as sureties only, they would be released. B. subsequently executed to D. two other mortgages of the lands comprised in the petition. A. having paid D. the full amount of the debt secured by the first mortgage, claimed to stand in D.'s place for 900*l.*, being B.'s debt, and the moiety of 2,014*l.* 9*s.* 9*d.*,

being C.'s debt, for which both he and B. were joint sureties, and to be placed on the final schedule on foot of, and in the priority of, the first mortgage:—Held, first, that A.'s claim was valid, and that he was not estopped by the special proviso of the mortgage from relying on his equitable rights of surety. *Kirkwood, In re*, 1 L. R. Ir. 108. And see *Forbes* v. *Jackson*, 51 L. J., Ch. 690; 19 Ch. D. 615; 30 W. R. 652.

Held, secondly, that a surety joining in a mortgage is entitled on paying off the original mortgage debt to get the benefit of all the securities held by the original mortgagee, without paying off subsequent mortgages. *Ib.*

Held, thirdly, that the doctrine of tacking is applicable only in the case of an existing debt. *Ib.*

Diverting Appropriated Funds.]—When a surety contracts with A. on behalf of a principal, the withdrawal, by arrangement between A. and the principal, of funds which the surety had a right to rely on as a security that the matters should be done which he, as surety, had contracted with A. should be done, is a prejudicial alteration of the surety's position, which discharges him from liability. *General Steam Navigation Co.* v. *Rolt*, 6 C. B. (N.S.) 550, 584; 6 Jur. (N.S.) 801; 8 W. R. 223—Ex. Ch.

D. having overdrawn his account at his bankers', and being desirous of further overdrawing it, for the convenience of carrying on his trade with ready money, induced his niece, who had lived under his care for several years, immediately after she attained her majority, and had come into possession of her property, to join as surety in a promissory note to the bankers to secure his balance. The bankers some time afterwards, without any communication with the surety, placed the amount of the note to the credit of D.:—Held, that, by this dealing with the note, the position of the surety was changed, and her liability discharged. *Archer* v. *Hudson*, 7 Beav. 551; 8 Jur. 761. Affirmed, 15 L. J., Ch. 211.

An obligation to a banker by a third party, to be responsible for a cash credit, to be given to one of the banker's customers, is not avoided by the fact, that immediately after the execution of the obligation the cash credit is employed to pay off an old debt due to the banker. *Hamilton* v. *Watson*, 12 Cl. & F. 109.

Discharge pro tanto.]—If, by the neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is pro tanto discharged. *Capel* v. *Butler*, 2 Sim. & S. 457; 4 L. J. (O.S.) Ch. 69.

Where, through negligence on the part of a creditor, a security, to the benefit of which a surety is entitled, is not properly perfected, the surety is discharged to the extent of the security lost. *Strange* v. *Fooks*, 4 Giff. 408; 2 N. R. 507; 9 Jur. (N.S.) 943; 8 L. T. 789; 11 W. R. 983.

Neglect to Enter up Warrant of Attorney.]—Where, upon taking a guarantee for repayment of advances to one of their customers, bankers also took from their principal debtor a warrant of attorney to cover the debt, and at the same time agreed with the guarantor that they would at any time, at his request, enter up judgment and levy execution on the warrant of attorney against the principal debtor; but by their neglect to file the warrant of attorney or a true copy thereof, in compliance with the requisitions of the Bankrupt Act (12 & 13 Vict. c. 106), s. 136, the warrant of attorney became void:—Held, that this neglect on the part of the bankers operated as a discharge to the surety in equity. *Watson* v. *Alcock*, 4 De G. M. & G. 242; 1 Eq. R. 231; 22 L. J., Ch. 858; 17 Jur. 568; 1 W. R. 399.

Giving up additional Security.]—But where a creditor, whose debt was secured by a bond of the principal debtor, and a surety took, after the date of the transaction, further security from the principal debtor, and afterwards gave up that further security:—Held, that this did not discharge the surety. *Newton* v. *Chorlton*, 2 Drew. 333; 10 Hare, 646. See *Lake* v. *Brutton*, 8 De G. M. & G. 441; 25 L. J., Ch. 842; 2 Jur. (N.S.) 839.

Cause of Loss.]—As between principal and surety, if the primary security proves worthless, whether it was so originally, or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor. *Hardwick* v. *Wright*, 35 Beav. 133.

Security and Covenant for Payment—Discharge of Liability on Covenant—Security also Released.]—Where a person joins in a mortgage as surety for the mortgagor by giving security and covenanting for payment of the mortgage debt, if the surety be discharged from liability on the covenant by reason of alteration of the contract with the principal debtor, the security given by the surety is also released. *Bolton* v. *Salmon*, 60 L. J., Ch. 239; [1891] 2 Ch. 48; 64 L. T. 222; 39 W. R. 589.

2. Release of Principal or Co-Surety.

Release of Principal.]—Action on a guarantee given the plaintiffs for goods to be supplied by them to G., to the extent of 400*l.* The guarantee provided, that the plaintiffs were to have full liberty to extend the period of credit to G., and to hold over or renew bills, notes, or other securities given by him, and to grant to G., and the person liable on such bills, notes or securities, any indulgence, and to compound with him or them, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant, by virtue of the guarantee. The declaration averred the supply of goods exceeding the guarantee, which was unpaid by G., of which the defendant had notice, and was requested to pay that sum, but had not done so. Plea, that, after the debt was incurred by G., and before action, the plaintiffs became parties to a composition deed between G. and his creditors, whereby he assigned all his stock-in-trade for the benefit of his creditors; and that, in consideration thereof, the plaintiffs and the other creditors, parties thereto, granted a general release to G., of all debts and demands against him. The plea averred, that the guarantee was only made by the defendant as surety, and that the plaintiffs, by the deed, released G. without the privity of the defendant, and without notice:—Held, that, under the express terms of the guarantee, the surety was not discharged by the release of the principal debtor. *Cowper* v. *Smith*, 4 M. & W. 519.

A defendant covenanted with the plaintiffs that, in consideration that they would give credit

to one Taylor, he would be surety to the extent of 100*l.* for any sum which might from time to time be owing by Taylor. The deed provided that no indulgence, time, credit or forbearance given or shewn to, or security taken from or composition with Taylor, should be any discharge of any liability under the deed, or should release the defendant from observing the provisions thereof. Taylor entered into a deed of composition with his creditors, which contained an unconditional release, which the plaintiffs executed:—Held, that the composition deed was no defence to the claim for 100*l.*, as by the terms of the guarantee the surety was not discharged by the release of the principal debtor. *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L. J., Ex. 133; 12 L. T. 499; 13 W. R. 922.

Where a creditor having already a warrant of attorney from his debtor, takes a promissory note from him and a surety, and afterwards enters up judgment under his warrant of attorney, and takes the goods of the debtor in execution, and subsequently withdraws the execution without the knowledge of the surety, he discharges the surety. *Mayhew* v. *Cricket*, 1 Wils. Ch. 418; 2 Swanst. 185; 19 R. R. 57.

—— **Substitution of Security for Personal Liability.**]—A surety guaranteed payment of the premiums upon a life policy, which had been assigned by the principal debtor to his creditor to secure payment of part of the debt. Subsequently, the creditor, without the knowledge of the surety, agreed with the debtor to take the security, with the liability of the debtor and surety to pay the premiums thereon, in substitution for the personal liability of the debtor, in respect of that portion of the debt, and released the debtor from personal liability in respect thereof:—Held, that this arrangement discharged the surety. *Lawes* v. *Maughan*, 1 Cab. & E. 340.

—— **Or Covenant not to Sue—Novation of Debt.**]—Where there is an absolute release of the principal debtor, the remedy against the surety is gone, because the debt is extinguished. Where such a release is given no right can be reserved, because the debt is satisfied and no right of recourse remains when the debt is gone. Language imputing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor when that intention appears, leaving such debtor liable to make good any claims for relief at the instance of his sureties. But a covenant not to sue the principal debtor is a partial discharge only, and although expressly stipulated is ineffectual if the discharge given is in reality absolute. *Commercial Bank of Tasmania* v. *Jones*, 62 L. J., P. C. 104; [1893] A. C. 313; 1 R. 367; 68 L. T. 776; 42 W. R. 256; 57 J. P. 644—P. C.

Release of Executor of Principal.]—Where a bond has been given for payment of money on a certain day by A., B. and C., jointly, and it does not appear on the face of the bond that B. and C. are only sureties, it is no defence in an action on the bond against B. and C., after A.'s death, to plead that A. was the principal, and that the plaintiff had released A.'s executor before bringing the action. *Ashbee* v. *Pidduck*, 1 M. & W. 564; 2 Gale, 116; 1 Tyr. & G. 1016; 5 L. J., Ex. 251.

Release of one of several Sureties.]—Semble, that if a creditor releases by deed one of two sureties, who are jointly and severally liable, the other is also discharged. *Evans* v. *Bremridge*, 2 Kay & J. 174; 25 L. J., Ch. 102; 2 Jur. (N.S.) 134; 4 W. R. 161. See *S. C.*, 25 L. J., Ch. 334; 2 Jur. (N.S.) 311; 4 W. R. 350—L.JJ.

Discharge of surety by creditor has not the effect of a discharge of the principal without reserve, and, therefore, a co-surety is not discharged. *Gifford, Ex parte*, 6 Ves. 805; 6 R. R. 53.

—— **Co-sureties in Severalty.**]—Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must shew an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release:—Held, in an action upon a guarantee, that a plea to the effect that M. was the defendant's co-surety, and had been released in consideration of a new guarantee given to the plaintiff, constituted no defence: the plea nowhere averring or implying that the liability was joint, or that the defendant became surety on the faith of M.'s co-suretyship, or that any right of contribution had arisen against M. which had been taken away or injuriously affected, or that the defendant had suffered any damage or injury by the substitution described. *Ward* v. *National Bank of New Zealand*, 52 L. J., P. C. 65; 8 App. Cas. 755; 49 L. T. 315.

Release by one Co-surety of the Other—Effect on Charge by Third Party in favour of the Former.]—B. and C. were jointly bound as sureties for A.; D., the wife of A., charged her separate estate to indemnify B. from all losses, &c. The whole loss was borne by B. alone, who afterwards, without the concurrence of D., released C., his co-surety:—Held, that D.'s separate estate was thereby released from the moiety of the losses. *Hodgson* v. *Hodgson*, 2 Keen, 704; 7 L. J., Ch. 5.

3. Death.

Of Surety.]—A guarantee, the consideration for which is given once for all cannot be determined by the guarantor, and does not cease on his death. But as to whether a guarantee for future advances which the party guaranteed is not bound to make, is not determinable by the guarantor and whether it does not cease on notice of his death, quære. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452—C. A.

In May, 1863, a father, on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyd's was then a voluntary association, governed by certain by-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. The association consisted of underwriting members, non-underwriting members, and subscribers. The practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the association and outsiders, but the policies with outsiders could only be effected through the

agency of insurance brokers who were either members of or subscribers to the association. The association as such incurred no liability on the policies underwritten by its members. In 1871 the society was incorporated by act of parliament, all the rights of the committee on behalf of the members being vested by the act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to Lloyd's. In 1878 the son became bankrupt, and thereupon ceased to be a member of Lloyd's:—Held, by the court of appeal, that the guarantee was not determined by the death of the father or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death. *Ib.*

A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—Held, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death. The death alone did not determine the guarantee. *Harris* v. *Fawcett*, 42 L. J., Ch. 502; L. R. 8 Ch. 866; 29 L. T. 84; 21 W. R. 742.

A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. *Coulthart* v. *Clementson*, 49 L. J., Q. B. 204; 5 Q. B. D. 42; 41 L. T. 798; 28 W. R. 355.

The death of the surety does not operate as a revocation of a continuing guarantee. *Bradbury* v. *Morgan*, 1 H. & C. 249; 31 L. J., Ex. 462; 8 Jur. (N.S.) 918; 7 L. T. 104; 10 W. R. 776.

A guarantee as follows: "I request you will give credit in the usual way of your business to L., and in consideration of your doing so, I hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100*l.*" is not a bare authority, but a contract, and therefore the executor of the guarantor is liable for goods supplied after his death. *Ib.*

W. guaranteed the current account of his firm at a bank by a letter, which provided that the guarantee was to be a continuing one "notwithstanding any changes in the partnership." W. died on April 12, 1895, but no notice of the fact was given to the bank. In November, 1895, the bank manager heard in conversation that W. was dead; but the bank continued to discount the firm's bills down to December 31, 1895, when the account was closed. The bank sought to make W.'s estate liable on the guarantee, the firm being insolvent:—Held, that knowledge of the guarantor's death was sufficient to put the bank upon inquiry whether there was any authority to continue the previous course of dealing, and that the guarantee was determined on the date when the bank first had knowledge of the guarantor's death. *Dodd* v. *Whelan*, [1897] 1 Ir. R. 575.

—— **Partner.**]—A partnership composed of three persons, A., B. and C., gave a joint and several bond to the bank to cover advances to be made to them by the bank on a cash credit; and in that bond two estates held by A. were specially named as part securities for these advances. On A.'s death:—Held, that by his death the partnership was dissolved and the security, so far as his estates were concerned, was no further continued. *Bank of Scotland* v. *Christie*, 8 Cl. & F. 214.

A bond was given by country bankers to a London firm conditioned to repay advances made by the latter to the former or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London firm. In the month following the death of the deceased partner the London bankers received sums in payment more than sufficient to discharge the balance due, but also made advances of an equal amount:—Held, that the London bankers were entitled to apply the payments to the debt of the new firm and to recover on the bond against the representatives of the deceased partner. *Simson* v. *Ingham*, 2 B. & C. 65; 3 D. & R. 249; 1 L. J. (O.S.) K. B. 234; 26 R. R. 273.

—— **Of one of several Guarantors.**]—A firm of bankers took a continuing guarantee for advances to a customer in the form of a joint and several bond from two sureties. One of the sureties died, and after notice thereof the bank made further advances to the customer:—Held, that the surviving surety was liable to the bank in respect of such advances. *Beckett* v. *Addyman*, 51 L. J., Q. B. 597; 9 Q. B. D. 783—C. A.

B. being hired as a clerk to A. & Co., but not for any definite period, C. and D. joined in a bond to secure his duly accounting for his assets. C. died, and his executrix gave a written notice to A. & Co. that she would no longer remain surety; A. & Co. communicated this notice to B., and required and obtained from him the bond of another surety; D. died, and also the new surety, and four years and a half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice:—Held, that the executrix of C. had no equity to restrain A. & Co. from proceeding at law on the bond. *Gordon* v. *Calvert*, 4 Russ. 581; 2 Sim. 253; 29 R. R. 94. And see *S. C.*, 7 B. & C. 809; 1 M. & Ry. 497.

The condition of a bond, after reciting that A., B. and C. had filed a bill in equity against D. and E., was, that the obligee would pay all such costs as the court of chancery should award to the defendants on the hearing of the cause:—Held, that the death of E., before any costs were awarded, could not be pleaded in discharge of the bond. *Kipling* v. *Turner*, 5 B. & Ald. 261.

Of Principal.]—By the conditions attached to a contract of indemnity against losses in trade, the guarantee became void on the death or retirement from trade of the person guaranteed:—Held, that this condition applied to the death or retirement of one of two partners guaranteed; and therefore, that a plea alleging such death of the partner was an answer to an action against the co-partner by the guarantors for the subscription or annual payment agreed to be paid by the assured. *Solvency Mutual Guarantee Co.* v. *Freeman*, 7 H. & N. 17; 31 L. J., Ex. 197.

4. Bankruptcy of Principal or Co-Surety.

Disclaimer by Trustee — Liability of Bankrupt's Surety.]—The plaintiff being lessee of a farm for a term of years, assigned the lease to P., taking the covenant of the defendant as surety

for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bankrupt, and his trustee having obtained the requisite leave of the court, disclaimed all interest in the lease. Subsequently the lessor demanded from the plaintiff the half-year's rent accruing after the bankruptcy. The plaintiff paid the rent, and brought an action to recover the amount from the defendant under his covenant. Neither the plaintiff nor the defendant had entered upon or taken possession of the farm:—Held, that the plaintiff was entitled to recover. By Manisty, J., on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve the bankrupt, his estate, and the trustee from liability without otherwise affecting third parties, and that the plaintiff as lessee remained liable for the rent, and had his remedy over against the defendant as the bankrupt's surety. By Watkin Williams, J., solely on the authority of *East and West India Docks Co.* v. *Hill* (22 Ch. D. 14). *Harding* v. *Preece*, 51 L. J., Q. B. 515; 9 Q. B. D. 281; 47 L. T. 100; 31 W. R. 42; 46 J. P. 646.

Sureties not Discharged by.]—By an agreement between the Agra and Masterman's bank, a Calcutta tea company, and their London agents, the bank granted a letter of credit, permitting the tea company to draw bills on the bank. The tea company undertook that the credit should provide for the outlay for the season's tea; that they would ship the whole produce of the season; that they would draw upon the London agents for the value of the produce, and forward to the bank the bills, with bills of lading, policy of insurance, and invoice of tea shipped; and that they would pay any balance which might appear due on the credit on or before a certain date. The London agents guaranteed to the bank that the tea company would perform its undertaking, "the terms of which we hereby confirm, holding ourselves responsible for the same." The tea company drew, in accordance with the letter of credit, several bills on the bank, which it accepted. Before any of them became due, the bank stopped payment, and was wound up, and its property transferred to the Agra bank. The bills were not paid at maturity, but were afterwards paid either by the Agra and Masterman's bank or by the Agra bank. The tea company never performed any part of their undertaking except the drawing the bills before mentioned, and became insolvent. The Agra bank, relying on the guarantee, claimed to be creditors for the amount of the bills, against the estate of the London agents, who had executed a deed of inspectorship:—Held, that the fact of the Agra and Masterman's bank stopping payment, and being wound up, did not excuse the tea company from fulfilling their contract, or release the guarantors from their liability; and that the claims of the Agra bank must be admitted for the amount of such damage as they had sustained by the default of the tea company to fulfil their contract. *Agra Bank, Ex parte, Barber, In re*, 39 L. J., Bk. 39; L. R. 9 Eq. 725.

A discharge of a debtor in liquidation, under the Bankruptcy Act, 1869, s. 125, is in all respects equivalent to and identical with a discharge in bankruptcy under s. 48, and therefore the unconditional discharge of a debtor in liquidation, obtained by means of a resolution of the statutory majority of creditors, under s. 125, does not release the debtor's sureties, although they did not assent to but protested against the resolution of discharge; and the right of the creditors to sue the sureties remains untouched and unaffected by such discharge. *Ellis* v. *Wilmot*, 44 L. J., Ex. 10; L. R. 10 Ex. 10; 31 L. T. 547; 23 W. R. 214.

The discharge of a debtor by the acceptance of a composition under the Bankruptcy Act, 1869, s. 126, is a discharge in bankruptcy by operation of law, and only releases the debtor himself, but does not release any person jointly bound with him. *Jacobs, Ex parte, Jacobs, In re*, 44 L. J., Bk. 34; L. R. 10 Ch. 211; 31 L. T. 745; 23 W. R. 251.

Therefore, when the acceptor of a bill of exchange filed a petition for liquidation of his affairs by arrangement, and the creditors duly passed resolutions accepting a composition from him, and the holder of the bill voted in favour of the composition:—Held, that this did not operate to release the drawer. *Ib.*

A debtor and his sureties jointly and severally covenanted with a trustee for the creditors, to pay to him so much as would suffice to pay a composition of 7*s.* 6*d.* in the pound to all the creditors, by three instalments, 2*s.* 6*d.* each, at four, eight, and twelve months; and the deed contained a proviso that in case default should be made in payment of any or either of the instalments or in case, before the composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make an attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then, and in every such case, the deed and the release, and every other clause and provision therein contained, should be thenceforth at an end and void. In an action against the sureties to recover the second instalment, the principal debtor having been adjudicated bankrupt on his own petition:—Held, that the bankruptcy did not render the deed void as against the sureties, but that the proviso made it voidable at the election of the creditors. *Hughes* v. *Palmer*, 19 C. B. (N.S.) 393; 34 L. J., C. P. 279; 11 Jur. (N.S.) 876; 12 L. T. 635; 13 W. R. 974.

Where under s. 18, sub-s. 11, of the Bankruptcy Act, 1883, an order is made adjudicating a debtor bankrupt, and annulling a composition made by him with his creditors, a surety who has given security for payment of the composition is discharged from liability, and the security becomes void so far as relates to such liability. *Walton* v. *Cook*, 58 L. J., Ch. 180; 40 Ch. D. 325; 60 L. T. 91; 37 W. R. 189.

Second Bankruptcy.]—A surety who guarantees the payment of an instalment under a composition resolution is not released by the debtor subsequently being adjudicated bankrupt at the suit of creditors who are not bound by the resolution. *Glegg* v. *Gilbey*, 46 L. J., Q. B. 325; 2 Q. B. D. 209; 35 L. T. 927; 25 W. R. 311—C. A.

The creditors of a debtor agreed by resolution to accept a composition payable by three instalments, the last instalment to be guaranteed by a surety. By a subsequent deed of inspectorship, the debtor was to be allowed to carry on his business, but if he made default the inspectors might apply for an adjudication in bankruptcy, or compel him to assign his effects to them; and the deed provided "that in the event of his

being adjudicated bankrupt or of a conveyance or assignment of his property and effects being made or required under the provisions of these presents" before payment, the surety should be released from his guarantee. The debtor was afterwards adjudicated bankrupt on the petition of creditors not bound by the resolution. A creditor sued on the guarantee:—Held, that, the surety's position not being altered by the act of a party to the contract of guarantee, and the bankruptcy not having been brought about by the inspectors under the deed, the surety was not discharged from liability. *Ib.*

Proof.]—If a creditor sues a surety on a guarantee, and the principal debtor becomes bankrupt, and the creditor proves the debt; and the surety gives notice to the creditor that, although he does not admit his liability as surety, he will, if the creditor signs the certificate, hold himself altogether discharged; and after issue joined in the action, but before the trial, the creditor signs the certificate, which, without such signature, the bankrupt could not obtain, and the certificate is allowed, and the creditor obtains judgment in the action, the surety is not discharged from his liability. *Browne* v. *Carr*, 2 Russ. 600; 5 M. & P. 497; 7 Bing. 508; 9 L. J. (O.S.) C. P. 144.

A defendant, after he had become bankrupt, was discharged out of custody, on a ca. sa. upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the court refused, on summary application, to exonerate the sureties. *Duncan* v. *Sutton*, 1 Scott, 338; 1 Bing. (N.C.) 431; 4 L. J., C. P. 164.

Composition with Debtor releasing Sureties.]—To an action on a bond the defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J., and afterwards a composition deed was made between J. of one part and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties to the second part all his estate to be administered for the benefit of his creditors in like manner as if J. had been adjudged bankrupt; and each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bankruptcy"; and that the plaintiff executed this deed without the consent of the defendant:—Held, a good plea. *Cragoe* v. *Jones*, 42 L. J., Ex. 68; L. R. 8 Ex. 81; 28 L. T. 36; 21 W. R. 408.

An agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and pay his other creditors 5*s.* in the pound, though not a discharge of the bond by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; and it is not possible in equity, upon such a transaction, to reserve any rights against the surety, and any attempt to do so would be void, as being inconsistent with the agreement. *Webb* v. *Hewitt*, 3 Kay & J. 438.

A banking company whose chief office was in London, but who had offices and carried on business in Australia, made advances at the request of M. and R. to C., the agent of M. and R. in Australia, upon bills of exchange drawn by him upon M. and R. These bills were dishonoured by M. and R., who had entered into a deed of composition with their creditors, which was executed on behalf of the banking company. Dividends had been received under this deed by the banking company, who had brought an action in Australia against C. for the amount of their advances upon the bills, and damages for their non-acceptance. Injunction granted restraining the banking company from proceeding in this action, they having been distinctly informed that the bills were drawn by C. as agent for M. and R., whom they had relieved by executing the deed and taking a dividend thereunder. Objection as to jurisdiction overruled, the chief office and domicile of the banking company being in London, where also the deed had been executed, and all the arrangements made. *Walker* v. *Brooks*, 4 W. R. 347.

Discharge of Recognizance under Bastardy Order—Consent of Parish Officers.]—On an application to discharge a recognizance which had been estreated, it appeared that the petitioner was surety for A. under an order of bastardy; that the petitioner subsequently became embarrassed and left D. and came to L. to endeavour to procure employment, during which period A. took the benefit of the insolvent act, and died; the petitioner then returned to D., and was arrested for the amount of his recognizance:—Held, although it was shewn that the petitioner had no property, that, as it appeared that the parish had been charged for many years with the burden cast on them by the principal, they could not grant the application without the consent of the parish officers, nor could they grant a rule to compel the parish officers to shew cause why they should not give their consent. *Smith, In re*, 13 Price, 3.

Bankruptcy of Surety—Discharge pro tanto of co-Surety.]—Under the law of principal and surety, a creditor must not (1) act in a manner inconsistent with the contract under which the obligation of suretyship was incurred; (2) do anything to prejudice the right of contribution between the co-sureties. If he does, the sureties will be released either wholly or pro tanto. Where the creditor had effected a compromise with the trustee in bankruptcy of one of several sureties, by which he precluded himself from receiving a dividend against his estate:—Held, that the co-sureties were discharged to the extent of the dividend which, but for such compromise, the creditor might have received. *Wolmershausen, In re, Wolmershausen* v. *Wolmershausen*, 62 L. T. 541; 38 W. R. 537.

5. Change of Service.

Terminable at Shorter Notice.]—A bond was given by the obligor as surety that a servant would from time to time, and at all times during the service, satisfactorily account for and pay over to the master all moneys received by the servant for the master's use. One of the terms of the service was that it should be terminable by one month's notice on either side, but this was not known to the surety. After the commencement of the service the master and servant agreed, without the knowledge of the surety, that the service should be terminable at three

months' notice :—Held, by Kelly, C. B., Pigott, B., and Pollock, B. (dubitante Martin, B.), that the surety was not discharged. But the servant having failed satisfactorily to account for or pay over moneys which he had received for the master's use, and the master having with knowledge, and without informing the surety thereof, retained the servant in his service :—Held, that the surety was discharged as to defaults committed by the servant after he was so retained. *Sanderson* v. *Aston*, 42 L. J., Ex. 64 ; L. R. 8 Ex. 73 ; 28 L. T. 35 ; 21 W. R. 293.

Where Separate Employments.]—Where a principal is appointed to two distinct employments, and his sureties guarantee by one bond his good conduct in both, they are not discharged from liability as to one of the employments by the fact of his duties being altered and enlarged in the other. *Skillett* v. *Fletcher*, 1 H. & R. 197 ; 35 L. J., C. P. 154 ; L. R. 1 C. P. 217 ; 12 Jur. (N.S.) 295 ; 13 L. T. 61 ; 14 W. R. 435. Affirmed 36 L. J., C. P. 206 ; L. R. 2 C. P. 469 ; 16 L. T. 426 ; 15 W. R. 876—Ex. Ch.

And where one enters into a bond as surety for the performance by another of two matters which are separate and distinct, a subsequent alteration of the principal's contract as to one of them, without the surety's consent, does not release the surety from his contract of suretyship as to the other. *Harrison* v. *Seymour*, 35 L. J., C. P. 264; L. R. 1 C. P. 518; 12 Jur. (N.S.) 924.

Change in Employers' Firm.]—A bond was given to a mercantile firm conditioned for the due accounting for and payment of all moneys received by B., their agent, on account of the firm. B. afterwards, with the knowledge and assent of the firm, takes A. into partnership, and the defendant enters into a similar bond, conditioned for the due accounting for and payment to the firm of all moneys received by A. on their account : —Held, first, that the defendant was not liable, within the meaning of the bond, for moneys received by A. and B. *London Assurance Corporation* v. *Bold*, 6 Q. B. 514 ; 14 L. J., Q. B. 50 ; 8 Jur. 1118.

Held, secondly, that letters written by the defendant, shewing his knowledge of the partnership between A. and B., could not be looked at for the purpose of so extending his liability. *Ib.*

A surety, who is bound for a clerk in the employment of the obligors, is not discharged from the obligation of his bond by the obligors having taken into the firm a new partner. *Barclay* v. *Lucas*, 1 Term Rep. 292, n. ; 3 Dougl. 321 ; 1 R. R. 202, n.

—— **Corporation.**]—A bond given to trustees to secure the faithful services of a clerk to an insurance company, which was no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer ; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body ; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf* v. *Bruin*, 12 East, 400 ; 2 Camp. 422 ; 11 R. R. 432.

Executors of Obligee.]—A bond with condition that a clerk shall serve faithfully and account for all money to the obligee and his executors does not make the obligor liable for money received by the clerk in the service of the executors of such obligee, who continue the business and retain him in the same employment. *Barker* v. *Parker*, 1 Term Rep. 287 ; 1 R. R. 201.

By Incorporation of Society.]—A bond was given to A., B., and C., payable to them and their successors, as the governors of the Society of Musicians, conditioned to secure H.'s faithfully accounting with them and their successors, governors, &c., as their collector ; afterwards the society was incorporated by letters patent, at which time H. had duly accounted for all moneys collected by him, but after the incorporation received money for which he did not account :—Held, that the obligor of the bond was not liable for such default. *Dance* v. *Girdler*, 1 Bos. & P. (N.R.) 34 ; 8 R. R. 748.

Reduction of Salary.]—In 1841, R. was, by a resolution of a vestry, appointed permanent assistant overseer to a parish at an annual salary of 16*l.*, and he performed the duties without giving security. In May, 1846, it was resolved by the vestry that he should continue his office upon giving security ; and accordingly, in June, 1846, a bond was entered into by R. with two sureties, in pursuance of 59 Geo. 3, c. 12, subject to the condition that R. should from time to time, and at all times thereafter during the continuance of his appointment, faithfully account for the collection of the rates, and duly execute all the duties of the office ; and a few days afterwards a warrant of the appointment of R. as assistant overseer was executed by the magistrates. R. continued to perform the duties of assistant overseer till 1851, but the duties having become lessened, in consequence of the appointment of a relieving officer in that year, a vestry (amongst whom was one of the sureties to the bond), with the consent of R., came to the resolution that R. should continue the office at a salary of 14*l.* per annum. After this R. continued to discharge the duties of the office for some months, and then resigned it, when he was found to be in debt to the parish :—Held, that the resolution of the vestry of 1851 did not amount to a revocation of the original appointment of R., but that he continued in the office at a reduced salary, and consequently that the sureties were not discharged from liability under the bond. *Franks* v. *Edwards*, 8 Ex. 214 ; 22 L. J., Ex. 42.

Increase of Salary.]—In March, 1845, L. was elected assistant overseer of a parish, by the inhabitants in vestry assembled, at a yearly salary of 27*l.* In May following he entered into a bond with two sureties as a security for the faithful execution of the office under 59 Geo. 3, c. 12 ; the condition of the bond recited that statute, and that L. had been duly nominated and elected at the annual salary of 27*l.* In March, 1846, at a vestry duly held, a resolution was come to that the permanent overseer's salary (meaning L.'s) should be raised from 27*l.* to 35*l.* a year, including all other extra charges. In June, 1846, a warrant of the appointment of L. was signed and sealed by two justices of the

peace; this warrant recited that L. had been nominated and elected in March, 1846, at a yearly salary of 35*l.* Subsequently to June, 1846, L. had acted as assistant overseer, but had become defaulter to a considerable amount. In an action on the bond against the sureties:—Held, that there never had been an appointment by the justices upon the nomination and election of March, 1845, at an annual salary of 27*l.*, upon which the bond had been given, inasmuch as the appointment was made in pursuance of the resolution of March, 1846, at the increased salary of 35*l.*, and therefore that L. had never been duly appointed assistant overseer, and the sureties were not liable. *Holland* v. *Lea*, 9 Ex. 430; 2 C. L. R. 532; 23 L. J., Ex. 122.

Change in Mode of Payment.]—A clerk was appointed at a salary of 100*l.* a year, and a bond was executed by the defendant, conditioned for the accounting by the clerk for all moneys received by him for the use of his employers. Subsequently his salary was commuted for a payment on commission:—Held, in an action on the bond, that the defendant was released by the change in the mode of payment. *L. & N. W. Ry.* v. *Whinray*, 10 Ex. 77; 2 C. L. R. 1207; 23 L. J., Ex. 261; 2 W. R. 523.

Yearly Reappointment.]—A bond, reciting that A. was appointed assistant overseer of a parish, was conditioned for the performance of his duties thenceforth from time to time and at all times so long as he should continue in such office. On the 25th June, 1840, a vestry meeting was held, at which A. was elected assistant overseer until the 25th March, 1841, at a salary of 8*d.* in the pound on some sums collected, and 4*d.* on others. Two justices by their warrant dated 9th July, 1840, reciting the vestry resolution, and that his salary had been fixed for the execution of his office until the 25th March then next, stated that, in pursuance of 59 Geo. 3, c. 12, they appointed him assistant overseer. On the 25th March, 1841, he was again elected to the same office at a salary of 50*l.* per annum, and was reappointed by the justices, and he continued to be so re-elected and reappointed by the justices until March, 1846. On ceasing to hold office, he retained the moneys in his hands:—Held, that the sureties were not liable on the bond. *Bamford* v. *Iles*, 3 Ex. 380; 18 L. J., M. C. 49.

Where parties had become sureties in a bond reciting that R. had been appointed to act as overseer for making and levying borough rates in that part of parish A. which lay within the borough during the pleasure of the council, and the bond was conditioned for performance of the duties during such time as A. should act as such overseer:—Held, that the sureties were liable beyond the expiration of the year A. continued in office, for that there was no law limiting the duration of the office to a year, so as to control the express stipulations of the bond. *Birmingham Corporation* v. *Wright*, 16 Q. B. 63; 20 L. J., Q. B. 214; 15 Jur. 749.

Action on a bond. Plea set out the bond, which recited that J. had been appointed clerk to a company, and upon such appointment being made it was agreed that he and his sureties should enter into such bond for the due execution of his office; and the condition was that he should duly account "so long as he should continue to hold the office and employment." Averment, that the appointment of J. in the condition mentioned was an appointment for one year, and no longer. Replication, that J., with the assent of the sureties and the company, continued and remained in the office and employment after the expiration of the year in the plea mentioned:—Held, that the sureties were not liable after the expiration of the period for which J. was originally appointed; that the fact of the appointment being for one year might be shewn by plea; and that the continuance in office alleged in the replication must be taken to be by a reappointment. *Kitson* v. *Julian*, 4 El. & Bl. 854; 24 L. J., Q. B. 202; 1 Jur. (N.S.) 754; 3 W. R. 371. *See also cases* ante, cols. 1202 et seq.

Variation of Annual to Perpetual Appointment.]—Sureties by bond in 1842 covenanted with a corporation that M., who had been appointed treasurer to the corporation under 5 & 6 Will. 4, c. 76, s. 58, "should well and truly pay to the corporation, or to their successors, all such sums of money as M. should or might recover or receive, in virtue of his appointment as treasurer, during the whole time of his continuing in the office in consequence of the said election, or under any annual or other future election of the council to the office." At the time of his appointment the office was an annual one; but in 1843 was passed the 6 & 7 Vict. c. 89, which repealed 5 & 6 Will. 4, c. 76, s. 58, as inconvenient and unnecessary, and directed that the treasurer should "thenceforth hold his office during the pleasure of the council for the time being":—Held, that there was not such a variation of tenure of the office as to discharge the sureties, and that the change from an annual to a perpetual appointment during pleasure was provided for by the words of the bond, "annual or other future election." *Oswald* v. *Berwick-upon-Tweed Corporation*, 5 H. L. Cas. 856; 25 L. J., Q. B. 383; 2 Jur. (N.S.) 743; 4 W. R. 738.

A bond executed before 6 & 7 Vict. c. 89 by the sureties of P., treasurer of a borough, was subject to a condition by which, after reciting that he had been elected treasurer under 5 & 6 Will. 4, c. 76, it was provided that the bond should be void, if he should account for moneys that might come to his hands as treasurer "(whether by virtue of his present or any subsequent appointment to the office) according to the directions and true intent and meaning of the statute, and in every other respect act in strict conformance with the same, and all other laws and regulations now or hereafter to be in force touching the office of treasurer, or the persons performing or liable to perform the duties thereof":—Held, that the sureties were liable for misconduct of P. after the tenure of the office had been altered by 6 & 7 Vict. c. 89 from an annual office to an office held during pleasure. *Clifton Dartmouth Hardness Corporation* v. *Silly*, 7 El. & Bl. 97; 26 L. J., Q. B. 90; 3 Jur. (N.S.) 434; 5 W. R. 255.

The condition of a bond, after reciting that S. had been appointed treasurer of a borough under 5 & 6 Will. 4, c. 76 (which by s. 58 required the treasurer to be appointed every year), was that he should faithfully and according to the provisions of the act, and of such statutes as might thereafter be passed relating to the office, conduct himself in the office and perform all the duties thereof:—Held, that the bond did not extend beyond the year of office for which S. had been appointed at the time of execution of the

bond. *Cambridge Corporation* v. *Dennis*, El., Bl. & El. 660; 27 L. J., Q. B. 474; 5 Jur. (N.S.) 265; 6 W. R. 653.

Assistant Overseer appointed Overseer.]—A., being duly appointed assistant overseer of the poor of a parish, entered into the usual bond with sureties; while he held that office he was appointed overseer of the same parish, and continued to discharge the duties of both those offices till he became a defaulter, when he resigned:—Held, that his acceptance of the office of overseer did not vacate that of assistant overseer without a resignation to and acceptance by the vestry; and that his sureties were liable for his defalcations committed both before and after he was so appointed. *Worth* v. *Newton*, 10 Ex. 247; 2 C. L. R. 1471; 23 L. J., Ex. 338; 2 W. R. 628.

Collector of Poor-rates appointed Collector of Drainage Rates.]—A declaration was framed on a bond conditioned for the due performance by A. of his duties as collector of the poor-rates and of the sewers and general rates of a parish, the bond to continue in force if A. held either office separately. Breach, that he received money in each capacity, and failed to pay it over. Plea, that before breach two acts of parliament were passed increasing his duties as collector of sewers and general rates, and under which he was also appointed collector of main drainage rates by the persons under whom he held his other appointments. These acts altered the proportion in which certain sewers rates were to be borne by different parishes, increasing the proportion payable by the parish, and also imposed upon the sewers rates fresh charges of small amount:—Held, that the appointment of A. to the new office of collector of main drainage rates did not avoid the bond. *Skillett* v. *Fletcher*, 36 L. J., C. P. 206; L. R. 2 C. P. 469; 16 L. T. 426; 15 W. R. 876—Ex. Ch.

Held, also, that the changes introduced by the acts did not amount to an alteration of the office to which he was originally appointed, and did not avoid the bond. *Ib.*

Collector of Rates—Transfer of District.]—A bond, reciting an order of the poor-law commissioners in 1836, by which the guardians of a union should appoint one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the parishes as the guardians might deem to require a collector, and that every person appointed a collector should give security for the due discharge of the duties of the office, and that W. was duly appointed to be a collector under the order, was conditioned that he should, during his continuance in his office, and whether the district for which he was appointed was or was not changed, faithfully discharge the duties thereof, and obey the lawful directions of the guardians. In the first instance, the guardians elected three persons to be collectors of the poor-rate in the union, to each of whom was assigned a portion of the parish. In 1848 the guardians divided the parish into four districts for collection of the poor-rates, and appointed an additional collector. After 13 & 14 Vict. c. 99, it was determined to appoint a fifth collector. At this time one of the four collectors resigned, and an advertisement was published that the guardians would appoint two persons to be collectors of the poor-rates of the parish, to one of whom would be assigned a collection of such rates from the owners of small tenements. W. applied, offering himself as a candidate for one of them; and he was elected for the purpose of collecting the rates from the owners of small tenements. The bond was then executed by W., and by A. as his surety. In 1855, one of the other collectors having resigned, W. applied to the guardians to transfer him to that district, which application was acceded to:—Held, that the appointment of W. was a general one, as collector of poor-rates for the parish, and that, there being only a change of the duties in 1855, the obligation of the surety was not discharged. *Portsea Island Union* v. *Whillier*, 2 El. & El. 755; 29 L. J., Q. B. 150; 6 Jur. (N.S.) 887; 2 L. T. 211; 8 W. R. 493.

Clerk to Railway—Amalgamation of Companies.]—A bond was given by a party to the C. railway company, as a surety for the performance by G. of his duties as clerk. The condition was, that if G. should render to the C. company, or to the committee for managing the London terminus of the C. and B. and S. E. Railways, a true account of all the receipts and payments of him as such clerk, and also should pay to the C. company, or to the committee, all such sums as he should receive on account of the company or committee, then the obligation to be void. The surety pleaded that the bond was made before the passing of an act to consolidate the B. and C. companies, and that the action was commenced afterwards, and that the C. company thereby became dissolved:—Held, that the plea was bad, and was no defence, inasmuch as the new company was the same as the two old ones, with additional powers, and that the amalgamation of the companies did not affect the responsibilities of the surety or G. *L., B. & S. C. Ry.* v. *Goodwin*, 6 Railw. Cas. 177; 3 Ex. 736; 18 L. J., Ex. 174.

C. as surety executed a bond, conditioned for the faithful service of a clerk to a railway company. Whilst the service continued that company and another railway company were dissolved and united into one company by a statute which provided that all bonds made or entered into with, in favour of, or by the dissolved companies should "be and remain as good, valid, and effectual, in favour of and against and with reference to the new company, and might be proceeded on and enforced in the same manner to all intents and purposes, as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or parties actually named therein":—Held, that the surety was liable for breaches of the bond committed by the clerk after the union of the two companies. *Eastern Union Ry.* v. *Cochrane*, 2 C. L. R. 292; 7 Railw. Cas. 792; 9 Ex. 197; 23 L. J., Ex. 61; 17 Jur. 1103; 2 W. R. 43.

Appointment — Whether ultra vires.]—In January, 1851, A. as surety executed a bond to a railway company, which, after reciting that the company had agreed to appoint L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of 100*l.*, was conditioned for the accounting by L. of all moneys received by him for the use of the company. L. performed the duties of clerk or agent at such salary until May, 1851, when it was agreed between L. and the company to substitute for such salary a

commission of 6*d.* per ton on all coal for which he should obtain orders. From that time L. was paid for his services by commission, which amounted to a larger sum than the fixed salary. In 1852 L. was indebted to the company for sums which he did not pay over, and the company having sued the defendant on the bond :—Held, that the bond was valid, although the company had no power to deal in coal. *L. & N. W. Ry.* v. *Whinray*, 10 Ex. 77 ; 2 C. L. R. 1207 ; 23 L. J., Ex. 261 ; 2 W. R. 523.

Enlargement of Office.]—Where the duties of a principal are enlarged and extended by act of parliament, a bond for the due discharge of the principal's duties is void although he may still be liable to perform the duties originally contemplated, because the duties and liabilities originally contemplated by the sureties were what the principal was at that time liable to perform and not what might be subsequently imposed upon him. *Pybus* v. *Gibb*, 6 El. & Bl. 902 ; 26 L. J., Q. B. 41 ; 3 Jur. (N.S.) 315 ; 5 W. R. 44.

Association of Partners with Agent.] — A surety entered into a bond with an insurance company, and conditioned that L., his son, who had been appointed agent for the company, would well and truly pay to the actuary of the company all sums of money received by him as such agent. At the time he entered into the bond he received a letter stating that he was only insuring his son's integrity. L., with the knowledge of the surety, was associated with F. in the agency ; and shortly afterwards L. and F. entered into partnership as general merchants, and afterwards became insolvent ; premiums having been received both by L. and F. as agents for the company, and such premiums not having been accounted for :—Held, in an action on the bond against the surety that the surrounding circumstances at the time he entered into the bond ought to be taken into consideration, and that his liability had been changed, and that he was consequently not liable on the bond. *Montefiore* v. *Lloyd*, 15 C. B. (N.S.) 203 ; 33 L. J., C. P. 49 ; 9 Jur. (N.S.) 1245 ; 9 L. T. 330 ; 12 W. R. 83.

6. Change of Partnership.

Admission of Partner.]—A surety bond for the faithful service of A. to a sole trader does not extend to a subsequent partnership. *Wright* v. *Russell*, 2 W. Bl. 934 ; 3 Wils. 530.

If A. becomes bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards, with B.'s knowledge, takes D. as his partner ; the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership. *Bellairs* v. *Ebsworth*, 3 Camp. 53 ; 13 R. R. 750.

A guarantee of moneys advanced by a firm, consisting of F. & Co., will not extend to a new firm, in which H. is introduced as a partner. *Spiers* v. *Houston*, 4 Bligh (N.S.) 515.

Payments made by the principal after the alteration of the firm, and in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration. *Ib.*

Retirement of Partner.]—In and prior to 1866, W. and L., partners in trade, executed two joint and several bonds to the trustees of S.'s will to secure the repayment with interest of two sums of money advanced to them. In 1869, W. retired from the firm, and in pursuance of an agreement, assigned by deed all his share and interest in the firm to L., who covenanted to indemnify him against all the trade debts and liabilities. The trustees had notice of this deed. L. carried on the business with C. till 1871, when they filed a petition for liquidation by arrangement. The trustees proved under the liquidation for the balance of the principal and interest then due on the bonds, and attended and voted at all the meetings of the creditors, who agreed to accept a composition. The trustees were also parties to the composition deed by which they gave time to L. and C. for the payment of the balance due on the bonds. W. filed a bill praying for a declaration that, under the circumstances, he was absolutely released from all liability under the bonds :—Held, that the retirement of W. with a covenant of indemnity with the knowledge of the trustees, had altered his character of principal into that of surety ; that the subsequent acts and conduct of the trustees had effected a complete novation of the bond debts ; and, consequently, that W. was entitled to the relief which he sought. *Wilson* v. *Lloyd*, 42 L. J., Ch. 559 ; L. R. 16 Eq. 60 ; 28 L. T. 331 ; 21 W. R. 507.

Action on a bond against a surety. The condition recited that the university of Cambridge had appointed B., C. and J. their agents for the sale of books printed at their press in the university, and that the defendant had offered to enter into a bond with them as a surety ; and it was conditioned that if B., C. and J., and the survivors or survivor of them, and such other person or persons as should or might at any time or times thereafter, in partnership with them, or any or either of them, act as agent or agents of the university, for the sale of books as aforesaid, did and should duly account to the university for all books delivered or sent to them, or any or either of them, for sale as aforesaid, and should pay all moneys which should become payable to the university in respect of such sale, then the obligation to be void :—Held, that by the retirement of J. from the partnership of B., C. and J., their surety was discharged from all further liability on this bond. *Cambridge University* v. *Baldwin*, 5 M. & W. 580.

A guarantee given to a firm consisting of three partners is determined by the retirement of one of them. *Dry* v. *Davy*, 2 P. & D. 249 ; 10 A. & E. 30 ; 8 L. J., Q. B. 209 ; 3 Jur. 315.

Substitution of Partner—Variation of Terms—Implied Consent of Sureties.]—A., B. and C. contracted with a company to execute certain works on given terms. D. and E. gave a bond, as their sureties, for the performance of the contract. A. and B. retired from the partnership, and F. was substituted. Afterwards disputes arose between the company and C. and F. as to the conduct of the works, and various transactions took place by which the terms of the contract were varied, and during which the company paid to C. and F. certain moneys which it had been agreed originally should be paid to A., B. and C. D. and E., the sureties, were no parties to these transactions, and gave no express consent, but they had been the solicitors of A., B. and C. in the original contract, knew of all the subsequent transactions, and acted as the

solicitors of C. and F., and as such solicitors, prepared many of the documents required for such transactions. The company having brought an action on the bond against the sureties, for breach of the contract, they filed this bill to restrain the action:—Held, that the sureties were not discharged, and that the action could not be stopped. *Woodcock* v. *Oxford and Worcester Ry.*, 1 Drew. 521.

Death of Partner.]—Where a bond by A., reciting that B. intended to open a banking account with C., D. and E. as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking-house of C., D. and E.:—Held, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation. *Strange* v. *Lee*, 3 East, 484.

Where C. became surety for such sums as should be advanced to meet bills drawn by A. and B. as partners, or either of them:—Held, that it did not extend to bills drawn by B. after the death of A. *Simpson* v. *Cooke*, 8 Moore, 558; 1 Bing. 452; 2 L. J. (O.S.) C. P. 74.

A., B. and C. carried on business in co-partnership for a term, which would expire on the 19th of February, 1807, under articles which empowered A., in case of his death during the term, to bequeath his share of the trade in favour of his wife or children. S., a customer of the bank and a surety, covenanted that they, or one of them, would pay to A., B. and C., the survivors or survivor of them, &c., all sums which, on or before or until the 19th of February, 1807, should become due from the customer to A., B. and C., the survivors or survivor of them, &c. A. died, having bequeathed his share of the concern to his executors, in trust for his children; the business continued to be carried on under the same firm as before, and his executors interfered in the management, and shared in the profit. At the time of A.'s death the balance due from S. to the bank was upwards of 14,000*l.*; after that time, S. continued his dealings with the bank in the same manner as previously, paying in more than 14,000*l.* within a few weeks after A.'s death, but drawing out during the same period a larger sum, and these subsequent dealings were contained in the same account with the preceding dealings, and some years afterwards S. became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards:—Held, that the partnership, which carried on the business after the death of A., was a new partnership; that the surety's covenant did not extend to cover sums advanced to the customer by the bank after A.'s death; that the balance due at A.'s death from the customer was to be considered as discharged by the payments subsequently made by him to the bank. *Pemberton* v. *Oakes*, 4 Russ. 154; 6 L. J. (O.S.) Ch. 35.

—— **State of Accounts.**]—A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced; and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond:—Held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and, that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. *Bodenham* v. *Purchas*, 2 B. & Ald. 39; 20 R. R. 342. See *Hart* v. *Alexander*, 2 M. & W. 484; 6 L. J., Ex. 129.

Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the bank might honour, and any advances they might make to the same customer within a certain time:—Held, that the guarantee ceased upon the death of one of the partners in the bank, before the expiration of the time to which the guarantee was expressed to extend. *Hollond* v. *Teed*, 7 Hare, 50.

Held, further, that bills accepted before the death of the partner, and payable afterwards, were within the guarantee. That the amount guaranteed could not be increased by any act of the continuing firm and the customer, after the death of the partner, although such amount might be diminished by such act. That, in the particular form of the guarantee, the amount guaranteed in respect of the bills honoured by the bank, was not to be reduced by the amount of a balance owing from the bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer. *Ib.*

A bond, conditioned to repay to five persons all sums advanced by them, or any of them in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. *Weston* v. *Barton*, 4 Taunt. 673; 13 R. R. 726.

Dissolution.]—R. and H., being in partnership, were in the habit, through the plaintiffs' firm, of consigning goods to B. and S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which they accepted bills drawn by R. and H., and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, the plaintiffs accepted fresh bills, which the defendants negotiated, and handed the proceeds to the plaintiffs, who were thereby enabled to take up the first acceptances,

and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. and H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock of the old firm. The plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiffs' advances, and they brought an action against R. and H. to recover the balance. R. raised as a defence, that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this had discharged R.:—Held, that R. and H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. and H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances. *Swire* v. *Redman*, 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069.

Continuing Business after Term.]—B., as principal, gave to his partner, C., a bond, which was executed by L. as surety, indemnifying him from all loss from the partnership business, it being stipulated by the articles of partnership that the business should continue for five years; that in case either partner should retire, and the other be desirous of continuing the business, the continuing partner might take the retiring partner's share of the partnership assets at a valuation; and that if at the expiration of the partnership term either of the partners should be desirous of carrying on the business, and should neglect or refuse to purchase his partner's share in the assets at a valuation, then the assets should be realised, the debts paid out of the proceeds, and the surplus divided between the partners according to their interests. At the expiration of the partnership term neither of the partners retired, but without consulting L., continued to carry it on for about twenty months longer, at the end of which time C. retired, leaving the whole partnership assets in the hands of B., by whom the business was continued till B.'s bankruptcy, about three months afterwards. B. afterwards absconded, leaving the concern insolvent, and C. was compelled to liquidate the liabilities of the partnership:—Held, that inasmuch as by the articles the partnership ought to have been wound up at the expiration of the term limited by the articles, it was not competent to C. to agree to its continuance without the consent of L., and yet to hold L. liable as surety upon the bond; and that C., therefore, was not entitled to put the bond in force against L. *Small* v. *Currie*, 5 De G. M. & G. 141; 2 Eq. R. 639; 23 L. J., Ch. 746; 18 Jur. 731.

Breach after Death of Partner—Before other Change.]—Action by A., surviving obligee of a bond, against a surety. The condition of the bond recited that A., B. and P. had entered into co-partnership, and that it had been agreed that P. should be the acting partner, and that he and his surety should become bound to A. and B., and it was conditioned for the performance by P. of the covenants on his part to be observed in a deed of co-partnership of the 1st of January, 1830, and made between A., B. and P., and also for the delivery to A. and B. by P., during such time as he should continue the acting partner in the trade of the co-partnership, of a true account of all moneys which should come to his hands. A plea averred performance by P. in the words of the condition, to A. and B. during the life of B., and to A. since the decease of B. The partnership deed provided that the parties would, from the day of date of the deed, and up to the 1st July, 1841, be partners; that P. should be sole acting partner, and that he should, during the term of the co-partnership, discharge the duties of acting partner; that once every year the parties thereto would meet and settle accounts relative to the co-partnership; that if any of them, the parties thereto, their executors and administrators, should wish to withdraw from the co-partnership at the end of the seventh year of the co-partnership, he might do so on giving notice, and that the deed of co-partnership should determine as to the party giving such notice. The deed provided that any of the partners of the joint trade or business should be at liberty to transfer in his lifetime his share therein or any part to any one or more of his sons, and to dispose of his share by will to any person or persons whatsoever, and that the son or sons, or other person or persons to whom any such transfer or disposition should be made, or in case of the death of a partner without such transfer or disposition, that the executors or administrators of such partner so dying, should be deemed a partner or partners in the joint concern during the residue thereof. The replication assigned as a breach of the condition that P., after the decease of B., one of the partners, delivered false accounts. At the trial a breach was proved to have been committed as assigned after the death of B., but before any other change in the firm had taken place:—Held, that as the condition in the bond for P.'s accounting to A. and B. applied merely to the co-partnership by the three parties to the deed, the obligation of the surety had determined on the death of B. *Chapman* v. *Beckington*, 3 G. & D. 33; 3 Q. B. 703; 12 L. J., Q. B. 61; 7 Jur. 62.

—— **Separate Securities of Deceased Partner.**]—A partnership composed of three persons, A., B. and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and in that bond two estates held by A. were especially named as part securities for these advances. A. died:—Held, that, by his death, the partnership was dissolved, and the security, so far as his estates were concerned, was no further continued; no arrangement between the surviving partners, or between them and the bank, for the purpose of settling the general accounts, being capable of affecting the security. *Bank of Scotland* v. *Christie*, 8 Cl. & F. 214.

After the death of A., the bank continued as before its dealings with the partnership, constituted by B. and C.; and at a certain period payments made to the bank balanced the debt due to it at the time of A.'s death:—Held, that the separate liability of A.'s estates was thereby discharged. *Ib.*

Action, by whom.]—An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually

constituted the firm when the bond was executed. *Moller* v. *Lambert*, 2 Camp. 548; 11 R. R. 795.

Construction.]—A company guaranteed a firm consisting of two partners in trade, against loss in respect of their gross annual returns. The guarantee was subject to the following conditions: "If a member of this company shall die, or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader, his guarantee or contract shall become void upon such death, or (if such trader) on his retiring from such trade":—Held, that under this condition the guarantee became void upon the retirement of one of the two partners from the trade. *Solvency Mutual Guarantee Co.* v. *Freeman*, 7 H. & N. 17; 31 L. J., Ex. 197.

A guarantee was addressed in the alternative "to Messrs. A. & Co., or the person or persons for the time being carrying on the business" of that firm:—Held, no variance, no change in the firm having in fact taken place. *Boyd* v. *Moyle*, 2 C. B. 644.

A declaration by A. against B. upon a guarantee stated, that in consideration of advances already made by A., and that A. would from time to time make advances to C., B. promised to repay A. the last-mentioned advances. The consideration on the face of the guarantee was "in consideration of advances made and to be made by A., or by any other persons of whom A.'s firm might from time to time consist":—Held, a variance. *Chapman* v. *Sutton*, 2 C. B. 634; 3 D. & L. 646; 15 L. J., C. P. 166.

A guarantee given in these terms, "In consideration of advances made and to be made by A. and B., or by any other persons of whom their firm may from time to time consist, in the way of loan, we jointly and severally hereby guarantee to A. and B. the repayment of the advances, and to indemnify them against any loss by reason of such advances, our liability not to exceed 1,000*l.*; this guarantee to be a continuing guarantee, and to be a security to A. and B. to the extent of 1,000*l.*, for the whole of any balance which may from time to time or at any time become due to A. and B., or to the persons for the time being constituting the firm," discloses a sufficient consideration for the promise, though there has been no change in the firm. *Ib.*

A guarantee for the future debt of a firm is not to be construed as a continuing one, so as to bind a party to it in the event of an alteration in the firm, unless the intention of the parties shall so appear either by express stipulation or by necessary implication from the nature of the firm, or otherwise. *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L. J., Q. B. 141; 11 Jur. (N.S.) 562; 12 L. T. 375; 13 W. R. 654.

The following guarantee, given to a banking firm, "In consideration that you have, at our instance and request, consented to open an account with the firm of G. W. and W. J. Hall, shipbuilders, Monkwearmouth, we, and each of us, do hereby guarantee the payment to you of the moneys that at any time may become due, not exceeding 5,000*l.*, such payment by us not to be made at a shorter date than twelve months from this date," does not come within the proviso in the above enactment, as it does not appear, either by express stipulation or necessary implication, that the guarantee was to continue, notwithstanding a change in the persons constituting the firm. *Ib.*

The 19 & 20 Vict. c. 97, s. 4, is simply an affirmance of the law as it previously stood. *Ib.*

An acte de cautionement made in Lower Canada by C. and others recited, that M., who had been a member of the firm of C. & Sons, required pecuniary assistance to meet the engagements of that firm, which was agreed to be afforded by a bank, and by such acte, C. and others agreed to become sureties, and made themselves jointly liable for all debts theretofore contracted, and generally, for all the then present and future debts and liabilities of M. with the bank. M. for some time after this agreement traded alone. He afterwards traded with other persons, and contracted debts with the bank, which had no reference to the firm of C. & Sons, or to M.'s sole trading:—Held, first, that there was no difference between the French law, as administered in Lower Canada, and the English law, upon the question of suretyship. *Bank of British North America* v. *Cuvillier*, 14 Moore, P. C. 187; 4 L. T. 159.

Held, secondly, that although the recital in that instrument was special, yet it did not control the generality of the subsequent operative words, so as to exclude from its operation the liability of the sureties for the advances made by the bank to M. *Ib.*

7. Giving Time.

General Rule.]—If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and, after that, he gives time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety applies. *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R. 7 H. L. 348; 31 L. T. 322. Affirming 41 L. J., Ch. 332; 20 W. R. 253.

A creditor giving the principal debtor further time for payment discharges the surety. *Nisbet* v. *Smith*, 2 Bro. C. C. 579.

Holder of a bill giving time to the acceptor discharges the drawer. *Wilson, Ex parte*, 11 Ves. 410; 8 R. R. 194.

By giving time to the principal, the grantee of annuity exonerates the surety for past and future arrears. *Eyre* v. *Bartrop*, 3 Madd. 221; 18 R. R. 216.

Surety by Bond.]—It was not any defence at law, to an action on a bond against a surety, that by a parol agreement time had been given to the principal. *Davey* v. *Prendergrass*, 5 B. & Ald. 187; 2 Chit. 336; 6 Madd. 124.

A court of equity will not relieve a surety by bond upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose. *Heath* v. *Key*, 1 Y. & J. 434.

Meaning of.]—Giving time to the principal, means, giving such time, without the consent or knowledge of the surety, as prevents the creditor from resorting to the principal on the day appointed, and thus puts the surety, who expects that this resort will be made in the first instance, in a worse situation than he was before. But an arrangement between the creditor and principal, of such a nature as may induce the creditor to give time, but does not, by its terms, bind him to do so, is not such "giving time" as renders the

surety's situation worse than it was before. A mere voluntary abstaining to pursue to judgment is not giving time. *Bell* v. *Banks*, 3 Scott (N.R.) 497; 3 Man. & G. 258.

Taking New Security.]—Merely giving an additional security by a principal will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so. *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, supra.

Obligee in a bond with a surety, without communication with the surety, takes notes from the principal, and gives further time, the surety is discharged. *Fordyce* v. *Ford*, 2 Ves. J. 539.

Where there are two co-sureties, and the creditor grants a further loan to his principal debtor, and takes a new security for that and the former loan, and gives further time to him and one of the sureties only, without specially reserving his remedy against the other surety, he by so doing discharges the latter. *Vyner* v. *Hopkins*, 6 Jur. 889.

Where the surviving obligee in joint and several bonds extended the time of payment of the bonds for three years, and on a further advance took a collateral security, reserving his right against the executors of the deceased obligee, but the arrangement was concealed from them:—Held, that by such indulgence they were discharged. *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; 10 Bli. (N.S.) 548. See *S. C.*, 1 L. J., Ch. 204.

A promissory note was made by A. and B., payable to C., to secure advances from C. to A.; after the note became due, it was agreed between C. and A., without the privity of B., that A. should execute a warrant of attorney to D., as trustee for C., to secure the amount of the note and a further advance made by C. to A.:—Held, that the acceptance of the new security by C., unaccompanied by any binding engagement on his part to give time to A., did not discharge B. *Bell* v. *Banks*, 3 Man. & G. 258; 3 Scott (N.R.) 497. S. P., *Bell* v. *Shuttleworth*, 10 L. J., C. P. 239.

C., being indebted to a bank on foot of the overdraft of his current account in a considerable sum, indorsed to the bank a bill of exchange for 2,000*l.*, accepted by the defendant and payable three months after date. Before the bill arrived at maturity C., without the knowledge of the defendant, executed a deed of mortgage to the bank to secure the sum of 8,800*l.*, which was the total amount then due by him on foot of his overdraft. The deed recited a previous equitable mortgage by deposit by C., to secure overdrafts of his current account, and contained a covenant by C. for the payment of the principal sum of 8,800*l.* and interest on a day three months subsequent to the date of the mortgage:—Held, that the taking of the mortgage by the bank constituted a giving of time to the principal debtor, and therefore that the defendant was discharged from liability. *Munster and Leinster Bank* v. *France*, 24 L. R., Ir. 82—C. A.

Taking Bill for Portion of Debt.]—The defendants were sureties to the plaintiffs for H. D., on a continuing guarantee for the value of goods to be supplied by the plaintiffs to H. D., not exceeding 300*l.* in all. The plaintiffs, without the defendants' knowledge or consent, having taken from H. D. a bill at three months still current for 45*l.*, on account of portion of the sum due for goods supplied to H. D., the actual amount due having been previously ascertained:—Held, that the defendants were not released from liability to pay the balance of the sum due for the goods supplied to H. D., under the guarantee, but were only discharged to the extent of the 45*l.* for which the bill was taken. *Dowden* v. *Leris*, 14 L. R., Ir. 307.

Consolidation of Securities.]—The defendant, by a deed dated the 4th of September, 1857, covenanted to pay on the 4th of March, 1858, the sum of 450*l.* and interest advanced to one B., and secured by a mortgage on certain property. By a deed dated the 15th of December, 1884, to which the defendant was not a party, given to secure an advance of 3,200*l.* made to B. by the plaintiff, and by which the mortgage of 1857 and mortgages on other property were consolidated, the mortgagees of the deed of 1857, in consideration of the payment of their debt, conveyed to the plaintiff the full benefit of the covenants and other powers in their mortgage-deed for securing the payment of the sum of 450*l.* and interest, and of all securities for the same; and B. covenanted to pay the whole sum of 3,200*l.*, with interest, on the 19th of January, 1885:—Held, that the covenant in the deed of 1884, fixing the date of repayment of the whole sum of 3,200*l.* was inconsistent with the covenant in the deed of 1857 as to the date for repaying the 450*l.*; and being equivalent to giving time to the principal debtor, the defendant was therefore discharged from liability as surety. *Bolton* v. *Buckenham*, 60 L. J., Q. B. 261; [1891] 1 Q. B. 278; 64 L. T. 278; 39 W. R. 293—C. A.

Consenting to Payment by Instalments.]—A father gave a bond to secure the repayment in four years of a simple contract debt due by his son. Upon the death of the father, the creditor commenced proceedings against his estate for the recovery of the debt, but afterwards stayed those proceedings upon obtaining from the son, who was heir to the father, and the widow, who was his personal representative, a joint bond for the payment of the same debt by instalments:—Held, that the estate of the father as surety was discharged, both on the ground of time given to the son, and because the second bond was to be considered as given in substitution for the first. *Clarke* v. *Henty*, 3 Y. & Coll. 187; 2 Jur. 918.

A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. Some years afterwards, A.'s account being overdrawn, an account was settled between A. and the bankers, in which the money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due, by instalments at distant periods. Before all the instalments were paid A. became bankrupt. It being proved that B. was privy to the settlement of accounts and to the warrant of attorney:—Held, that he was not discharged by the time given to A. *Tyson* v. *Cox*, Turn. & R. 395; 24 R. R. 79.

In an action by the payee against the maker of a note, the plaintiff proved a joint and several note made by the defendant and another person. The defendant then proved that he was a mere surety, having become a party to the note at the request of the other person who was indebted to the plaintiff, and that the note not having been paid when it became due, the plaintiff, in Hilary term, 1828, brought an action against the principal, which being about to be tried at the spring

assizes, 1828, the plaintiff took a cognovit for the debt payable by three instalments, the first on the 28th of April, the others in May and June; but if the defendant failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment and issue execution for the whole sum. The first instalment was not duly paid:—Held, that as the plaintiff, if he had proceeded in the action, could not have obtained judgment and issued execution before the 28th of April, the plaintiff did not, by taking the cognovit, give any time to the principal debtor. *Price* v. *Edmunds*, 10 B. & C. 578; 8 L. J. (O.S.) K. B. 119.

By Judgment or Order by Consent.]—A. and B. were indebted as principal and surety to C. B. dies, and C. in a creditors' suit obtains a decree against his estate. Afterwards C. sues A., and takes a judgment by arrangement, giving time, without the knowledge of the surety:—Held, that this did not discharge the surety. *Jenkins* v. *Robertson*, 2 Drew. 351; 23 L. J., Ch. 816.

S., as principal, and the defendant, as his surety, were jointly and severally indebted to the plaintiffs in the sum of 1,096*l.* upon three promissory notes. S. carried an arrangement in the court of bankruptcy with his creditors for 20*s.* in the pound, payable by four equal instalments in four, eight, twelve and sixteen months respectively, the last instalment to be secured by S. lodging the amount thereof with the official assignee on or before a certain date. S. made default to the extent of 715*l.* in lodging the amount of the fourth instalment, and the plaintiffs, to whom 4,850*l.* was then due, including the amount of the said promissory notes, consented that the moneys in court should be appropriated to paying in full the last instalment to the other creditors before paying them, and that S. should have further time to lodge the 715*l.* An order was made by the court of bankruptcy, grounded on the plaintiffs' consent, so appropriating the moneys in court, and extending the time for lodging the 715*l.* S. never lodged or paid this sum. In an action by the plaintiffs against the defendant on the promissory notes, the defendant contended that by this consent of the plaintiffs he was discharged. The plaintiffs having waived their claim to one-fourth of the amount secured by the promissory notes, judgment was entered for them for the remaining three-fourths:—Held, that the extension of time for the lodgment by S. of the last instalment, although made upon the plaintiffs' consent, was a judicial act and did not discharge the defendant from liability for at least the three-fourths, for which judgment was entered. Semble, even as to the one-fourth waived by the plaintiffs, the proceedings in question would not have operated as a discharge to the defendant. *Provincial Bank* v. *Cussen*, 18 L. R., Ir. 382—C. A.

Replevin—Reference to Arbitrator—Enlargement of Time for Award.]—Where action in replevin is by agreement referred to arbitration, and without consent or privity of surety in bond, time for award is enlarged, surety becomes discharged. *Bowmaker* v. *Moore*, 7 Price, 223; 21 R. R. 758.

Court will grant injunction to restrain landlord from proceeding at law on assignment of replevin bond against the sureties, if there has been an agreement to refer, and a reference between landlord and tenant (the debtor) without concurrence of surety, whereby performance of condition of bond (to proceed with effect) has been suspended. *S. C.*, 3 Price, 214; 21 R. R. 758.

Staying Execution.]—Creditor sues the principal by direction of the surety, but without his privity agrees to stay execution, the surety is discharged. *Rees* v. *Berrington*, 2 Ves. J. 543.

Course of Business—Renewing Bills.]—R. and H., being in partnership, were in the habit, through the plaintiff's firm, of consigning goods to B. and S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which they accepted bills drawn by R. and H. and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, the plaintiffs accepted fresh bills, which the defendants negotiated, and handed the proceeds to the plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. and H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock of the old firm. The plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiffs' advances, and they brought an action against R. and H. to recover the balance. R. raised as a defence, that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this, had discharged R.:—Held, that R. and H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. and H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances. *Swire* v. *Redman*, 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069.

Semble, even if the giving fresh acceptances would have otherwise discharged R., that, as it was only a continuance of the old practice to which R. was a party, it would not have discharged him. *Ib.*

A. guaranteed the payment of any goods to be supplied by B. to C. between the 2nd of April, 1814, and the 2nd of April, 1815. Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and C. having accepted bills for the amount of the goods delivered, which B. permitted him to renew when payable, without any communication to A. on the subject of such renewal:—Held, that A. was discharged from his guarantee, by virtue of the rule that a creditor, giving further time to the principal debtor, without the consent of the surety, releases the surety; and that, although it was proved that the renewal was given only in consequence of C.'s inability

to pay, and that no injury could accrue to A., the surety being himself the fit judge of what is or is not for his own benefit. *Samuell* v. *Howarth*, 3 Mer. 272; 17 R. R. 81.

The following guarantee was given in January, 1825, to certain bankers: "Please to open an account with and honour the cheques of B., on mill account, for whom I will be responsible." The account having been opened, the bankers made advances to B. from time to time till February, 1827, when they ceased; a large balance was then due to them from B., who, in October of that year, paid a sum into the bank on account of it; in February, 1828, the bankers took an acceptance from B., at three months, for the balance of his account, with interest, without the guarantor's knowledge; in several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the guarantor had been consulted by them as their attorney on the dishonour of several of them, it was not shewn that he was aware of the practice of the bank in that particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantee. *Howell* v. *Jones*, 4 Tyr. 548; 1 C. M. & R. 97; 3 L. J., Ex. 255.

A guarantee was given by the defendant, in consideration of the plaintiff's giving A. a current credit, to make good, upon the event of his failure, any deficiency, not exceeding a certain sum; a short time after the guarantee was given, a bill which had been previously given by A. to the plaintiff was dishonoured, and the plaintiff permitted him to renew it without giving any notice of the transaction to the defendant:—Held, that this was not such a failure of the principal as to entitle the surety to a notice of the renewal of the bill. *Carr* v. *Brown*, 12 Moore, 62.

If a surety of a bill assents to its being renewed, he is not discharged. *Torrance* v. *Bank of British North America*, L. R. 5 P. C. 246; 29 L. T. 109; 21 W. R. 329.

A. at the request of B., and on his promises that he would share any loss or liability which he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C. being unable to meet it, it was agreed between the holders and A. and C. (without the knowledge of B.), that another bill should be drawn for the amount, in substitution of the former acceptance. A. having been obliged to pay the second bill, sued B. on his indemnity:—Held, that B.'s liability on his undertaking was not discharged by the renewal of the bill, the parties not standing in the position of creditor and principal and surety. *Way* v. *Hearn*, 11 C. B. (N.S.) 774; 32 L. J., C. P. 34.

See also *Grahame* v. *Grahame*, ante, col. 1163.

—— **Original Debt Paid off.**]—In consideration of the plaintiff supplying C. with goods, the defendant agreed to be answerable up to 200*l.* for the price of goods supplied to C. at any time due to the plaintiff on an account current after two months' credit. Some time after, 332*l.* being due from C. to the plaintiff for goods supplied, C. executed a mortgage deed to the plaintiff as security for the then existing debt, and for any future debt for goods to be supplied. The deed contained a proviso that if C. paid the plaintiff the 332*l.* in six months from its date, and all sums due for future supplies in six months from their date, without prejudice to the plaintiff's right not to give credit in respect of future supplies, the mortgaged premises were to be reconveyed to C. There was also a covenant to pay the existing debt in six months, and future debts within six months from their accruing due, without prejudice to the plaintiff's refusing to give credit for future debts. The parties in fact dealt on a two months' credit only. In the course of dealing, C. paid off the 332*l.* A further debt exceeding 200*l.* having subsequently accrued, which C. could not pay, the plaintiff sued the defendant on the guarantee. He pleaded that he was discharged by time having been given by the plaintiff to C.:—Held, that by the mortgage deed the plaintiff did not give time to C., except in respect of the 332*l.* debt, and that, as that debt had long been discharged, the giving that time did not prejudice the surety as to other and future debts due from C. to the plaintiff; and that, as in fact only a two months' credit was given by the plaintiff to C., the guarantee remained in force, and that the defendant was liable, up to 200*l.*, on C.'s failure to pay the sum due in respect of goods supplied by the plaintiff to C. subsequently to the mortgage deed. *Bingham* v. *Corbitt*, 34 L. J., Q. B. 37; 12 W. R. 1030—Ex. Ch.

—— **Agreement not to press for Repayment in consideration of Higher Rate of Interest.**]—The plaintiffs lent 1,000*l.* to B., one of their customers, upon the security of a joint and several promissory note, payable on demand, made by B. and the defendant, a solicitor, and also upon the deposit of the deeds of a house of which B. was the owner, together with a memorandum signed by B. that the deeds were deposited as security for any general balance, not exceeding 1,000*l.*, which might then or thereafter be due to the plaintiffs from him. The memorandum contained an undertaking by B. to execute a legal mortgage of the house, but this undertaking was not carried out. Subsequently, in March, 1875, an arrangement was entered into without the knowledge of the defendant, between the plaintiffs and B., whereby it was agreed that the plaintiffs should not press for repayment of the loan, but that B. should pay instead a higher rate of interest than that on which the loan was originally made, and this higher rate was afterwards debited to B. in his current account. The loan and current account were always kept distinct, and for some months subsequent to this arrangement the plaintiffs always had a balance exceeding 1,400*l.* to the credit of B. The plaintiffs having pressed for the execution of a legal mortgage with the usual power of sale, the defendant's partner, on behalf of and in the name of his firm, prepared a legal mortgage to the plaintiffs, another solicitor acting for B. This mortgage, which was executed by B., secured the payment to the plaintiffs of any sum not exceeding 1,500*l.*, which might thereafter be due to the plaintiffs upon B.'s general account, with interest at 6 per cent., and also contained a covenant for payment three months after demand, and a power of sale in case of default. In an action brought upon the promissory note against the defendant, after default made by B.:—Held, that the defendant had signed and was liable

upon the promissory note as principal, and that as there was no evidence to shew that the plaintiffs had agreed to accept the defendant merely as surety, he was not entitled to be treated as such. Held, also, that assuming the defendant was, and had been, accepted by the plaintiffs as surety for B., the transaction of March, 1875, did not amount to such a giving of time to B. as to discharge the defendant from his liability on the promissory note. *York City and County Banking Co.* v. *Bainbridge*, 43 L. T. 732 ; 45 J. P. 158.

—— **In Consideration of Payment of Interest.**]—A letter written by an agent of a bond creditor to the principal obligor, giving him eighteen months' further time to pay the debt, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future, is a mere promise without consideration, and not binding ; and therefore the obligor, who has joined in the bond as surety only, is not thereby discharged. *Tucker* v. *Laing*, 2 Kay & J. 745.

In an action on a note payable on demand, the defendant pleaded as an equitable defence, that he signed the note only to secure a debt due from S. (one of the makers) to the plaintiffs, and that they knowing this, without the defendant's consent, for a good consideration, agreed to give S. time for payment of the note, whereby he had been damnified. The only evidence in support of the plea was, that the principal had repeatedly prepaid the plaintiffs a certain sum as interest in order to obtain forbearance for successive periods of three months :—Held, that this evidence was insufficient to sustain the plea. *Rayner* v. *Fussey*, 28 L. J., Ex. 132.

Where a bond creditor by agreement with his debtor, takes interest on his debt by anticipation, to a certain time, a court of equity will restrain an action on the bond, whether brought against the principal or the surety. *Blake* v. *White*, 1 Y. & Coll. 420 ; 4 L. J., Ex. Eq. 48.

—— **Extending Credit.**]—The plaintiffs sued upon the following guarantee : "I hereby guarantee and engage to see you paid for any porter you may send Mr. A. J. of this town, until you receive notice to the contrary from me." According to the course of dealing between the plaintiffs and A. J., the latter was to have six months' credit, and then pay by a bill at two months :—Held, that an extension of the credit to nine months, and a bill at two months (without notice), discharged the surety. *Combe* v. *Woulfe*, 1 M. & Scott, 241 ; 8 Bing. 156; 1 L. J., C. P. 51.

—— **Allowing Increased Overdraft.**]—Where a banking company agree with a customer, to whom they already allow an overdraft, that he shall for a specified period be permitted to overdraw his account to a larger amount, the agreement may be terminated before the specified period upon notice given by the bank to the debtor. It is not, therefore, such a binding agreement to give time to the principal debtor as to discharge a surety who has become liable to the bank upon a guarantee for a part of the sum due from the customer. *Oakeley* v. *Pasheller* (4 Cl. & F. 207) and *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (L. R. 7 H. L. 348) discussed. *Rouse* v. *Bradford Banking Co.*, 63 L. J., Ch. 890 ; [1894] A. C. 586 ; 6 R. 349 ; 71 L. T. 522 ; 43 W. R. 78—H. L. (E.)

Semble, that when two or more persons who are bound as full debtors arrange, either at the time when the debt is contracted or subsequently, that, inter se, one of them shall only be liable as a surety, the creditor, after receiving notice of the arrangement, must do nothing to prejudice the interests of the surety in any question with his co-debtors. *Ib.*

Quære, whether, where a bank has agreed to give a customer an overdraft, they can refuse to honour cheques drawn upon such overdraft until after a reasonable notice to the customer. *Ib.*

Where Series of Payments.]—Where a surety guarantees a series of payments to be made at stated periods, if time is given to the principal debtor in respect of one payment by a binding agreement, the surety is discharged from liability in respect of that payment, but not in respect of future payments. *Croydon Commercial Gas Co.* v. *Dickinson*, 46 L. J., C. P. 157 ; 2 C. P. D. 46 ; 36 L. T. 135 ; 25 W. R. 157—C. A.

A principal (with sureties for the performance of the contract) contracted to take tar from a gas company, and to pay for each month's supply within the first fourteen days of the ensuing month, unless the company should by writing allow a longer time for payment. After the expiration of the first fourteen days of August the company took a promissory note from the principal for the amount due for July. Default was made by the principal in payment of the amounts due for July, for August, and for September :—Held, that, time having been thus given for the payment of the amount due for July, the sureties were discharged as to that amount. *Ib.*

But not as to the amounts due for August and for September ; the contract being separable, and the position of the sureties as to those amounts not being affected by the giving time for payment of the amount due for July. *Ib.*

Where Binding Agreement.]—An obligee of a bond having placed himself in such a position with regard to the principal debtor, that he could not demand payment of the bond, until an agreement entered into with third parties had been carried into effect :—Held, that this was such a giving of time to the principal debtor as discharged a surety to the bond. *Cross* v. *Sprigg*, 2 Mac. & G. 113 ; 2 Hall & Tw. 233 ; 19 L. J., Ch. 528 ; 14 Jur. 634.

The rule as to the liabilities of sureties in a bond is the same in Scotland as in England, viz., that they are not to be discharged from their obligation unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. *Creighton* v. *Rankin*, 7 Cl. & F. 325.

If a bond creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of his surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where the surety would have a right to require him to do so. *Bank of Ireland* v. *Beresford*, 6 Dow, 238 ; 19 R. R. 50. And see *Archer* v. *Hall*, 1 M. & P. 286 ; 4 Bing. 464 ; 6 L. J. (o.s.) C. P. 79.

The indorsees of bills of exchange as a security for a floating balance due on the accounts between them and the drawer, had notice that the

acceptance was for the drawer; they afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them ships, and should, in the meantime, be secured by a policy of insurance:—Held, first, that time was thus given to the principal debtor, and the surety was released in equity, if not at law also. *Davies* v. *Stainbank*, 6 De G. M. & G. 679.

Held, secondly, that a creditor who holds a floating guarantee for a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion. *Ib.*

In order that the giving of time by a creditor to his principal debtor, without the consent of a surety, may discharge the surety, two things are necessary: there must be a binding contract to give time, capable of being enforced, and the contract must be with the principal debtor. *Clarke* v. *Birley*, 58 L. J., Ch. 616; 41 Ch. D. 422; 60 L. T. 948; 37 W. R. 746.

By a deed made in 1872 between a coal company of the first part, six sureties of the second part, and a bank of the third part, the company and the sureties jointly and severally covenanted with the bank to pay to the bank on demand the balance (not exceeding 25,000*l.*) for the time being due from the company to the bank on their current account with interest. In November, 1880, the following guarantee, addressed to (but not executed by) the bank, was executed by three of the six sureties and one L.: "In consideration of your continuing or giving an account . . . to the company for one year from the date hereof, we, the undersigned, do hereby jointly and severally guarantee to you the due payment of all moneys and liabilities which are or have been or shall from time to time be owing to or incurred by you on account of the said company, it being agreed as follows:—1. That not more than 8,000*l.* shall be ultimately recoverable hereunder. 3. This shall be a continuing security until a notice in writing under the hand of us or any of us to determine this security as to the persons or person signing such notice shall be given to you and to the other parties to this guarantee. 9. The security hereby given is in addition to the other securities held by you for the said account": —Held, that the liability of the three sureties (who were not parties) was not released or determined by this guarantee. *Ib.*

—— **Under Deed of Arrangement.**]—By a deed of arrangement, it was proposed that P. should carry on his business under inspectorship for the benefit of all his creditors; that the plaintiffs, creditors of P., who held various securities for their debt, should be paid a certain sum in full, and a composition on the residue of their debt by instalments, they covenanting not to enforce claims against any parties to the bills in their hands who, as between themselves and P., were not then liable on the bills; but the rights of the plaintiffs against all parties to the bills in their hands (whether liable or not to P. as between him and such parties) were not to be prejudiced in the event of the proposals not being carried into effect. It was provided that the creditors (except as mentioned in the proposal) who should execute the deed, and who should hold any securities upon which any other persons should be liable, should not be prejudiced as to their rights and remedies against such persons; and that the deed should not extend to prevent the creditors, other than as provided for in the proposal, from enforcing or otherwise obtaining the full benefit of any mortgage, &c., upon any estate or effects, whether belonging to P. or any other person, or from suing any other persons who might be liable or accountable for the payment of all or any part of their debts either as drawers, indorsers, or acceptors of any bills of exchange. Under this deed, which was in force for more than two years, time was given to P., the principal debtor; he then made default in paying the first instalment. In an action against the acceptor of one of the bills of exchange, of which the plaintiffs were holders at the time when the deed was executed, and which he had accepted for the accommodation of P., though the plaintiffs had no notice of that fact:—Held, that the effect of the deed was to discharge the defendant in equity, and therefore there was an equitable defence to the action. *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L. J., Q. B. 41; 11 Jur. (N.S.) 134; 9 L. T. 646. S. P., *Ewin* v. *Lancaster*, 12 L. T. 632; 13 W. R. 857.

Agreement with Stranger.]—A binding agreement for a good consideration, made by a creditor with a stranger, to give time to the principal debtor, does not operate as a discharge of the surety. *Fraser* v. *Jordan*, 8 El. & Bl. 303; 26 L. J., Q. B. 288; 3 Jur. (N.S.) 1054; 5 W. R. 819.

Before Recovery of Judgment against Principal.]—A surety is not discharged by the creditor taking from the debtor a cognovit in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. *Hulme* v. *Coles*, 2 Sim. 12; 29 R. R. 52.

A., principal, and B., surety, gave their promissory note to C. C. sued A., and took a cognovit, payable by instalments, the first instalment to be paid on the day before that on which C. might have signed final judgment in the action if no cognovit had been given, with power to issue execution for the whole debt in case of default. A. made default at the day:—Held, that B. was not discharged. *Price* v. *Edmunds*, 5 M. & Ry. 287; 10 B. & C. 578; 8 L. J. (O.S.) K. B. 119.

When Relationship begun — Pleading.]—When two joint debtors entered into an arrangement between themselves by which, inter se, one of them became the principal and the other the surety, to the knowledge of the creditor, who afterwards, by taking a bill of exchange, gave time to him who had so become the principal:—Held, that the surety was discharged, and that these facts constituted a good answer, by way of equitable defence, to an action subsequently brought by the creditor against the surety, although the relation of principal and surety did not subsist at the time of the original contract. *Maingay* v. *Lewis*, Ir. R. 5 C. L. 229—Ex. Ch.

Held, also, that the equitable defence was not bad on demurrer, for want of an averment that the time was given to the quasi-principal without the knowledge or assent of the quasi-surety. *Ib.*

Where Surety not bound till a Certain Time after Demand.]—Where sureties are bound after a certain time's demand, creditor may make

arrangements with debtor for time, &c., prior to that interval, so that it does not interfere with sureties' recourse back on debtor. *Prendergast* v. *Devey*, 6 Madd. 124; 22 R. R. 254.

Subsequent Consent of Surety.]—Where creditors whose debt was secured by certain promissory notes gave further time for payment of the debt to the principal debtor, by deed, without the consent of the surety, but afterwards, and before the notes became due, the surety consented to the giving of time:—Held, that a consent so given by the surety revived her liability upon the notes. *Smith* v. *Winter*, 4 M. & W. 454; 8 L. J., Ex. 34.

Bail.]—After a bail-bond has been forfeited, and an assignment thereof taken, time given to the principal is no discharge of the sureties. *Woosnam* v. *Price*, 1 C. & M. 352; 3 Tyr. 375; 2 L. J., Ex. 115.

If one of the bail below consents to time being given to the defendant to perfect bail above, this act is binding on both. *Howard* v. *Bradberry*, 3 D. P. C. 92.

Where a plaintiff receives bills of exchange from a defendant with an agreement that he shall not be precluded from proceeding while the bills are running, the bail are not thereby discharged. *Melvil* v. *Glendining*, 7 Taunt. 126.

Bail are discharged by time being given to their principal without their consent, although they may not have been damnified. *Hannington* v. *Beare*, 4 D. P. C. 256.

A mere honorary obligation on the part of a plaintiff not to press a defendant for payment of debt and costs is not such an indulgence to him as will release his bail. *Ladbrook* v. *Hewett*, 1 D. P. C. 488.

If a plaintiff by an agreement with a defendant expedites his remedy against him, the bail are not thereby released. *Ib.*

A cognovit by the principal, without notice to the bail, does not of itself discharge the bail. *Hodgson* v. *Nugent*, 5 Term Rep. 277.

Unless time is thereby given. *Stevenson* v. *Roche*, 9 B. & C. 707; 4 M. & Ry. 561; 7 L. J. (O.S.) K. B. 304.

But if a plaintiff accepts from the principal defendant a cognovit, whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement. *Bowsfield* v. *Tower*, 4 Taunt. 456.

And if a plaintiff takes a cognovit, payable by instalments, and postponing the payment of any instalment to a later date than the time when the plaintiff could, with diligence, have obtained judgment and execution, the bail are discharged. *Croft* v. *Johnson*, 5 Taunt. 319; 1 Marsh. 59.

8. Concealment and Fraud.

Non-communication of Material Facts without Fraud.]—In consideration of the plaintiff accepting one H. as his tenant of certain lands, the defendant guaranteed the payment of the rent to become payable by H. as such tenant. In an action upon the guarantee, the defendant pleaded that, prior to the making of the guarantee, H. had been tenant to the plaintiff of the lands at a rent, and had been guilty of gross irregularity and delay in payment of such rent, and at the date of the guarantee was indebted to the plaintiff in a large sum for arrears of such rent, of which the defendant was ignorant; that the plaintiff did not, prior to the guarantee, communicate to the defendant these facts, but concealed from him the said material facts, which, if communicated to the defendant, would have prevented him from executing the said guarantee:—Held, upon demurrer, a bad plea. *Roper* v. *Cox*, 10 L. R., Ir. 200.

Where an obligee at the time of the execution of a bond concealed a material circumstance from a surety under it:—Held, that such concealment was sufficient to absolve the surety from all liability. *Stiff* v. *Eastbourne Local Board*, 19 L. T. 408; 17 W. R. 68.

An injunction having been granted by the Vice-Chancellor to restrain an action on a bond against a surety, on the ground that when the bond was entered into a material fact was concealed from the surety, the Court of Appeal discharged the injunction, on the ground that the defence was equally open at law by way of plea. *S. C.*, 20 L. T. 339; 17 W. R. 428.

Quære, how far is it the duty of the creditor to communicate to a surety any arrangements between the creditor and principal debtor which do not appear on the instrument creating the contract of suretyship? *Espey* v. *Lake*, 16 Jur. 1106.

A. covenanted to convey certain estates to B., free from all incumbrances, except those specified, B. and C. covenanting, as principal and surety, to secure the payment of an annuity to A. It afterwards appeared that part of the estates was subject to a mortgage, not included in the specified incumbrances, the existence of which had not been discovered to C., and which A. alleged he had forgotten at the time:—Held, that C. was discharged from his liability as surety. *Willis* v. *Willis*, 17 Sim. 218; 14 Jur. 404.

Sureties in a bond for the fidelity of an agent were sued by his employer for alleged defalcations and misconduct on his part. The defendants pleaded that the agent during his employment was guilty of falsifying his accounts; that the plaintiff, before the accrual of the causes of action, had knowledge of "or had reasonable means of knowing" such misconduct, but did not inform defendants thereof; and that defendants had no notice or knowledge thereof, and were thereby prevented from revoking their guarantee. Reply, that although defendants had not notice of all the particulars of the agent's misconduct, they had notice at the time mentioned in the defence that he "was a defaulter in a large amount in his accounts with the plaintiff, and as such agent":—Held, on demurrers both to the defence and reply, first, that the defence was bad for qualifying the allegation of actual knowledge by plaintiff of the misconduct by the addition of the words "or had reasonable means of knowing," and semble, also, for not alleging with sufficient distinctness that the defaults sued for occurred after such knowledge by the plaintiff; secondly, that the reply was bad on the ground that notice to the defendants merely of the agent being a defaulter in his accounts would not be sufficient to fix them with continuing liability on their guarantee, when the plaintiff knew that the agent had been guilty of falsifying accounts, and retained him in employment without apprising the defendants of the particular nature of the misconduct. *Enright* v. *Falvey*, 4 L. R., Ir. 397.

In such a case, where the employer has actual knowledge of dishonest conduct on the part of

the person for whom the sureties are responsible, justifying immediate dismissal, and nevertheless retains him in employment, the sureties are discharged from liability for subsequent default, unless informed of all such circumstances as are material to enable them to decide whether they will require the employment to be terminated, or will assent to its continuance, and for that purpose notice in general terms of his being in default, consistent with his being merely a debtor on foot of his accounts, is not enough; but distinct information of any acts of dishonesty or criminal misconduct should be given to the sureties. *Ib.*

Uberrima fides, whether necessary.]—Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement. *Davies* v. *London and Provincial Marine Insurance Co.*, 47 L. J., Ch. 511; 8 Ch. D. 469; 38 L. T. 478; 26 W. R. 794.

In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract. *Ib.*

The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company:—Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties. *Ib.*

The rule which prevails in assurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there is no fraud in the concealment, does not extend to guarantees. *North British Assurance Co.* v. *Lloyd*, 10 Ex. 523; 3 C. L. R. 264; 24 L. J., Ex. 14; 1 Jur. (N.S.) 45.

In the latter case the concealment, to vitiate the guarantee, must be fraudulent. *Ib.*

A. obtained a loan of 10,000*l.* from an insurance company, on the deposit of railway shares, with a stipulation that, if the market value of the shares fell below a certain amount, A. should either furnish fresh shares or pay their value, so as to leave a given surplus. When the time for repayment of the loan arrived, the shares having fallen in value, the time was extended to a further period, on the deposit of additional shares, and the acceptance of A.'s brother (B.) to the amount of 2,000*l.* Before the loan became due, in pursuance of the terms of this second arrangement, B. applied to the company to be released from his acceptance upon procuring the guarantee of the defendant and three others for 500*l.* each. The company assented to this arrangement. A. then informed the defendant of the loan and of its terms, and told him, that, unless he could procure security, his shares would be sold at a great loss; but the arrangement as to the withdrawal of B.'s acceptance was not communicated to the defendant, and he was wholly ignorant of it. The defendant executed a guarantee which did not refer to B.'s acceptance for 2,000*l.*, but recited the consideration for the guarantee to be the original loan, and of the company's agreeing not to require any further security in the event of the depreciation of the shares, as provided for by the original agreement. In an action on this guarantee by the company:—Held, that the non-communication of the private arrangement between the company and A. and his brother did not amount to constructive fraud, and afforded no defence to the action. *Ib.*

At the request of the defendant, the plaintiff accepted a bill for 110*l.*, dated the 25th of October, 1859, and drawn by Read for the purpose of raising funds to relieve the latter from an execution, the defendant at the same time giving the plaintiff the following undertaking: "You having lent your name to Mr. Read on a bill for 110*l.*, payable three months from this date, the proceeds to be applied to the discharge of the amount payable to the sheriff, I undertake to share with you any loss or liability you may incur in respect of such bill." Prior to this transaction, Read, finding himself in a state of great embarrassment, had applied to the defendant (who was his attorney) for advice; and, at the suggestion of the latter, an accountant was employed to prepare a statement of Read's affairs, to be laid before a meeting of his creditors. The plaintiff assisted the accountant in preparing this statement, and at his desire (in order, as he stated, that his imprudence might not come to the knowledge of his wife) the fact of Read being indebted to him to the extent of 2,000*l.* for money lent was kept out of the statement, and altogether suppressed:—Held, that, the contract being one of indemnity, and not of suretyship, although the plaintiff knew that the defendant, when he agreed to be responsible for half the 110*l.*, was influenced by the impression that the balance-sheet contained a true statement of Read's affairs, he was entitled to recover from the defendant one-half of the loss entailed upon him by that transaction, the jury having negatived fraud. *Way* v. *Hearn*, 13 C. B. (N.S.) 292; 32 L. J., C. P. 34.

Mere non-communication of circumstances affecting the situation of the parties material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. *Railton* v. *Mathews*, 10 Cl. & F. 934.

It is settled that there must be something amounting to fraud to enable a surety to say, that he is to be released from his contract on account of misrepresentation or concealment. *Pledge* v. *Buss*, Johns. 663; 6 Jur. (N.S.) 695.

In an action on a banking guarantee, to take effect at once, a plea on equitable grounds, that it had been given on a misrepresentation by the

plaintiff as to the state of the principal's banking account, and on an undertaking to return it if a partnership between the principal and the defendant did not take effect:—Held, that the latter part alone would not be any defence, and that to sustain the former part it must be shewn, not only that there was a misrepresentation, but that the defendant relied upon it, and gave the guarantee on the faith of it. *M'Kewan* v. *Thornton*, 2 F. & F. 594.

An injunction having been obtained to restrain proceedings in an action on a bond in which the plaintiff had joined as a surety, on the ground of misrepresentation on the part of the obligee, and a deviation by him, with the concurrence of the principal obligor, from the terms of the contract on which the bond was founded; and it appearing on the evidence that there was reason to suppose that there had been such misrepresentation and deviation, although the evidence was not conclusive on the point, the court refused, on motion, to dissolve the injunction, or to put the plaintiff on the terms of bringing the money into court. *Allan* v. *Inman*, 7 Jur. 433.

Necessity of Inquiry.]—A surety is not, of necessity, entitled to receive, without inquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. *Hamilton* v. *Watson*, 12 Cl. & F. 109.

If he requires to know any particular matter of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. *Ib.*

A party relying on his ignorance of facts must shew, not only that he had not the information, but that he could not, with due diligence, obtain it. *Wason* v. *Wareing*, 15 Beav. 151.

The plaintiff, a surety, sought to set aside a deed executed in 1848, on the ground that he had been released by a transaction between the principals in 1842, of which he was ignorant in 1848. It appeared that he had made inquiries in 1845, and was referred to persons who could give him the information, but neglected to do so until the end of 1849, when he obtained it:—Held, that, having in 1845 the means of acquiring the knowledge, he must be deemed to have had it in 1848, and his bill was dismissed. *Ib.*

Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may be safely stated, that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. *Owen* v. *Homan*, 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.

Extent of Doctrine of Notice.]—Notice to a creditor when his debt is contracted that the relation of principal and surety exists between his co-debtors is sufficient to affect him with the consequences of that relation without any further acceptance of it on his part. *Wythes* v. *Labouchere*, 3 De G. & J. 593; 5 Jur. (N.S.) 499; 7 W. R. 271.

But it is not a consequence of that relation that the creditor, without any inquiry on the part of the surety, should acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case. *Ib.*

A customer, being desirous of obtaining an advance from his bankers on the credit of a surety, employs solicitors for that purpose, who are also the ordinary solicitors of the bankers, but are not employed by them in the transaction in question. The solicitors, however, give information to the bankers as to the sufficiency of the surety, and debit them with the costs of preparing the instrument of suretyship:—Held, that they could not be regarded as having acted for the bankers from the beginning, so as to affect the bankers with notice of any concealment or misrepresentation on the part of the customer towards the surety. *Ib.*

Signature of Specification.]—By a deed between a local board of the first part, certain contractors of the second part, and the defendants of the third part, the contractors covenanted to do work upon the basis of a specification; and the defendant covenanted to pay any losses that might be sustained from the non-performance of the work. The deed recited that the specification had been signed by five members of the local board, as was required by the local act. In point of fact the specification had never been signed, although it had been acted upon:—Held, that the mere fact of the specification not having been signed did not release the sureties from their liability. *Russell* v. *Trickett*, 13 L. T. 280.

Application of Moneys.]—A. gave his promissory note as a security for a loan of 2,600*l.* by B. to C. Before the making of the note, it was agreed between B. and C. that part of the money lent should be applied to the payment of an old debt from C. to B. This agreement was concealed from A.:—Held, this was a fraud in law, and that A. was released from liability on the note. *Stone* v. *Compton*, 5 Bing. (N.C.) 142; 6 Scott, 846. See *Pidcock* v. *Bishop*, 5 D. & R. 505; 3 B. & C. 605; 3 L. J. (O.S.) K. B. 109; 27 R. R. 430.

As between principal and surety, if any material part of the transaction between the creditor and his debtor (in respect of which the surety enters into his engagement) is, with the knowledge and assent of the creditor, misrepresented to the surety (the misrepresentation being such, that but for the same the suretyship would not have been entered into, or being entered into, the extent of the surety's liability may thereby be increased), the security given by the surety is not available against him on the ground of fraud. *Ib.*

Exposing Vessel to Unusual Risk.]—The defendant agreed to sell two ships to a company to be paid partly in bills of exchange accepted by the company, with liberty to the defendant to freight one of the vessels. The plaintiff agreed to indorse the bills by way of surety. Shortly afterwards the defendant, assuming to act as agent of the company, despatched one of the vessels to Constantinople, laden, on his own account, with munitions of war, for the Circassians, who were at war with Russia. This was not known either to the company or to the plaintiff:—Held, that, the defendant having exposed the ships to extraordinary risk, it amounted to a release of the plaintiff from his liability. *Burke* v. *Rogerson*, 12 Jur. (N.S.) 635; 14 L. T. 780—L. JJ.

Postponement of Execution—Necessary Consents.]—Upon the eve of a sale by a sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. Representations were made on behalf of the judgment creditors when they took the guarantee, that they had power to stop the sale, and it would be stopped:—Held, that the surety was entitled to have the guarantee delivered up to be cancelled. *Cooper* v. *Joel*, 1 De G. F. & J. 240; 1 L. T. 351.

Further Liability—Evidence.]—C. contracted with R., the attorney of the plaintiff, to purchase the goodwill of a business for 425*l*. C., and H. as his surety, gave the plaintiff a bond for 300*l*., and C. gave his separate bond for 125*l*. To an action on the bond, H. pleaded that it was obtained by the fraud of the plaintiff. Held, that to support this plea, H. was bound to shew that R., who prepared the bond, knew and agreed that H. should be kept in ignorance of C.'s further liability for the 125*l*. *Spencer* v. *Handley*, 4 Man. & G. 414; 11 L. J., C. P. 250.

Previous Indebtedness.]—P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen into arrear to the extent of 1,272*l*. the plaintiffs required him to find security to the amount of 300*l*., and at his request the defendant consented to guarantee 100*l*. The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties. In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, that the noncommunication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea. *Lee* v. *Jones*, 14 C. B. (N.S.) 386. Affirmed, 17 C. B. (N.S.) 482; 34 L. J., C. P. 131; 11 Jur. (N.S.) 81; 12 L. T. 122; 13 W. R. 318—Ex. Ch.

It is no defence by a surety in an action on a bond, that at the time of his entering into the bond his principal was indebted to the obligees of the bond, and that they withheld this fact from him, unless he shews a fraudulent concealment, which will not be presumed where the principal, upon the evidence, had the money of the obligees in his hands in the course of his duty, no default being shewn. *Stokesleigh Union* v. *Stoddart*, 2 W. R. 14.

A surety who executes a bond on a misrepresentation by the obligee of a material fact is entitled to relief. *Blest* v. *Brown*, 3 Giff. 450; 8 Jur. (N.S.) 187; 5 L. T. 663. Affirmed, 8 Jur. (N.S.) 602; 6 L. T. 620; 10 W. R. 569.

Therefore, where a surety was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, the court directed the bond to be cancelled. *Ib.*

Where a bond by a surety purported to guarantee the payment of flour, to be supplied by the obligee (of a specified quality), in order to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour, so that the contract was annulled, the obligor is entitled to have the bond cancelled. *Ib.*

—— **Liability of Bank for Representations of Agent.**]—The plaintiff supplied oats to D., a customer of a bank, for the purpose of enabling D. to perform a contract with the government for the supply of oats, on the faith of a guarantee given by the manager of the bank that, on receipt of the money to be paid by the commissariat department to the bank for D. for the price of the oats supplied to the government by D., the bank would pay the plaintiff out of that money the sum due to him, subject only to the debt due to the bank from D. D. was at the time so largely indebted to the bank that it was practically impossible that there should be any surplus to come to the plaintiff, after payment of the debt due to the bank; but the manager concealed this from the plaintiff. The bank having appropriated the whole of the money to the payment of their own debt:—Held, that on proof of these facts there was evidence to go to the jury of a false representation on the part of the manager of the bank; that the bank was answerable for such false representation; and that the false representation was properly described in the declaration as that of the bank. *Barwick* v. *English Joint Stock Bank*, 36 L. J., Ex. 147; L. R. 2 Ex. 259; 16 L. T. 461; 15 W. R. 877—Ex. Ch.

Servant's Honesty—Previous Acts.]—In the case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. *Phillips* v. *Foxhall*, 41 L. J., Q. B. 293; L. R. 7 Q. B. 666; 27 L. T. 231; 20 W. R. 900.

Declaration on a bond given to the plaintiff by the defendant which recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as clerk and traveller (not further stating the terms of the agreement) and was conditioned for J.'s accounting for and paying over to the plaintiff all moneys which he might receive on the plaintiff's account; the breach alleged being that J. had received moneys for the plaintiff which he had not accounted for or paid over. Plea, that before the defaults sued for, J. had committed other defaults of the same kind; that the plaintiff had, with knowledge of those defaults, continued to employ J. in his service without notice to the defendant; and that the defaults sued for were committed during such continuance of the service:—Held, that the plea was good. *Sanderson* v. *Aston*, 42 L. J., Ex. 64; L. R. 8 Ex. 73; 28 L. T. 35; 21 W. R. 293.

When an action was brought by a county treasurer against the surety to the bond of a county cess collector, on account of a breach of the bond by nonpayment into the proper bank of the cess which had been collected, the surety attempted to set up an equitable defence that the cess collector had been previously engaged in that office, and that during the time he fulfilled the duties of that office he had misconducted himself, which acts of misconduct were known to the plaintiff, who had given no notice to the surety on his becoming surety:—Held, that as no privity could exist between the surety to the bond, and the plaintiff in his official capacity of county treasurer, no equity could be set up against him. *Lawder* v. *Simpson*, Ir. R. 7 C. L. 57; 21 W. R. 439.

Contractor's Honesty—Certificate obtained by Fraud.]—An alteration in the position of a surety brought about by the act of an employer does not discharge the surety, if the act of the employer has been caused by the fraud of a contractor whose honesty the surety has guaranteed. The plaintiffs entered into a contract with a firm of contractors for the construction of certain works. The defendants were parties to the contract as sureties for the contractors. The contract provided that the liability of the sureties should continue until the engineer of the plaintiffs should have given his final certificate of completion. A certain sum of money was to be retained by the plaintiffs, and not paid over to the contractors until six months after the granting of the final certificate of completion. The certificate was obtained by fraud on the part of the contractors, and the retention-money was paid over to the contractors:—Held, that the certificate having been obtained by the fraud of the contractors, whose honesty the defendants had guaranteed, did not operate as a discharge of the defendants' liability under their contract of suretyship; that the payment over of the retention-money, even if it had not been brought about by the contractors' fraud, would not have discharged the defendants, there being no evidence that the payment of the retention-money had caused any alteration in the position of the defendants. *Kingston-upon-Hull Corporation* v. *Harding*, 62 L. J., Q. B. 55; [1892] 2 Q. B. 494; 4 R. 7; 67 L. T. 539; 41 W. R. 19; 57 J. P. 85—C. A.

Precautions against Fraud.]—A surety guaranteeing the honesty of a person employed is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty. *Black* v. *Ottoman Bank*, 15 Moore, P. C. 472; 8 Jur (N.S.) 801; 6 L. T. 763; 10 W. R. 871—P. C.

To discharge a surety for the due performance of duties, there must be on the part of the obligee an act of connivance or gross negligence amounting to wilful shutting of the eyes to the fraud or something approximating to it. *Dawson* v. *Lawes*, Kay, 280; 2 Eq. R. 230; 23 L. J. Ch. 434; 2 W. R. 213.

Effect of Power of Suspension of Defaulting Party.]—Under the 12 & 13 Vict. c. 91, the power of dismissing rate collectors is vested in the lord-lieutenant, but by regulations of the privy council, made under the act, the collector-general is empowered to suspend any collector who, in his opinion, has been guilty of neglect of duty:—Held, that the omission of the collector-general to suspend the collector, after knowledge of fraud and dishonesty on his part during his service and employment, was not a defence to an action on the guarantee; first, because the doctrine of *Phillips* v. *Foxhall* (L. R. 7 Q. B. 666) was inapplicable to a guarantee for the fidelity of an officer appointed and removable by the lord-lieutenant; secondly, because the omission to exercise a power of suspension as distinguished from a power of dismissal did not terminate the liability of the sureties. *Byrne* v. *Muzio*, 8 L. R., Ir. 396.

Action by co-Surety to set aside Transaction—Parties.]—One of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction, on the ground of fraud, and prayed an account of the payment of the bond:—Held, that the principal debtor and the co-surety were necessary parties. *Allan* v. *Houlden*, 6 Beav. 148; 12 L. J., Ch. 181.

Where, by the construction of the terms of a guarantee, there is no right of contribution amongst the guarantors, any one of them may sustain a bill in equity to set aside the guarantee for fraud, without making his co-guarantors parties. *Pendlebury* v. *Walker*, 4 Y. & Coll. 424.

9. Laches and Negligence.

What amounts to.]—The mere passive inactivity of a person to whom a guarantee is given, his neglect to call the principal debtor to account in a reasonable time, and to enforce payment against him, does not discharge the surety; and the rule at law and in equity is the same, that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as to imply connivance, and amount to fraud. *Black* v. *Ottoman Bank*, 15 Moore, P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871—P. C.

Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of a debtor, will not discharge the surety, and is no ground of equitable defence. *Madden* v. *M'Mullen*, 13 Ir. C. L. R. 305; 4 L. T. 180.

Or mere forbearance or inactivity on the part of a creditor will not discharge a surety. *Strong* v. *Foster*, 17 C. B. 201; 25 L. J., C. P. 106; 4 W. R. 151.

If a party guaranteed does any act injurious to the surety, or inconsistent with his right, or omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter is discharged. *Watts* v. *Shuttleworth*, 5 H. & N. 235; 29 L. J., Ex. 229. Affirmed, 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132—Ex. Ch. See *Stewart* v. *Robinson*, Ir. R. 3 C. L. 69.

—— **Bond for Performance of Duties—Breach of Condition — Acquiescence — Connivance.**] — Mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. *Durham Corporation* v. *Fowler*, 58 L. J., Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.

The plaintiffs sued the defendants, as sureties, on two bonds, the first given to the plaintiffs, as urban sanitary authority, to secure the due performance of the duties of a collector of district

rates under the Public Health Act, and the second given to the plaintiffs, as the corporation of a borough, to secure the performance by the same person of his duties as collector and receiver of borough rates under the Municipal Corporations Act. The evidence shewed that the plaintiffs had acquiesced in an irregular mode of accounting on the part of the collector, but that the collector was never suspected of dishonesty until a year after the date of the second bond, when defalcations were discovered, and he was dismissed. The jury in answer to questions put to them found, first, that the plaintiffs had permitted the collector to retain moneys in his hands for a longer period than a week (which was contrary to s. 195 of the Public Health Act, 1875, and to the conditions of the bonds, and to a resolution passed by the plaintiffs before the bonds were given); and secondly, that the plaintiffs had permitted him to mix the proceeds of the different rates:—Held, that the plaintiffs' acquiescence in the collector's irregular mode of accounting was not such connivance as to discharge the sureties; that upon the evidence there were no questions which the judge could have been properly required to leave to the jury other than those he did leave; and that on the facts proved at the trial, and on the findings, there was no defence to the action, and the plaintiffs were entitled to judgment:—Held, further, that on the construction of the second bond, in which the person guaranteed was described as "collector and receiver," the sureties were liable for his breach of the condition to pay over moneys received by him, independently of the question of the validity of the rate. *Ib.*

Of Agents.]—A. obtained an advance of money from a loan society, upon the security of a joint and several promissory note of himself and the defendant (who, to the knowledge and on the requirement of the society, signed the same as surety), and of a bill of sale of A.'s furniture. Certain instalments of the note being in arrear, the lenders seized and sold the goods of A. under the bill of sale, and afterwards sued the defendant for the balance:—Held, that it was competent to the defendant to shew, by way of equitable defence, that but for the mismanagement of the lenders' agents, the goods of A. would have realised sufficient to satisfy the whole debt. *Mutual Loan Fund Association* v. *Sudlow*, 5 C. B. (N.S.) 449; 28 L. J., C. P. 108; 5 Jur. (N.S.) 338.

Bond to Guardians for Collection of Rates—Surety Liable through Overseers' Negligence.]—The defendant, as surety, gave a bond to the guardians of the poor for the M. union, conditioned for the due discharge by C. of his duties as collector of poor-rates for the parish of N. C. absconded, having embezzled part of the rates, and allowed others to be lost by not applying for them. The guardians sued the defendant for the loss. The defendant admitted his liability as to the sums embezzled, but disputed his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N. had discharged their statutory duties with reasonable care the loss would not have occurred:—Held, that the plaintiffs were entitled to recover from the defendant the moneys lost through failure of C. to collect them, for that there had been no negligence on the part of the plaintiffs, and they were not answerable for the negligence of the overseers. *Mansfield Union* v. *Wright*, 9 Q. B. D. 683—C. A. Affirming 46 J. P. 200.

Non-discovery of Fraud.]—A. was bound jointly with B., the trustee of a bankrupt's estate in Scotland, to the extent of 1,000*l.* The condition of the bond was, that B. should faithfully discharge his office, account, &c. The creditors of the bankrupt, according to the practice in Scotland, chose three commissioners to act for them and superintend the proceedings of the trustee. B., by various contrivances, amounting to fraud against the estate, was found in arrear to the amount of 1,000*l.* Whereupon the bond being put in suit against A., he pleaded that the commissioners, by neglect and connivance, caused and permitted the default, or knowing it concealed it from him. Of this imputation there was no distinct proof:—Held, that even on that supposition A. was not discharged. *M'Taggart* v. *Watson*, 10 Bligh, 618; 3 Cl. & F. 525. *And see cases* ante, cols. 1258, 1259.

As to Accrual of Liability.]—A. having sent an order to B. for certain goods, C. undertook to guarantee payment to B., upon an undertaking of D. to indemnify C.; B. accordingly informed C. that the goods were preparing, and afterwards shipped them for A. without giving notice to C. that they were shipped; afterwards D. desired to recall his indemnity, upon which C. wrote to B. to know whether he had executed the order; to which no answer was given by B. for a considerable time, he having gone abroad in the interim. Upon this C., supposing from the silence of B. that the order was not executed, gave up his indemnity to D.:—C. still remained liable to B. on his guarantee. *Oxley* v. *Young*, 2 H. Bl. 613; 1 Esp. 424.

In Examining Accounts.]—The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees), in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment, so soon as they might have done, for sums in arrear, or unaccounted for, is not an estoppel in an action against the sureties. *Trent Navigation Co.* v. *Harley*, 10 East, 34.

An insurance broker, bound with two sureties, became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of 6*s.* in the pound under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy:—Held, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. *London Assurance Co.* v. *Buckle*, 4 Moore, 153. And see *Hearn* v. *Cole*, 3 Dow, 459.

Delay in Suing.]—The liability of a surety on a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Eyre* v. *Everett*, 2 Russ. 381.

Extent of Delay—Notice.]—The defendant guaranteed the payment of the price of certain timber sold by the plaintiff to the defendant's son. The plaintiff received part payment from the son, and afterwards made repeated applications for the residue. More than two years having elapsed from the day stipulated for payment, the son gave the plaintiff a bill of exchange, which was dishonoured, and shortly afterwards became bankrupt. The plaintiff did not give the defendant notice of the dishonour of the bill, nor did he inform him of the state of the account until after the bankruptcy:—Held, that the defendant was notwithstanding liable, and was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son. *Goring* v. *Edmonds*, 6 Bing. 94; 3 M. & P. 259; 7 L. J. (O.S.) C. P. 235; 31 R. R. 358.

A. guarantees to B. the debt of C. upon condition "that no application shall be made to A. on B.'s part for the amount guaranteed, or any portion thereof, but on the failure of B.'s utmost efforts and legal proceedings to obtain the same from C." C. remains in England two years; then goes abroad insolvent, not having paid the debt to B. No proceedings are taken against him until four years after the guarantee given, when process is issued, and continued on the roll, C. remaining abroad until more than six years after the guarantee given:—The guarantor is discharged by the laches of B. *Holl* v. *Hadley*, 4 N. & M. 505; 2 A. & E. 758; 4 L. J., K. B. 126.

If A. becomes bound to B. for the honesty of C., who embezzles money, B. may maintain an action on the guarantee, though three years have elapsed without notice having been given of the embezzlement by B. to A.; at least if A. was acquainted with the circumstances from any other quarter, and B. does not appear to have concealed it from him industriously, A. will not be discharged from his guarantee, though B. appears to have given credit to C. for the amount of the sum embezzled. *Peel* v. *Tatlock*, 1 Bos. & P. 419.

Not giving Notice.]—Under a bond, conditioned that if M. should duly account for all moneys received by him in the plaintiff's service as a clerk; and also that if M. should embezzle the plaintiff's property, and should, within three days after proof thereof, repay the plaintiff the damage sustained by such misbehaviour or misdoing; or, in default thereof, if the defendant should, after notice given, make a full recompense to the plaintiff, the bond was to be void; the plaintiff, in order to render the defendant (the surety) liable for M.'s not accounting, must give the defendant notice thereof,; as, by the construction of the condition, the notice must be given for M.'s not accounting, as well as for his embezzling. *Phillips* v. *Fordyce*, 2 Chit. 676.

Neglect to enforce Payment—Proceeds of Execution.]—By a guarantee, the defendant engaged to pay to the plaintiff any debt due to him from the defendant's son, not exceeding 100*l.*, provided that, before the defendant was called on in pursuance of the guarantee, the plaintiff should avail himself to the uttermost of any bonâ fide securities he held of the son; provided, also, that in case anything should prevent the defendant from receiving and retaining the proceeds of an execution he had levied on his son's property, the guarantee should be void:—Held, that the plaintiff's neglecting to adopt means to enforce payment of a bill by a party who was proved to be totally insolvent, and to have been three years and a half in gaol, where he continued, was not a breach of the condition upon which the guarantee was given. *Muskett* v. *Rogers*, 8 Scott, 51; 5 Bing. (N.C.) 728; 8 L. J., C. P. 354.

Held, also, that the circumstance of a portion of the property seized, which turned out not to be the property of the defendant's son, being afterwards recovered by the owner, neither avoided the guarantee nor afforded ground for diminishing the amount of the defendant's liability thereon. *Ib.*

Keeping Bill of Exchange Unreasonable Time.]—Where the firm of A. & Co. gave a guarantee to B. & Co. that they would endorse any bill or bills which C. might give to B. & Co., in part payment of an order for certain goods then executing for him; B. & Co. to allow 5*l.* per cent. on the amount of the bills for the guarantee; and C. gave B. & Co. a bill at eighteen months, in part payment of the goods which the latter kept for seventeen months and ten days, and then, finding that C. was insolvent, applied, for the first time, to A. & Co. for their indorsement, tendering the amount of commission:—Held, that B. & Co. were concluded by their laches, and that A. & Co. were not liable on their guarantee. *Payne* v. *Ives*, 3 D. & R. 664.

Neglect to Present for Payment.]—Where a commission broker effected the sale of wool from the plaintiff to C. & P., to be paid for by a bill at eight months, accepted by the latter; and the broker agreed to guarantee half the amount for an allowance of 1 per cent.; and the plaintiff confirmed the sale, and informed the broker that if he could not procure from C. & P. acceptances of approved houses (which they would prefer), that they would take his guarantee for one-half the amount on the terms proposed; and the wool was delivered to the vendees without the intervention of the broker, and the vendors took the acceptance of the former for the amount of the wool, made payable at a banker's; but before the bill was at maturity, the vendees became insolvent, and the vendors resorted to the broker upon his guarantee:—Held, that he was liable, though the bill had not been presented for payment, and though there was no proof that it would not have been paid if presented. *Holbrow* v. *Wilkins*, 2 D. & R. 59; 1 B. & C. 10; 1 L. J. (O.S.) K. B. 11; 25 R. R. 285.

Where a debtor indorsed a bill of exchange of which he was the indorsee, over to his creditor by way of collateral security for his debt, and the creditor did not present it at maturity, nor give the debtor notice of its dishonour when presented:—Held, that the creditor could not recover in an action either on his original debt or upon the bill of exchange. *Peacock* v. *Purcell*, 14 C. B. (N.S.) 728; 32 L. J., C. P. 266; 10 Jur. (N.S.) 178; 8 L. T. 636; 11 W. R. 834.

In an action on a note, the defendant pleaded that he made the note jointly with E. for his accommodation, and as his surety only to secure payment of a loan made by the plaintiff to E.; that at the time when the note was made, the plaintiff, having notice of the premises, agreed, in consideration of the defendant making such note as surety, that the plaintiff would call in and demand payment of the note from E. within three years; that this agreement should be

indorsed in writing on the note at the time of making it, which, by mistake, was not done; that the plaintiff omitted to demand payment of the note from E. within three years, whereby he lost the means of obtaining payment from E., who had become insolvent :—Held, that the plea was good, on the ground that the condition, in consideration of which the defendant had become surety, had not been performed by the plaintiff. *Lawrence* v. *Walmsley*, 31 L. J., C. P. 143; 5 L. T. 798; 10 W. R. 344.

Omission to fill up Name in Bill—Notice of Non-payment.]—The debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. The plaintiff at the same time, as a surety, deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt. The debtor died without the creditor having filled in the name of the drawer, and his estate was insolvent. The bill was never presented for payment, nor was notice given to the plaintiff of its non-payment :—Held, that the creditor had not discharged the plaintiff from his suretyship by his omission to fill up the drawer's name, and to give notice of the nonpayment of the bill to the plaintiff. *Carter* v. *White*, 54 L. J., Ch. 138; 25 Ch. D. 666; 50 L. T. 670; 32 W. R. 692 —C. A..

Sale of Goods at a Loss.]—When money is borrowed on the security of a bill of sale of the borrower's goods, together with a note for the amount of the loan, signed by him and a third person, payable by instalments, the whole of the residue unpaid to become due upon default in payment of any instalment; and, default being made, the lender takes and sells the goods, and then sues the third person for the balance; it is a good equitable defence for him that he signed the note as surety merely, to the knowlege of the plaintiff, and that the goods would have sufficed, if properly sold, to satisfy the whole claim of the plaintiff, yet by his negligence and misconduct of the sale a loss was occasioned; and it is not material, for this purpose, that the fact of the suretyship does not appear on the face of the note. *Mutual Loan Fund Association* v. *Sudlow*, 5 C. B. (N.S.) 449; 28 L. J., C. P. 108; 5 Jur. (N.S.) 338.

Neglect to Insure.]—H. agreed with W. to complete fittings for a warehouse for 3,450*l.*, to be paid by instalments during the progress of the work. The contract contained a stipulation, that W. shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract. By an agreement reciting in part the contract, the defendant agreed with W. to guarantee the due performance of the works by H. W. advanced 1,800*l.* to H. during the progress of the works; after which the fittings, to the value of 2,300*l.*, while still unfinished, were destroyed by accidental fire in the workshop of H. W. had not insured the fittings. H. became insolvent and never repaid the 1,800*l.*, or any part of it. W. was compelled to pay a sum greater by 340*l.* than the original contract price to complete the work contracted for :—Held, that W. was bound to insure the fittings, and that his omission to do so, in equity, discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but in toto. *Watts* v. *Shuttleworth*, 5 H. & N. 235; 29 L. J., Ex. 229. Affirmed, 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132—Ex. Ch.

Neglect to Inrol Recognizance.]—A tenant's recognizance was executed at the same time as his lease, but was not inrolled for four years after. The tenant in the meantime became insolvent and incumbered his property :—Held, that the neglect to inrol the recognizance, when the lease was executed, did not discharge the surety. Quære, whose duty is it to inrol the recognizance. *Jephson* v. *Maunsell*, 10 Ir. Eq. R. 38, 132.

To File Warrant of Attorney.]—By an agreement between bankers, a customer and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso, empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee, on a warrant of attorney, and simultaneously a second agreement was entered into between the bankers, the customer and the surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bankers would at any time, when requested by the surety, enter up judgment and issue execution. The bankers omitted to file the warrant of attorney, and the customer became bankrupt :—Held, that the agreement to issue execution was not nudum pactum, and that by the omission to file the warrant of attorney the surety was discharged. *Watson* v. *Allcock*, 4 De G. M. & G. 242; 1 Eq. R. 231; 22 L. J., Ch. 858; 17 Jur. 568; 1 W. R. 399.

In Registering Bill of Sale.]—By a deed, dated 25th of August, 1870, the goods of B. and P. were assigned to the plaintiffs as securities for money advanced to them by the plaintiffs. The defendant was a party to the deed, as surety for B. and P. In that capacity he covenanted for payment, on the 25th of August, 1871, and on other days, of a certain sum of money to the plaintiffs. The first instalment of interest became due from B. and P. upon the 25th of February, 1871. It was not paid, and to the knowledge of the plaintiffs B. and P. became embarrassed in their affairs. On the 5th of August they filed a petition in liquidation; a trustee was appointed, one being the solicitor in the liquidation, and the goods were sold by auction. The defendant knew nothing of the embarrassed state of B. and P. By the terms of the deed, B. and P. were to remain in possession until default was made; but upon default being so made, the plaintiffs were also, by the terms of the deed, entitled to take possession of the goods, and after giving a month's notice to sell the goods. They did not avail themselves of this power :—Held, that, to the extent of the value of the goods assigned, the defendant was released from liability, by reason of the laches of the plaintiffs in not registering the deed under the Bills of Sale Act, and in not taking possession of the goods when default was made in the payment of interest, and when bankruptcy was, to their knowledge, impending. *Wulff* or *Woulff* v. *Jay*, 41 L. J., Q. B. 322; L. R. 7 Q. B. 756; 27 L. T. 118; 20 W. R. 1030.

Creditor's Misfeasance.]—Corn factors supplied flour on credit to a baker, on his executing to them, with a surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond was to be void if the baker should deliver to the corn factors his bills on the government as he drew them, and if he and the surety should make good the amount to become due to the corn factors. The corn factors supplied flour, but not of the quality specified in the government contract, which was vacated on that account:—Held, that the corn factors could not as against the surety allege ignorance of the terms of the contract, and that the surety was discharged. *Blest* v. *Brown*, 4 De G. F. & J. 367; 8 Jur. (N.S.) 602; 6 L. T. 620; 10 W. R. 569.

By Civil Law.]—By the civil law, sureties are not discharged from their liability to satisfy the creditor, though the benefit of a hypothec of the debtor is lost by the laches of the creditor to enforce his demands. *Macdonald* v. *Bell*, 3 Moore, P. C. 315.

10. Alteration of Instrument.

General Rule.]—A surety is bound only to the letter of his engagement; if that engagement is altered in a single line, no matter whether it be altered for the benefit of the surety, or whether the alteration be innocently made, the surety has a right to say the contract is no longer that for which he engaged to be the surety, and he is entitled to be relieved from the engagement. *Blest* v. *Brown*, supra.

Promissory Note.]—A. being indebted to the plaintiff, it was arranged that B. and the defendant should join as her sureties in a promissory note for the amount payable to the plaintiff. The defendant, in ignorance of the arrangement that B. should sign the note, signed a joint and several note for the amount together with A. and as her surety. The note so signed was then handed to the plaintiff, who procured it to be signed by B., without the defendant's consent or knowledge:—Held, that, assuming the note to have been completely issued when it was signed by B., this was an alteration of the note and of the defendant's liability in a material point, and that the defendant was consequently discharged. *Gardner* v. *Walsh*, 5 El. & Bl. 83; 24 L. J., Q. B. 285; 1 Jur. (N.S.) 828; 3 W. R. 460.

Affixing Seal.]—To an action on a guarantee, the defendant pleaded that, whilst the guarantee was in the hands of the plaintiff, it was, without the defendant's knowledge, by some person to him unknown, altered in a material particular, by affixing a seal by and near to his signature, as and for his seal, thereby causing the guarantee to purport to have been sealed by him, and to be his deed; by reason whereof the guarantee became void in law:—Held, that the plea was an answer to the action. *Davidson* v. *Cooper*, 13 M. & W. 343; 12 L. J., Ex. 467—Ex. Ch.

Words inserted by co-Surety after Execution to Limit Amount of his Contribution. — See *Ellesmere Brewery Co.* v. *Cooper*, 65 L. J., Q. B. 173; [1896] 1 Q. B. 75; 73 L. T. 567; 44 W. R. 254.

Inserting Unimportant Word.]—A. agreed to do for B. & Co. all the wood-work on an iron ship which they were building for M. & Co., according to a certain tender, the whole to be completed for 3,800*l.* The contract or tender contained the following clause: "Any important work not mentioned in this tender that may be required to be done by the owners, to be paid for by them, in addition to the amount herein specified." The work was undertaken by A. for B. & Co. upon the faith of a guarantee as follows: "In consideration of your contract with B. & Co. for the wood-work of an iron ship now building by them for M. & Co., we hereby guarantee the payment to you according to the contract." The word "important" in the contract was inserted by A., with the consent of B. & Co., after the guarantee was signed by C.:—Held, that the contract bound B. & Co. for extra work done, they being the persons referred to therein as the owners, and that the insertion of the word "important" had no material effect upon the liability of C. under the guarantee. *Andrews* v. *Lawrence*, 19 C. B. (N.S.) 768—Ex. Ch.

In whose Custody.]—Several directors of a banking company, amongst whom was the defendant, signed a document, whereby they severally undertook to pay a sum of money to the bank, the intention, however, being that they should only be bound each for a proportion. The defendant and some others paid their proportion, and the secretary then struck out their names without the knowledge of the defendant, he being under the impression that the legal effect of the document was what had been intended. An action was brought against the defendant on this document to recover the whole amount secured:—Held, that the document was in the custody of the bank as distinguished from the individual directors, and that the above material alteration, therefore, discharged the defendant. *Bank of Hindustan, China and Japan* v. *Smith*, 36 L. J., C. P. 241; 16 L. T. 518.

11. Payment.

Subsequently avoided.]—A surety is not discharged by the fact of the creditor having innocently received payment from the principal debtor, if such payment has been subsequently avoided as a fraudulent preference under the bankruptcy laws by the assignees of the debtor, and they have recovered from the creditor the sum paid. *Petty* v. *Cooke*, 40 L. J., Q. B. 281; L. R. 6 Q. B. 790; 25 L. T. 90; 19 W. R. 1112.

S., and the defendant as his surety, made and delivered to the plaintiff a joint promissory note, for the payment of money due from S. to the plaintiff. S. paid to the plaintiff the amount of the note, and the plaintiff in good faith received such amount, but at the time of making the payment, S. was in insolvent circumstances, and made the payment in contemplation of bankruptcy, of which the plaintiff was ignorant. After the time of payment, S. made an assignment to trustees for the benefit of his creditors. The trustees elected to treat the payment by S. to the plaintiff as a fraudulent preference, and the plaintiff paid the amount to them:—Held, that the plaintiff had a right to maintain an action against the defendant, and that the latter was not discharged from liability in respect of the note. *Ib.*

Time of.]—Where an obligee of a bond receives the whole principal after it is payable, he cannot

recover interest in an action on the bond, as solvet post diem is a good plea. *Dixon* v. *Parkes*, 1 Esp. 110. S. P., sed quære, *Hellier* v. *Franklin*, 1 Stark. 291.

To whom.]—A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot without some circumstances to shew that it was intended to be made in discharge of the bond, be so applied in favour of a surety of the obligor, in an action upon the bond, under the plea of payment. *Plomer* v. *Long*, 1 Stark. 153.

Payment of a bond debt to one of two trustees is a good discharge as to both. *Husband* v. *Davis*, 10 C. B. 645; 20 L. J., C. P. 118.

Appropriation of Payments by Party guaranteed.]—A. & Co., bankers, advanced 2,000*l.* to B., a customer, by placing it to the credit of his general current account, and took as security a series of ten promissory notes, maturing at the rate of one per week during a period of ten weeks. C., as surety for B., gave a written undertaking that if the notes were not paid, he would secure the debt by a mortgage upon property of his own. Moneys were paid into B.'s account more than sufficient to meet the bills if they had been so applied, but as the account was at the same time largely drawn upon, it was at the dates of the maturing of the bills constantly overdrawn:—Held, that A. & Co. having received moneys which they might have applied to the satisfaction of the notes, were bound so to have applied them to the relief of the surety, before applying them to the liquidation of the current account, and that the surety was consequently discharged. *Kinnaird* v. *Webster*, 48 L. J., Ch. 348; 10 Ch. D. 139; 39 L. T. 494; 27 W. R. 212.

Certain of the directors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died, and his estate was under the administration of the court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation:—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.*, and interest at 4 per cent. from the date of the testator's death. *Booth, In re, Browning* v. *Baldwin*, 40 L. T. 248; 27 W. R. 644.

Action on a bond, dated 10th January, 1837, conditioned for the repayment of principal and interest on the 6th April following, and given as a security by the defendants to the plaintiffs on the advance of 1,000*l.* by the plaintiffs to W., one of the defendants, who had then lately opened an account with the bank of which the plaintiffs were trustees. Several sums of money had been paid in by W. to the credit side of his account previously to and since the execution of the bond:—Held, there being evidence to lead to such a conclusion, that the bond was given as a continuing security, and was not discharged by the sums paid in by W. *Henniker* v. *Wigg*, 4 Q. B. 792; D. & M. 160; 7 Jur. 1058.

A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond, and before it became due, A. paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards, an account was settled between A. and the bankers, in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for payment of the balance found due upon the settlement, by instalments at distant periods. Several of the instalments were paid, but A. became bankrupt before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangement respecting the warrant of attorney:—Held, that the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities. *Tyson* v. *Cox*, Turn. & R. 395; 24 R. R. 79.

M. was surety in a bond given by G., collector of taxes in Jamaica, for payment of the collections for 1842. G. at the date of the bond was in arrear for taxes collected by him in 1841. G. appointed S. his deputy, to collect the taxes for 1842, which he partly did, and G. collected the remainder. Shortly after the collection of the taxes, the receiver-general pressed G. for the payment of the arrears of 1841. G. went to S. and obtained from him 3,000*l.* to remit to the receiver-general, S. taking that amount out of a chest, in which were placed the moneys collected for 1842. G. converted that sum, and also 2,000*l.* which he had collected for taxes in 1842, into paper money, and transmitted 5,000*l.* to the receiver-general, who appropriated the whole amount in liquidation of the arrears for 1841. In an action by the Crown against M. upon the bond:—Held, that the receiver-general had a right to appropriate the remittance by G. to the liquidation of the arrears of 1841, and that it was not necessary that G. should assent to that appropriation, and that M. was bound by the appropriation, and liable on the bond for the deficiency of the taxes for 1842. *Att.-Gen. of Jamaica* v. *Manderson*, 6 Moore, P. C. 239; 12 Jur. 313.

Taxes collected in one year under 23 Geo. 3, c. 99, must be duly paid by the collector to the account of that year, and the sureties are liable, though all the moneys collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the commissioners in satisfaction of the arrears of a former year. *Gwynne* v. *Burnell*, 7 Cl. & F. 572; West, 342; 1 Scott (N.R.) 711; 6 Bing. (N.C.) 853.

—— **Agreement with some co-Sureties—Suspense Account—Bankruptcy.**]—Several persons became guarantors to a bank for a debt. Some of them subsequently arranged with the bank, that in lieu of their personal liability to pay the entire debt a sum should be deposited in the bank to a suspense account, which sum the bank had power to appropriate towards the payment of the debt, but had not done so:—Held, that this deposit did not amount to payment, and that

the bank were entitled to prove for the whole debt in the bankruptcy of a guarantor who was no party to the above agreement. Such an agreement is not an evasion of the bankruptcy law. *Commercial Bank of Australia* v. *Wilson*, 62 L. J., P. C. 61; [1893] A. C. 181; 1 R. 331; 68 L. T. 540; 41 W. R. 603—P. C.

Satisfaction.]—The plaintiffs, in an action against the co-obligor of the defendant on the joint and several indemnity bond of both of them, accepted from the former 215*l.*, the damages being at that time unliquidated, and gave a receipt for that sum, stating it to be in discharge of the damages and costs in that action:—Held, that this receipt did not shew that the plaintiffs had accepted the 215*l.* in satisfaction of the entire claim to indemnity under the bond; and therefore that they were entitled to recover a further sum against the defendant. *Field* v. *Robins*, 2 N. & P. 226; 8 A. & E. 90; 1 W. W. & H. 145; 7 L. J., Q. B. 153; 2 Jur. 855.

A. gave B. a bond to secure an annuity, and before any payment became due A. lent B. a sum of money, on which it was agreed that B. should retain the payments of the annuity, as they became due, till that sum was discharged; the agreement to retain held a good plea to an action on the bond, such agreement and retainer being equivalent to a plea of solvit ad diem. *Sturdy* v. *Arnaud*, 3 Term Rep. 599.

A., as surety, became bound to the guardians of a poor-law union, by a bond conditioned, that the treasurer of the union should discharge the duties of his office "by receiving all moneys tendered to be paid to guardians, by paying, out of the moneys in his hands of the guardians, all orders on him drawn on their behalf," and that he should pay over to the guardians all balances, moneys, &c. due to the union. The treasurer, who was a corn factor, had extensive dealings in corn, and opened accounts in trade with the overseers of the townships who were farmers. No money was received from these townships, but it was the practice of the treasurer to debit the overseers in his trade account with the amount of the poor-rate ordered by the guardians to be paid, and then to debit himself with the amount as paid to him as treasurer. His accounts were audited half-yearly, and the credits on the corn were allowed by the auditor as payments in money. At the last audit the auditors found that the sum of 239*l.* 1*s.* 10*d.* was due from him to the guardians:—Held, that the surety was liable, inasmuch as between the treasurer and the overseers money had in fact passed. *Belford Union* v. *Pattison*, 1 H. & N. 523; 26 L. J., Ex. 115; 3 Jur. (N.S.) 116; 5 W. R. 121—Ex. Ch.

A. guaranteed the payment to B. of two bills of exchange accepted by C. C. afterwards handed over the amount of the bills to B. A fiat having issued against C., his assignees recovered the money from B. as having been paid by way of fraudulent preference. In an action by B. against A. upon the guarantee, A. pleaded that C. had paid, and B. had received, the money in satisfaction:—Held, that this payment did not amount to a satisfaction. *Pritchard* v. *Hitchcock*, 6 Man. & G. 851; 6 Scott (N.R.) 851; 12 L. J., C. P. 322.

Conduct.]—A treasurer of a poor-law board entered with sureties into a bond, with a condition that he should honestly, diligently and faithfully perform the duties of his office, one of which was to pay orders for money which should be drawn upon him by the guardians. He was a banker, issuing his own notes. On a Friday he paid orders drawn upon him by the guardians, partly in cash and partly in his own notes; and again on Monday forenoon paid similar orders in a similar way, and also gave in exchange for their order, in favour of persons from London, a common banker's draft upon London, which was afterwards dishonoured. The bank stopped payment on Monday afternoon:—Held, that the sureties were discharged, because as to the notes given on Friday, the guardians having kept them during Saturday, conclusively elected to treat the orders as paid; as to all the notes, the guardians, who were entitled to receive cash, thought fit to receive the notes; and as to the banker's draft upon London, the guardians received it for their own convenience. *Lichfield Union* v. *Greene*, 1 H. & N. 884; 26 L. J., Ex. 140; 3 Jur. (N.S.) 247; 5 W. R. 370.

Pleading.]—Action on a bond for the penal sum of 12,000*l.* The declaration set forth the condition, which was for the payment of 6,000*l.* with interest, and assigned as a breach the non-payment of the 6,000*l.* (omitting interest). Plea, that the defendant paid the 6,000*l.* with interest according to the form and effect of the condition, is bad. *Bishton* v. *Evans*, 2 C. M. & R. 12; 3 D. P. C. 735; 1 Gale, 76; 5 Tyr. 639; 4 L. J., Ex. 142.

Payment, by whom.]—Action on a bond. Plea, payment. 200*l.* having been lent by the plaintiff to the defendant on his bond, through M., the defendant's attorney, and who acted for him generally as his agent in his pecuniary affairs, and repayment being afterwards demanded, M. obtained from his banker (the real plaintiff) an advance of 400*l.* for himself, depositing the bond and another bond as a security for repayment, stating in a letter to the plaintiff that he had laid down the money to prevent her any further inconvenience. The defendant was not aware of the application for, or of the repayment of the 200*l.*:—Held, that this was not a payment by the defendant. *Lucas* v. *Wilkinson*, 1 H. & N. 420; 26 L. J., Ex. 13; 5 W. R. 197.

Where, on default of the receiver, and discharge under the Insolvent Act, the plaintiff not appearing, although served with notice, his surety paid the amount to the solicitor, which was proved by affidavit:—Held, that such payment was insufficient, and a motion to discharge the recognizance of the surety refused; but, on a subsequent notice on the plaintiff to shew cause, on his not appearing the order made. *Mann* v. *Stennet*, 8 Beav. 189; 9 Jur. 98.

Investment by Treasurer of County.]—The 12th section of the 1 Vict. c. 54, enabling the treasurer of a county to apply to the Court of Chancery by motion, to vacate the recognizances of himself and his sureties, upon his investing in government securities a sum equal to that secured by the recognizances, applies only to those cases where the party continues to be treasurer at the period of making the application. Therefore, a petition presented under the 12th section by a person who had resigned the office of county treasurer before the passing of the above act was dismissed. *Callaghan, In re*, 1 Ir. Eq. R. 448, n.

Not always a Discharge.]—In cases of principal and surety, circumstances may arise where payment of the entire sum by the principal would not discharge the sureties. *Id.* 450, n.

12. RESERVATION OF RIGHTS AGAINST SURETY.

Rule.]—It is a general rule that a creditor may give time to the principal debtor without discharging his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect. *Owen* v. *Homan*, 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.

A transaction, which would otherwise operate as a release of a surety, will not have that effect if the remedy against the surety is reserved. *Wyke* v. *Rogers*, 1 De G. M. & G. 408; 21 L. J., Ch. 611.

Covenant not to Sue.]—By a deed under the Bankruptcy Act, 1861, the principal debtor assigned all his property to trustees to sell, with power to them to advance moneys necessary for converting the prepared earth, part of the property assigned, into bricks, and for selling the same, and ultimately to pay thereout rateably, so far as it would extend, the debts of the several creditors. It was also declared that the creditors did, "subject to the proviso, acquit, release, and for ever discharge" the debtor; and then followed a proviso that any creditor who had any security for his demand, or to the payment whereof any person was liable as surety for the debtor, might execute the deed without prejudice to such security or to the claim against any surety:—Held, that the deed operated only as a covenant not to sue, and not as a release extinguishing the debts, and that, therefore, the creditors' rights against any surety of the debtor were legally reserved. *Bateson* v. *Gosling*, 41 L. J., C. P. 53; L. R. 7 C. P. 9; 25 L. T. 570; 20 W. R. 98.

A. and B. entered into a joint and several bond, conditioned for payment of moneys due by B. to a bank. After the making of the bond, the bank, without the privity or consent of B., executed a deed, whereby the bank released B. from all actions, &c., with a proviso that nothing therein contained was to extend to prevent the bank from suing any other person than B., who might be liable to make good to the bank any money due from B., or as being jointly or severally bound with B. in any bond, &c., as if the deed had not been executed, it being understood and agreed, that, as regards any such suits, the deed should not operate or be pleaded in bar or as a release:—Held, first, that this deed operated only as a covenant not to sue B., and not as a release. *Price* v. *Barker*, 4 El. & Bl. 760; 3 C. L. R. 927; 24 L. J., Q. B. 130; 1 Jur. (N.S.) 775.

Held, secondly, that A. was not discharged by the execution of the deed without his consent; the effect of a covenant not to sue the principal debtor qualified by a reserve of the remedies against a surety being to allow the surety to retain all his remedies over against the principal, and the covenant not to sue operating only so far as the rights of the surety may not be affected. *Ib.*

Express Reservation.] — A surety by deed guaranteed the payment of a banking current account, and agreed that no composition with the principal debtor should discharge his liability. The principal debtor entered into a deed of composition with his creditors, which contained an absolute release of his debts:—Held, that the surety was not discharged by the release of the principal debtor. *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L. J., Ex. 133; 12 L. T. 499; 13 W. R. 922.

A transaction which would otherwise operate as a release of a surety, such as giving time to the principal debtor, will not have that effect, either at law or in equity, if the remedy against the surety is expressly reserved. *Boaler* v. *Mayor*, 19 C. B. (N.S.) 76; 34 L. J., C. P. 230; 11 Jur. (N.S.) 565; 12 L. T. 457; 13 W. R. 775.

It is a rule of law that a creditor may suspend his right for ever against the principal debtor, and yet preserve his rights against the surety. When a debtor executed a deed which contained a release from his creditors, followed by a proviso reserving any rights his creditors might have against any other persons in respect of any debt due by the debtor, either alone or jointly with any other persons:—Held, that a surety was not released. *Green* v. *Wynn*, 38 L. J., Ch. 76; L. R. 7 Eq. 28; 19 L. T. 553; 17 W. R. 72. Affirmed, 38 L. J., Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.

If A., the creditor of B., by bills, for which C. and D. are sureties, by a deed to which B. and C. are parties, discharges B. and C., reserving his remedies against D., such reservation is not defeated by a stipulation that the bills shall be delivered up; it appearing that such stipulation was intended to be so modified as to give to A. the benefit of such reservation. *Maltby* v. *Carstairs*, 1 M. & Ry. 549; 7 B. & C. 735; 6 L. J. (O.S.) K. B. 196.

A release to one of two sureties who had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso that the release should not prejudice the right of the grantee to enforce payment against the grantor, and the other surety, or either of them:—Held, that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by the release. *Thompson* v. *Lack*, 3 C. B. 540; 16 L. J., C. P. 75.

To an action by payee against maker of a promissory note, plea, that the note was made by him and G., and that the plaintiff afterwards, by deed-poll, released G., whereby the defendant was released. The deed, by which it appeared that the creditors of G. agreed to accept a composition, contained a clause that it should not extend to invalidate notes upon which other parties might be jointly liable with G., or prejudice the claim of any creditor against a surety of G.:—Held, that the deed did not release the defendant. *North* v. *Wakefield*, 13 Q. B. 536; 18 L. J., Q. B. 214; 13 Jur. 731.

A. gave a promissory note payable to B. (for which A. had received no consideration) as a security for goods to be sold to B. on credit; and B. indorsed the note over to the creditors. B. afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, that they should not be prevented by that arrangement from suing on any securities which they held, and that on default in paying the instalments the deed should be void:—Held, that the delay granted to B. by this agreement did not discharge A. *Nichols* v. *Norris*, 3 B. & Ad. 41.

Semble, that to reserve a creditor's right against a surety there must be a distinct expres-

sion of intention to reserve it. *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R. 7 H. L. 348 ; 31 L. T. 322. Affirming 41 L. J., Ch. 332 ; 20 W. R. 253.

A creditor, having the security by bond of a third person for the due accounting of an agent, settles accounts with that agent and takes from him a bond for the balance found to be due, and bills at different dates for the amount of the bond and the interest thereon, until the last of the bills should fall due : and at the same time stipulates that he is at liberty at any moment to proceed on the original security :—Held, that this was not a discharge of the surety. *Lindsay* v. *Downes* (*Lord*), 2 Ir. Eq. R. 307.

Parol, Sufficiency of.]—Where a creditor discharges the principal debtor, but reserves his rights against the surety, even by parol, the surety is not discharged. *Norman* v. *Bolt*, 1 Cab. & E. 77.

If an intention to give what is in effect time be declared by a written agreement, in order that the right as against the surety may be reserved, it is necessary that such a reservation be declared also in writing. *Wyke* v. *Rogers*, 1 De G. M. & G. 408 ; 21 L. J., Ch. 611.

A. and B. (principal and surety) became bound to C. in the payment of 400*l.*, of which sum, by an arrangement between A. and B., 120*l.* were paid to the latter. B. repaid to C. that sum before the time limited by the bond for the payment of the 400*l.*, and C., after that time, accepted from A. a promissory note, payable at two months, for the remainder, on a parol agreement (which was proved) that the note was not to be considered as given in discharge of or as substituted for the bond. A. died insolvent. On a bill filed by B. against C. for a declaration, that under the circumstances he might become released and discharged from the bond, and for an injunction to restrain C. from proceeding in an action which he had commenced for the recovery of 280*l.*, the remainder of the 400*l.* :—Held, that the surety was not discharged, and that there was no case for the interference of a court of equity. *Ib.*

The plaintiffs brought an action against the defendant, one of five joint and several sureties, to recover the balance of the sum guaranteed. The plaintiffs had previously by letter, without the defendant's knowledge or consent, agreed to release another of the sureties from "all debts due" by him :—Held, that evidence of a verbal agreement prior to the letter of release to reserve rights against the sureties was not admissible, and that parol evidence was not admissible to alter the ordinary legal construction of a document. *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317 ; 1 R. 371 ; 57 J. P. 741—P. C.

Assumpsit on a guarantee, given by the defendant to the plaintiff in 1833, for goods to be furnished to one Jardine. Breach, delivery of goods to the amount of 90*l.* 9*s.* 11*d.*, and non-delivery by the defendant. The plea alleged a subsequent agreement between Jardine and the plaintiff and defendant and others, embodied in the following note :—"1836. We jointly and severally promise to pay to Messrs. J. M'Clure & Son, or order, the sum of 44*l.* 4*s.* 11*d.*, which is to constitute a discharge in full, for a debt of 90*l.* 9*s.* 11*d.*, due by Wm. Jardine to Messrs. M'Clure & Son." Signed by defendant and Jardine and four others, and delivered to the plaintiff, and received by him. Upon the trial the plaintiff proposed to prove, by parol, that at the time he took this note it was expressly agreed that he was still to be at liberty to sue the defendant upon his guarantee :—Held, that this evidence was rightly rejected. *M'Clure* v. *Fraser*, 9 L. J., Q. B. 60.

If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety. Not so if it be stipulated in the deed of composition that the remedies against the sureties shall be reserved. Parol evidence of the understanding of the parties to the deed that the remedies against the sureties should be reserved cannot be admitted. *Glendinning, Ex parte*, Buck, 517 ; *Carstairs, Ex parte*, *id.* 560. And see *S. C.*, 1 Rose, 130.

Knowledge of Arrangement with Principal.]—A declaration alleged that the defendant agreed to guarantee and be accountable for the payment of all sums of money which were or thereafter should become due to the plaintiffs from R. M'G. on a banking account. It then stated as a breach that 599*l.* 13*s.* 4*d.* became due upon the advance of moneys by the plaintiffs to R. M'G., yet that R. M'G. did not pay the same, and thereby the defendant became liable. To this the defendant pleaded, that no part of the 599*l.* 13*s.* 4*d.* was due or owing from R. M'G. to the plaintiffs on the banking account. Another plea was, that, after the accruing of the debt of R. M'G. to the plaintiffs, he was indebted to them in 1,100*l.*, of which the 599*l.* 13*s.* 4*d.* was part, and was also indebted to other persons, and was in insolvent circumstances, and unable to pay his debts in full, and that thereupon his creditors agreed with him and mutually with each other to accept a composition in discharge of their respective debts ; and the plea then stated the payment by R. M'G. of the composition to the plaintiffs. Replication, that the plaintiffs entered into the composition with the knowledge of the defendant, and upon the agreement that it should not discharge the defendant from his liability upon the guarantee, which was denied by the rejoinder. At the trial, the facts stated in the replication were found by the jury, and the judge told them that under those circumstances they ought also to find the second issue for the plaintiffs, which they accordingly did :—Held, on a rule to arrest the judgment, that the replication to the fourth plea was good, inasmuch as it did not appear that the reservation of the plaintiffs' rights against the defendant was unknown to the other creditors. *Davidson* v. *M'Gregor*, 8 M. & W. 755 ; 11 L. J., Ex. 164.

Where upon giving time to a principal debtor there is a reservation of rights against a surety the surety is not discharged, and the question whether or not the surety is informed of the arrangement is wholly immaterial. *Webb* v. *Hewitt*, 3 K. & J. 438.

Effect of Security given by Surety.]—In general a release to the principal is in equity a release to the surety, but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety. *Hall* v. *Hutchons*, 3 Myl. & K. 426 ; 3 L. J., Ch. 45.

B. accepted a bill of exchange as surety for A., and subsequently, in consideration of further time given him (B.) for payment, covenanted by

deed to pay what was due on the bill with interest, and at the same time assigned a policy as further security:—Held, that an entire acquittal of debts given to A. by all his creditors did not release B. *Defries* v. *Smith*, 10 W. R. 189.

Intention to Abandon.]—A deed of assignment contained a clause providing that it should not affect any surety nor any security which any of the creditors might have, but if such security should be enforceable against the debtor or his estate, then the creditor (unless he should consent to abandon his security) should be entitled to receive dividends upon so much only of his secured debts as might remain after such security should have been realised, after credit should have been given for the full value thereof; and a creditor, holding a policy of assurance at that time valueless, proved for the full amount of his debt and received a dividend thereon:—Held, that there was no evidence of the creditor's intention to abandon his security. *Parker* v. *Anglesea* (*Marquis*), 25 L. T. 482; 20 W. R. 162.

Surety suing Released Principal.]—The plaintiff, a shareholder in a banking company, became surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition deed, to which the plaintiff and the company were parties, whereby he assigned his property to trustees for the benefit of his creditors; and this deed contained a stipulation for a reserve of remedies against sureties for the defendant. The plaintiff having been compelled to pay the debt to the company:—Held, that he was entitled to recover back the amount from the defendant. *Kearsley* v. *Cole*, 16 M. & W. 128; 16 L. J., Ex. 115.

Action by the indorsee against the acceptor of a bill of exchange. Plea, a composition deed registered under the Bankruptcy Act, 1861; the deed contained no reservation of rights against sureties. Replication, that the bill was accepted for value and indorsed to the plaintiff for value, and that if he had assented to the deed he would have discharged the drawers. Rejoinder, that before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed. The issue upon the rejoinder having been found for the defendant:—Held, that, as by reason of such consent the plaintiff might have come in for the composition and have held the drawers liable for the balance, he was in the same position as if the right to have recourse to the drawers had been reserved to him in the deed, and therefore he was bound by it. *Poole* v. *Willats*, 9 B. & S. 957; 38 L. J., Q. B. 255; L. R. 4 Q. B. 630; 20 L. T. 1006; 17 W. R. 1009.

In an action by the drawer against the acceptor of a bill, he pleaded a composition deed executed by him before the bill was due. The deed contained a clause reserving the rights of creditors against sureties. In the declaration the bill was stated to be payable to the plaintiff, without shewing that it was a negotiable instrument. The replication alleged that the bill was payable not to the plaintiff only, but to the plaintiff or order; that he had indorsed the bill; that the holders of the bill at the time of the making and registration of the deed presented the bill for payment, and it was dishonoured by the defendant. The plaintiff never assented to the deed, and was compelled to pay the amount of the bill to the holders, upon which he became the holder. The replication concluded, that "the plaintiff, except as in the replication mentioned, was not a creditor of the defendant in respect of his claim on the bill":—Held, that there was no departure from the declaration, but that the replication was bad because the plaintiff was a creditor and was barred by the deed. *Hooper* v. *Marshall*, 39 L. J., C. P. 14; L. R. 5 C. P. 4; 21 L. T. 639.

The acceptor of a bill of exchange for 100*l.* being sued thereon by the holders, paid into court the sum of 30*l.* in satisfaction of the whole cause of action. The holders gave notice (in Form 4, App. B., of the R. S. C. 1883) that they accepted that sum, having previously written to the acceptor to say that the indorsers had arranged to pay the balance of 70*l.*, and would sue the acceptor therefor:—Held, that the acceptor was not thereby absolutely released, and that the indorsers, having paid the balance, could recover it from the acceptor. *Jones* v. *Whitaker*, 57 L. T. 216—C. A.

13. Other Cases.

Balance Due from Creditor to Principal.]—Where A. joins as surety for B.'s debt, the mere circumstance of a balance, to the amount of the debt, being owing from the creditor to B. in other transactions, is no discharge to A. from his suretyship. *Harrison* v. *Nettleship*, 2 Myl. & K. 423; 3 L. J., Ch. 86.

Felony of Third Parties.]—Bond of a clerk to commissioners of public works, conditioned from time to time when so required, to account in writing for all moneys, and also make good answer for and pay the moneys due on the balance of such accounts to the commissioners. In an action on the bond, a replication, that although he had accounted, and a large sum was due on balance of such account, yet he did not make good answer for or pay the balance. Rejoinder, that he paid part of the balance and made good answer for the residue thus, that he was necessarily travelling on the public way in discharge of his duty, with such residue on his person, when the same was violently and feloniously stolen and taken from him:—Held, that the acts of strangers to the bond could not discharge the obligor. *Hornsby* v. *Slack*, 1 Ir. C. L. R. 126.

Agreement that Principal's Effects should be first Sold.]—Defendant drew bills as surety for H., who accepted them, and it was provided by a deed to which the plaintiff, the holder, as well as the defendant, was a party, that he should not sue defendant on the bills till H.'s effects should have been sold, and the proceeds applied in discharge of the bills. H.'s effects were seized and sold under a commission of bankruptcy, the trustee, to whom they had been conveyed by the deed, having, with the knowledge and assent of the defendant, omitted to take possession of them in time:—Held, that the plaintiff was not barred from suing the defendant on the bills. *Lancaster* v. *Harrison*, 6 Bing. 726; 4 M. & P. 561; 8 L. J. (O.S.) C. P. 288.

Landlords distraining.]—Landlords advanced money to their tenant on a joint note of himself and a surety; they afterwards took a security for this and another sum advanced at the same time by an assignment of furniture of the tenant by way of mortgage:—Held, that, by taking the furniture under a distress for rent in arrear, they discharged the surety. *Pearl* v. *Deacon*, 1 De G. & J. 461; 26 L. J., Ch. 761; 3 Jur. (N.S.) 1187; 5 W. R. 793.

Hire-purchase Agreement—Seizure of Goods by Vendor.]—Where an agreement which is in form a hire-purchase agreement, but in reality an executory contract of sale, contains a stipulation that it may be determined in case of instalments being in arrear by seizure of the goods, a seizure by determining the obligation will discharge a surety for the purchaser who has guaranteed the future instalments. *Hewison* v. *Ricketts*, 63 L. J., Q. B. 711; 10 R. 558; 71 L. T. 191.

Surety becoming Principal.]—Judgment having been obtained against a surety, he entered into a new arrangement with the creditor (irrespective of the principal debtor), by which execution was not to issue while he kept up certain policies for securing the debt:—Held, that he became principal, and not surety, by the new arrangement, and that no subsequent dealing between the creditor and the principal debtor would annul it. *Reade* v. *Lowndes*, 23 Beav. 361; 26 L. J., Ch. 793; 3 Jur. (N.S.) 877.

Judgment against Principal.]—By a deed, 1,400*l.* was advanced to one Gye on the security of three life policies, whereby Gye covenanted to keep up the premiums and pay interest at 3 per cent. on the loan. By a covenant in the deed, which was made between M. of the one part, G. and L., sureties, of the second part, and Gye of the third part, G. and L. covenanted with M. "that they or one of them will, during the continuance of the present security, in the event of the premiums on the said policies . . . and the interest in respect of the said principal sum of 1,400*l.* not being paid, as to the premium within three days, and as to the interest within thirty days, of their falling due by Gye . . . duly pay the premiums . . . and also pay the interest on the said sum of 1,400*l.*" Judgment was recovered for the 1,400*l.* against Gye:—Held, that it operated as a merger with regard to the liability to pay future interest, and that the surety was released. But semble, there could be no merger of interest accrued before the judgment. *Faber* v. *Lathom* (*Earl*), 77 L. T. 168.

Renewal of Liability.]—Where a creditor, having already a warrant of attorney from his debtor, takes a promissory note from him and a surety, and afterwards enters up judgment under his warrant of attorney, and takes the goods of the principal debtor in execution, and subsequently withdraws the execution without the knowledge of the surety, he discharges the surety. But if the surety, after knowing that the execution is withdrawn, makes a new promise, his liability is restored, and he cannot object to the promise as being without consideration. *Mayhew* v. *Crickets*, 1 Wil. Ch. 418; 2 Swanst. 185; 19 R. R. 57.

A debtor and his surety persuaded the creditor to accept from the debtor a transfer of a mortgage which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterwards the creditor, at the request of the surety, who suggested to him that he was secured by the mortgage, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew that they had refused to do unless the release was given:—Held, that the creditor was entitled to be restored to his rights against the surety. *Scholefield* v. *Templer*, Johns. 155; 28 L. J., Ch. 452; 5 Jur. (N.S.) 619. Affirmed on appeal 4 De G. & J. 429; 7 W. R. 635.

Terms on which Relief granted.]—Where a surety had pleaded to an action on the guarantee, and then filed a bill in equity for an injunction, and had put the bankers to unnecessary costs:—Held, that he could only be relieved in equity on paying the costs at law subsequently to the declaration. *Watson* v. *Allcock*, 4 De G. M. & G. 242; 1 Eq. R. 231; 22 L. J., Ch. 858; 17 Jur. 568; 1 W. R. 399.

Discharge of Surety by Tenant for Life of Creditor—Extent of.]—Where a testator bequeathed the residue of his property to his widow and executrix for her life, and she released the surety for a debt due to her husband's estate from payment of all interest on the debt:—Held, to extend only to her life interest in the principal moneys due in respect of the debt. *Coates* v. *Coates*, 3 N. R. 355; 33 L. J., Ch. 448; 10 Jur. (N.S.) 532; 9 L. T. 795; 12 W. R. 634.

C. RIGHTS OF SURETY.

1. CONTRIBUTION.

a. Nature of Liability.

Under what Instruments.]—There is a right of contribution between co-sureties, whether by separate instruments or by the same instrument. *Mayhew* v. *Crickets*, 2 Swanst. 185; 1 Wils. C. C. 418; 19 R. R. 57. S. P., *Craythorne* v. *Swinburne*, 14 Ves. 160; 9 R. R. 264.

But where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them. *Coope* v. *Twynam*, 1 Turn. & Russ. 426; 24 R. R. 89.

A bond was executed by a principal and two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the plaintiff signed a separate undertaking to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the plaintiff and obtained payment of the amount due. The plaintiff filed his bill against the solvent surety in the first bond for contribution:—Held, that he was entitled to contribution from him. *Whiting* v. *Burke*, L. R. 6 Ch. 342. Affirming L. R. 10 Eq. 539.

The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burden and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute. *Deering* v. *Winchelsea* (*Earl*), 1 Cox, 318; 2 Bos. & P. 270; 1 R. R. 41.

How Arranged.]—When it is ascertained what each of the co-sureties has paid beyond his proportion, the equity as between them is arranged upon the principle of contribution for excess. *Gifford*, *Ex parte*, 6 Ves. 805; 6 R. R. 53.

Custom of London.]—Where one obligee is sued by the custom of London, his co-sureties shall contribute. *Layer* v. *Nelson*, 1 Vern. 456.

Where Different Shares.]—Where several parties are sureties for the payment of one sum of money, though by distinct instruments, and one pays more than an equal share of that sum, he may have contribution from his co-sureties; but if it is arranged by contract, which it may be, that each surety shall be answerable only for a given portion of one sum of money, in such case there is no right of contribution amongst the co-sureties. *Pendlebury* v. *Walker*, 4 Y. & C. 424.

—— **Arrangement for Settlement.**]—A., B., C. and D., at request of E., who was in pecuniary difficulties, had joined with E. as sureties in various promissory notes and bills of exchange, but in no instance had they all four joined. A. was liable to a larger amount than B., C. and D. The creditors of E. pressed for payment, and A., B., C. and D. employed W., a solicitor, to enter into arrangements with the creditors on their behalf, and the following agreement was drawn up by W. and signed by A., B., C. and D.:—"We, the undersigned, being jointly liable as guarantors upon certain bills of exchange given in favour of E., authorise W. to act for us as our joint and several solicitor in all matters concerning those bills, and we further authorise W. to take such proceedings as he may think fit to recover the amount of such bills from E. In carrying out the terms W. will negotiate to settle the above upon the best terms he can. As, however, between the parties themselves, the following is the basis of the arrangement inter se: Upon the amount being ascertained for which the liabilities can be discharged, the parties to this arrangement undertake to provide the same in the proportion of one-fourth each, and all sums recovered from E. are to be brought into account and repaid to such parties in proportion to their existing liabilities, or to the amounts respectively found by them." In a suit by A. for contribution:—Held, that, upon the true construction of this agreement, the parties did not intend to alter their existing liabilities and to take the entire liability upon themselves in equal shares, but only to advance the requisite money in the first instance in equal shares; and that, consequently, their ultimate rights and liabilities were not thereby varied. *Arcedeckne* v. *Howard*, 45 L. J., Ch. 622—H. L. Affirming 27 L. T. 194; 20 W. R. 879—L.JJ.

Between Wrong-doers.]—The principle that no rights of indemnity and of contribution exist as between wrong-doers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the court will not entertain a suit for the relief of the malfeasors. The principle is further limited to cases where the fraudulent or illegal transaction is itself the basis of the claim, and does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it. *Power* v. *Hoey*, 19 W. R. 916.

Trustee who had incurred liability for negligence:—Held, not entitled to contribution from his co-trustee. *Blyth* v. *Fladgate*, 63 L. T. 546.

Promise not within Statute of Frauds.]—A promise by one co-surety to indemnify another is not within the 4th section of the Statute of Frauds, and therefore need not be in writing. *Thomas* v. *Cook*, 3 M. & Ry. 444; 8 B. & C. 728; 7 L. J. (o.s.) K. B. 49.

Where A., at the request of B., entered into a bond with him and C. to indemnify D. against certain debts due from C., and D. and B. promised to save A. harmless from all loss by reason of the bond:—Held, that this promise was binding, although not in writing, and that A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond. *Ib.*

Liability accrues after Payment of more than Share.]—A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor. *Davis* v. *Humphreys* (infra) followed. *Craythorne* v. *Swinburne* (14 Ves. 160; 9 R. R. 264) discussed. *Snowdon, Ex parte, Snowdon, In re*, 50 L. J., Ch. 540; 17 Ch. D. 44; 44 L. T. 830; 29 W. R. 654—C. A.

A surety is not entitled to sue his co-sureties for contribution until he has paid on account of the principal debt a sum greater than he would be obliged to pay when the entire liability should be fairly apportioned among them. *Davis* v. *Humphreys*, 6 M. & W. 153; 9 L. J., Ex. 263; 4 Jur. 250.

Where one of several co-sureties has had judgment against him for the whole of his guarantee he cannot obtain contribution against the others until he has actually paid more than his own share, but he is entitled to a declaration of his right to contribution and to a prospective order that on paying his own share he be indemnified by his co-sureties against further liability. *Wolmershausen* v. *Gullick*, 62 L. J., Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.

Several Interest.]—Two of three persons who are jointly and severally bound in a bond of indemnity to the sheriff, in a matter in which they are severally interested, cannot, after having paid the whole, join in an action against the third for contribution. *Kelby* v. *Steel*, 5 Esp. 194.

Joint Surety at Instance of Plaintiff.]—Where the defendant at the instance of the plaintiff became a joint surety for a third person, and the plaintiff was forced to pay all the money:—Held, that he could not call on the defendant for contribution of a moiety; aliter if he had become a joint surety of his own motion. *Turner* v. *Davies*, 2 Esp. 478.

Payment without Demand.]—Where one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, on the note becoming due paid the amount, although no demand had been made or action brought against him by the holder:—Held, that such payment could not be considered voluntary, and that he might sue his co-surety for contribution. *Pitt* v. *Purssord*, 8 M. & W. 538; 10 L. J., Ex. 475; 5 Jur. 611.

Nature of Payment.]—A surety has no right to sue his co-surety for contribution, unless the sum paid by him, and in respect of which he sues, is his own money. *Gopel* or *Goepel* v. *Swindon*, 1 D. & L. 888; 13 L. J., Q. B. 113; 8 Jur. 340.

Giving Time to Surety.] — Although time given to the principal will, under certain circumstances, exonerate a surety, yet time given to a

surety without the privity of his co-surety will not, upon his paying the debt, affect his right to contribution against such co-surety. *Dunn* v. *Slee*, 1 Moore, 2; Holt, N. P. 399; 17 R. R. 651.

A surety in an indemnity bond may maintain an action against his co-surety, although he has given a subsequent security to the obligees, under which he paid the sum conditional in the bond, without the knowledge or consent of such co-surety. *Ib.*

Advance made by Principal to one co-Surety —Concealment.]—M. and W. became co-sureties for a sum of 500*l.*, borrowed by B. Of this sum of 500*l.*, 125*l.* was, by previous agreement, advanced by B. to his surety W. No notice of this transaction was given to M. B. became bankrupt, and M. and W. were called upon to pay the unpaid balance of the loan of 500*l.* M. brought an action against W., claiming that W. should be treated as principal debtor on account of the advance of 125*l.* given to him, and claiming the benefit of all securities given to him:—Held, that there was no concealment between the co-sureties of any material fact, and that the plaintiff was not entitled to the relief claimed. *Mackreth* v. *Walmsley*, 51 L. T. 19; 32 W. R. 819.

Security given by Principal to one co-Surety.]—In an action by a co-surety against his companion for contribution on a bond, it appeared that at the time of executing the bond the plaintiff had, unknown to the defendant, taken a promissory note from the principal for the amount:—Held, that the jury was rightly directed to say whether the plaintiff and defendant were co-sureties for the principal; and that, if the defendant meant to contend that the giving the promissory note was in consequence of an arrangement that the surety was to look solely to the principal for repayment, he should have asked the judge to put that question to the jury. *Done* v. *Whalley*, 2 Ex. 198; 17 L. J., Ex. 225; 12 Jur. 338.

—— **Duty to bring into Hotchpot.**] — *See* post, col. 1306.

Discharge of Principal—Mistake.] — To an action by the plaintiff to recover contribution from the defendant, his co-surety, he pleaded that without his privity or consent the plaintiff had agreed to discharge the principal. Replication, on equitable grounds, that the agreement, by which it was alleged the principal was discharged, was worded by mistake so as to include the claim sued for, contrary to the intention of the parties, and that the plaintiff did not otherwise discharge the principal, and that the true agreement was in all respects performed:—Held, a good replication. *Yorley* v. *Barrett*, 1 C. B. (N.S.) 225; 26 L. J., C. P. 1; 5 W. R. 137.

Alteration of Instrument by Surety.]—N., E., P. and B. purported to become sureties under a bond for C. up to 150*l.* N. and E. purported to covenant to pay up to 50*l.* each, and P. and B. up to 25*l.* each. N., who executed the bond last, bonâ fide added after his signature the words "for twenty-five pounds only." Judgment having been obtained against C. for 48*l.*, the plaintiffs sought to recover that amount from the co-sureties in the proportion of 12*l.* apiece:—Held, that the defendant sureties were discharged from all liability under the bond, on the ground that there had been a material alteration made bonâ fide by N. in the bond after its execution by the other sureties, inasmuch as, although the amount sought to be recovered from each surety was less than any amounts for which each had purported to covenant, yet the principle of proportional contribution must regulate the right of contribution as between the sureties, and that proportion had been materially altered by the limitation of liability added by N.; further, that N. himself was not liable under the bond for 25*l.*, inasmuch as he only undertook the liability under a contract in which other sureties were joined, and that contract being void in respect of the other sureties, was necessarily void as against him. *Ellesmere Brewery Co.* v. *Cooper*, 65 L. J., Q. B. 173; [1896] 1 Q. B. 75; 73 L. T. 557; 44 W. R. 254.

Between Drawer and Indorser of Accommodation Bills.]—A., being in want of money, applied to the plaintiff and the defendant to put their names to a bill for his benefit, which they agreed to do; A. drawing the bill, the plaintiff accepting, and the defendant indorsing; A. at the same time giving the plaintiff and the defendant a memorandum, stating that the bill was accepted and indorsed for his accommodation, and that he would pay the bill when it became due; he, however, not being able to do so, again applied to the plaintiff and the defendant to put their names to a second bill, in order to meet the first, which they did, the position of the names being changed, A. accepting, the plaintiff drawing, and the defendant indorsing, as before. The plaintiff having eventually to pay the amount of the bill, brought an action against the defendant for contribution as a co-surety:—Held, that the defendant was a co-surety, and therefore bound to pay his quota. *Reynolds* v. *Wheeler*, 10 C. B. (N.S.) 561; 30 L. J., C. P. 350; 7 Jur. (N.S.) 1290; 4 L. T. 472.

Between Co-owners of Lands Charged with Payment of Tithes.]—The defendant was the owner and occupier of certain lands which were charged with payment of tithes; there was a provision for recovery. In an action of debt for arrears accrued in respect of the whole of the lands charged for four years, during which time the defendant was the owner and occupier of a portion only of such lands:—Held, that the defendant had his remedy by action against the co-owners for contribution. *Christie* v. *Barker*, 53 L. J., Q. B. 537—C. A.

Directors—Breach of Trust—Ratification—Liability of Administrator.]—The directors of a company advanced moneys of the company upon an unauthorised security, and two sums of 600*l.* and 400*l.* so lent were lost. The 600*l.* formed part of a loan of 800*l.*, and the 400*l.* formed part of a loan of 1,000*l.* which was granted by the board of directors, and of which 400*l.* was actually advanced and repaid, and a second 400*l.* was advanced and not repaid. In an action by the company against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of 600*l.* and 400*l.* to the company, and, having paid them, sued three of his co-directors for contribution. One of the defendants was not present at the meeting at which the loan of 800*l.* was granted, and at which a cheque for the 800*l.* was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read and

confirmed. The 800*l.* had been already paid to the borrower :—Held, that, whether the defendant would or would not have been liable to the company, there was no equity to compel him to contribute to the plaintiff in respect of the 600*l.* *Ramskill* v. *Edwards*, 55 L. J., Ch. 81 ; 31 Ch. D. 100 ; 53 L. T. 949 ; 34 W. R. 96.

The same defendant was present at the meeting at which the loan of 1,000*l.* was granted, when he protested strongly against it. He was present at a subsequent meeting at which the minutes of the first meeting were read and confirmed, and he then signed a cheque which was drawn for the first 400*l.* :—Held, that by signing the cheque he had adopted the whole loan of 1,000*l.*, and that he was therefore liable to contribute in respect of the second 400*l.*, which was lost. *Ib.*

The third defendant died after the commencement of the action, and his administrator was then made a defendant :—Held, that the liability to contribute survived against the defendant's estate. *Ib.*

b. Amount.

Rateable Proportion.]—It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties. *Cowell* v. *Edwards*, 2 Bos. & P. 268.

Even though the insolvency of the principal and of the other sureties is not proved. *Ib.*

If A., B. and C. become bound as sureties for D. in three separate bonds, and any one of them is compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds. *Deering* v. *Winchelsea* (*Earl*), 2 Bos. & P. 270 ; 1 Cox, 318 ; 1 R. R. 41.

A surety may recover contribution, according to the number of sureties, without reference to the number of principals, from his co-sureties in an action for money paid. *Kemp* v. *Finden*, 12 M. & W. 421 ; 13 L. J., Ex. 137 ; 8 Jur. 65. S. P., *Pitt* v. *Purssord*, 8 M. & W. 538 ; 10 L. J., Ex. 475.

Sureties in a recognizance contribute in proportion to the amounts for which they were respectively originally bound. *MacDouglas*, *In re*, Ir. R. 10 Eq. 269—C. A.

Death of Surety—Substitution of New Surety—Liability of Estate of Deceased Surety.]—F., E. and B. entered into a joint and several bond to secure the repayment of a sum lent to F., and it was stipulated that if E. or B. should die, F. should within a month procure some other person to enter into a further bond to the like effect. E. died, and a fresh bond was executed by F., B. and H. in the same form as the former bond, with the additional proviso that it should not release the heirs, executors, or administrators of E., or in any way alter, vary, or lessen their liability, or affect any right or remedy of the lender under the former bond. B. and H. having paid the debt in equal shares, claimed against E.'s estate for half the amount :—Held, that E.'s estate was liable for one-third only of the amount paid by B. and H. *Ennis*, *In re*, *Coles* v. *Peyton*, 62 L. J., Ch. 991 : [1893] 3 Ch. 238 ; 7 R. 544 ; 69 L. T. 738—C. A.

Security obtained by one Co-surety who has paid off Debt.]—C. being indebted to D., four of his friends joined him in signing and giving four promissory notes to secure the payment to D. of the sum of 13,000*l.* and interest. D. effected three policies on the life of C. for, in the aggregate, 10,000*l.* In 1867, Lord H. of E., one of the co-sureties, having been sued by D. on the notes, paid, with the assistance of his father, the Earl of E., the 13,000*l.* and interest by a mortgage of estates which were settled upon the earl for life with remainder to Lord H. of E.; and the earl having paid the premiums and kept the policies on foot, in September, 1871, shortly after the death of C., obtained an assignment from D. of the policies and received the 10,000*l.* from the insurance office. A., another of the four sureties, died. His estate, which was stated to be insolvent, was being administered by the court, and Lord H. of E. brought in a claim against it for contribution in respect of the sum paid to D. on the notes :—Held, that, under all the circumstances of the case, Lord H. of E. and his father, the earl, must be treated as one person, and that the claim for contribution would be allowed, but only after Lord H. of E. had brought into account, as a set-off, the moneys which were received on the three policies assigned to the earl, credit being first given for the premiums and other moneys which had been paid in reference to the transaction. *Arcedeckne*, *In re*, *Athins* v. *Arcedeckne*, 53 L. J., Ch. 102 ; 24 Ch. D 709 ; 48 L. T. 725.

One Surety Insolvent.]—One of the sureties of an annuity was obliged to pay the arrears of an annuity, a second was insolvent, and an action was brought against the third for contribution :—Held, that at common law he was liable only to one-third, and not one-half. *Browne* v. *Lee*, 6 B. & C. 689 ; 9 D. & R. 700 ; 5 L. J. (o.s.) K. B. 276.

Five directors of a company gave their joint and several bond to a bank to secure repayment with interest of a loan made by the bank to the company. By an agreement between five persons interested in the company of the first part, and the five directors of the second part, after reciting the bond, it was agreed that, in pursuance of an agreement made upon the treaty for the loan by the bank, the liability of the several persons parties thereto of the second part, under the bond, should be borne and discharged by the ten several persons parties thereto in equal shares and proportions, and that each of the several persons parties thereto would indemnify the other nine against all actions, &c., in respect of the loan by the bank or in respect of the bond. The company was ordered to be wound up, and the bank recovered judgment against the obligees of bond for the whole amount of principal and interest due thereunder. One of the guarantors had become insolvent. On a bill by two of the guarantors, who had under the judgment paid more than their proportion of the sum secured by the bond, against the other eight guarantors to enforce a rateable contribution from them in respect of the principal, interest, and costs recovered under the bond :—Held, that all the solvent guarantors were liable to contribute rateably in respect of that whole amount recovered under the bond, and that the extra liability arising from the insolvency of one of the guarantors was not to fall upon the defendants to the action at law. *Dallas* v. *Walls*, 29 L. T. 599.

—— **Amount of Proof by Co-surety who has paid off Debt.**]—Where one of several co-sureties has paid off the debt, he is, notwithstanding the

terms of s. 5 of the Mercantile Law Amendment Act, 1856, entitled to the benefit of a proof by the creditor against one of the co-sureties for the full amount of the debt, and his right of proof is not (though his right of receiving dividends is) limited to the sum which as between him and his co-surety such co-surety is liable to pay. *Stokes, Ex parte* (De G. 618) followed. *Parker, In re, Morgan* v. *Hill*, 64 L. J., Ch. 6; [1894] 3 Ch. 400; 7 R. 590; 71 L. T. 557; 43 W. R. 1—C. A.

Whether the result would be the same if the creditor had never proved, and the surety who had paid the debt had in the first instance claimed against his co-surety, quære. *Ib.*

Joint Adventure—Default in Payment of Loss by One Party.]—By agreement between the plaintiffs, the defendants, and Messrs. L., B. & Co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of L., B. & Co. at San Francisco, consigned to the plaintiffs at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for costs and insurance of the cargo by drafts on the plaintiffs at sixty days' sight to the extent of 45*s.* per quarter, less freight, and for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess. The cargo was shipped, and a bill was drawn by the San Francisco house for 20,353*l.* 18*s.* 1*d.* on account of the invoice price of the wheat, less freight, upon the plaintiffs, and was duly accepted and paid by them, together with freight, insurance, and other charges in respect of the cargo; and the wheat on arrival was sold by the plaintiffs at a loss. In December, 1883, L., B. & Co. became insolvent and compounded with their creditors for 30 per cent. of their liabilities, which composition the plaintiffs received, leaving an unpaid balance of 1,760*l.* 10*s.* 9*d.* due from that firm for their share of the loss on the adventure:—Held (the judge to draw inferences of fact), that the purchase and shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in the profit or loss; and that the defendants, according to the rule of equity, which since the Judicature Act, 1873, is to prevail, were liable to contribute equally with the plaintiffs to make good the default of L., B. & Co. *Lowe* v. *Dixon*, 16 Q. B. D. 455; 34 W. R. 441.

Costs.]—A. and B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A. and recovered:—Held, that in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, and that he could not recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees. *Knight* v. *Hughes*, 3 Car. & P. 467; M. & M. 247.

Held, also, that if A., after the verdict in the action against him on the bond, obtained a sum of money from C., he must take that in reduction of the amount of the verdict, and could not apply it either to pay his own costs or the taxed costs of the obligees. *Ib.*

A. deposited with the defendant, as a security for goods, a bill accepted by the plaintiff, for which the plaintiff had received no value. A. afterwards paid for the goods, and asked for the restoration of the bill; but the defendant indorsed it for value to G., who sued the plaintiff and recovered:—Held, that the plaintiff might recover from the defendant the amount of the bill as money paid to the use of the defendant, but not the costs of the action by G. against the plaintiff. *Bleaden* v. *Charles*, 7 Bing. 246; 5 M. & P. 14; 9 L. J. (O.S.) C. P. 82.

Where the plaintiff and the defendant executed as sureties a warrant of attorney, given as a collateral security for a sum of money advanced on mortgage to the principals, and on default being made by the principals, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff:—Held, that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution. *Kemp* v. *Finden*, 12 M. & W. 421; 13 L. J., Ex. 137; 8 Jur. 65.

Interest.]—When one of several sureties has paid the principal debt, and some of the co-sureties are insolvent, he is entitled as against the solvent sureties to be repaid their numerical shares of what he has paid with interest from the time of payment, although the instrument does not contain any express indemnity so as to carry interest as on a specialty. *Hitchman* v. *Stewart*, 3 Drew. 271; 3 Eq. R. 838; 24 L. J., Ch. 690; 1 Jur. (N.S.) 839; 3 W. R. 464.

By deed A. agreed to charge certain property with all sums that B. should pay as surety for a third party, and also agreed that B. should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—Held, that he was entitled to interest thereon. *Hodgson* v. *Hodgson*, 2 Keen, 704; 7 L. J., Ch. 5.

Where sureties joined as co-obligors in a bond, one, who had been compelled to pay the amount with interest, was not entitled to carry on interest upon such payment against the personal representative of his co-surety. Contribution decreed, but without interest either on the consolidated sum or the principal money paid. Quære, whether as against the principal debtor or his representative such payment carries interest in the absence of express agreement. *Onge* v. *Truelock*, 2 Moll. 42.

—— **Use of Recognizance.**]—When one of two sureties has paid the full amount of a receiver's recognizance, he is entitled to use the recognizance for the purpose of recovering, out of the estate of his co-surety, not only one-half of the sum so paid by him, but also interest thereon from the date of payment. *Swan's Estate, In re*, Ir. R. 4 Eq. 208—Ch. App.

A surety having paid the whole amount of a recognizance, and having been allowed to use the recognizance for the recovery of contribution from his co-surety, he is not thereby entitled to recover interest thereon. *Salkeld* v. *Abbott*, Hay & J. 110.

Use of Crown Securities.]—A surety by recognizance who pays the whole amount into court, when pressed with crown process, is entitled to use the crown securities, in order to levy a moiety from his co-surety, provided he share with his co-surety the benefit of any counter-security he may have taken from the principal. *Latouche* v. *Pallas*, Hayes, 450.

c. Proceedings.

Action.]—A surety may recover contribution from his co-surety in an action for money paid. *Kemp* v. *Finden*, 12 M. & W. 421 ; 13 L. J., Ex. 137 ; 8 Jur. 65.

A. mortgaged an estate to B., in which C. joined as a surety ; and A. and C. gave a joint bond for the payment of the sum advanced by B. A. afterwards, by indenture, to which C. was no party, sold the estate to D., who engaged to pay B. the sum advanced by him to A., and covenanted to indemnify A. and C. from the payment thereof. D. being afterwards called on for payment by B., C. advanced to D. the sum due to B. in discharge of the mortgage :—Held, that C. was not entitled to recover from D. in an action for money paid. *Crafts* v. *Tritton*, 2 Moore, 411.

Where a surety, bound with his principal for the payment of money by instalments, takes a bond as a security, he cannot recover on the implied promise. *Toussaint* v. *Martinant*, 2 Term Rep. 100.

Parties.]—Suit by one surety against another for contribution, the representatives of another surety who died insolvent ought to be parties. *Hole* v. *Harrison*, Rep. t. Finch, 15.

Proof of Insolvency of Principal.]—On a bill filed by a surety against his co-surety and the principal, for a contribution from the co-surety in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal ; otherwise, where the principal is not a party to the suit. *Lawson* v. *Wright*, 1 Cox, 275.

Evidence of Payment.]—In an action against a co-surety in a bond for contribution, any declaration of the obligee upon what account he received the money paid him in account by the principal obligor is not evidence unless made at the time of payment. *Dunn* v. *Slee*, 1 Moore, 2 ; Holt, N. P. 399 ; 17 R. R. 651.

Proof in Bankruptcy—Statute of Limitations.]—Liability to contribution as a surety, though the amount was not ascertained at the time of the bankruptcy, is a debt provable under s. 37 of the Bankruptcy Act, 1883. The Statute of Limitations does not begin to run as against a surety claiming contribution until his own liability is ascertained. *Wolmershausen* v. *Gullick*, 62 L. J., Ch. 773 ; [1893] 2 Ch. 514 ; 3 R. 610 ; 68 L. T. 753.

2. Recoupment.

By Custom of London.]—By the custom of London, where a surety pays a debt, he shall maintain an action against the principal, though he has not counter bond. *Layer* v. *Nelson*, 1 Vern. 456.

Effect of subsequent Accord.]—An annuity bond was executed by two brothers, one as principal, the other as surety. By agreement afterwards, between them and a third brother, for the settlement of their several claims and debts, and for the apportionment of property to meet the latter, the annuity bond was included. The surety in that bond was afterwards compelled to pay ; and his representative brought an action against their principal to be reimbursed :—Held, that the agreement was an accord, in respect of the annuity bond ; and that as third parties were bound by that agreement, the surety was also bound ; and that the action could not be maintained. *Cartwright* v. *Cooke*, 3 B. & Ad. 701 ; 1 L. J., K. B. 261.

Bankruptcy of Principal—Right of Surety to Prove.]—Surety for bankrupt not entitled to prove for purpose of voting at first meting unless he has paid the debt. *Whittaker, Ex parte, Parrott, In re*, 63 L. T. 777 ; 39 W. R. 400 ; 8 Morrell, 49.

Under s. 37 of the Bankruptcy Act, 1883, the surety of a bankrupt is entitled to prove against the bankrupt's estate, although he has not paid the debt for which he is liable. *Delmar, Ex parte, Herepath, In re*, 38 W. R. 752 ; 7 Morrell, 129, 190.

A bank held the guarantee of B. for their debtor's account, whereby it was provided that "the guarantee should extend to the repayment of all moneys which should at any time be due from the debtor to the bank, and should be a continuing guarantee to the extent of 800*l*. . ." and "that the guarantee should not be considered as wholly or partially satisfied by the payment or liquidation at any time or times thereafter of any sums for the time being due, but should extend to and be a security for every and all future sum or sums of money at any time due to the bank thereon, notwithstanding any such payment or liquidation ;" and "that all dividends, compositions, and payments should be taken or applied as payments in gross, and that the guarantee should apply to secure any ultimate balance due to the bank." The debtor having filed a petition for liquidation, B. paid 800*l*., the amount of his guarantee, to the bank. Upon a question whether the bank, or B., was entitled to prove for the 800*l*. :—Held, that B. having by the guarantee contracted himself out of his original right, in favour of the bank, the latter was entitled to prove for the whole amount of their debt, including the 800*l*. paid by B. *Midland Banking Co., Ex parte, Sellers, In re*, 38 L. T. 395.

Principal and surety, on a note payable by instalments ; after one payment became due, principal discharged under the Insolvent Debtors Act. Bill by creditor, and decree against surety, and him to have remedy over against effects of the principal for the first money due on the first payment, and the common decree for the rest. *O'Carroll's Case*, Ambl. 61.

Surety in a bond for the bankrupts after the bankrupts obtain their certificate, joins with them in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety :—Held, that this was not equivalent to payment by the surety so as to enable him to prove under the commission. *Sergeant, Ex parte*, 1 Glyn & J. 183. Affirmed 2 Glyn & J. 23.

Right to Dividend where Creditor proves.]—A. guaranteed to B. & Co. the payment of all goods supplied by them to H. until they received notice from C. of the discontinuance of the guarantee, "but so as A.'s liability under the guarantee should not at any time exceed 250*l*." H. afterwards became bankrupt, and owed B. & Co. for goods, 657*l*., upon which sum they received a dividend in the bankruptcy. A. paid the 250*l*. under his guarantee :—Held, that A. was entitled to receive from B. & Co. a proportionate part of the dividend. *Hobson* v. *Bass*, L. R. 6 Ch. 792 ; 19 W. R. 992.

Four directors of a company, by way of security for any balance which might be due from the company to a bank, gave the manager of a branch of the bank their promissory note for 2,000*l.*, and the manager indorsed the note to the bank. The company was wound up. The bank proved in the winding-up for 3,659*l.* as due by the company to the bank, and was declared entitled to a dividend of 1,051*l.* on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank 2,067*l.* for debt and interest due on the note :—Held, that the giving the note was in pursuance of an ordinary contract of suretyship, and that the surety who had paid the 2,067*l.* was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank. *Gray* v. *Seckham*, 42 L. J., Ch. 127 ; L. R. 7 Ch. 680 ; 27 L. T. 290 ; 20 W. R. 920.

Surety for indemnity to a limited amount, having paid to the extent of his engagement, entitled to dividends, upon proof by the creditor under the bankruptcy of the principal debtor, subject (see *Turner, Ex parte*, 3 Ves. 243 ; 3 R. R. 90) to a deduction of the porportion of dividend upon the residue of the debt proved beyond that for which the surety was engaged, supposing that expunged. The surety not entitled to the benefit of the proof against other estates upon a distinct security. *Paley* v. *Field*, 12 Ves. 435 ; 8 R. R. 349.

A surety by bond for advances generally, but under a limited penalty, is not liable beyond the penalty : by paying the penalty, he is entitled to a proportion of the dividends from a proof by the creditors to a greater amount under the bankruptcy of the principal debtor ; and a surety may compel the creditor to prove under the commission against the principal, and to become a trustee of the dividends for such surety having paid the whole. *Wood, Ex parte*, cor. *Ld. Thurlow*, Bridg. Ind.

A person who becomes surety for a limited amount of a debt has, on paying the amount for which he is liable, all the rights of a creditor in respect of that amount, and is entitled to share in the security held by the creditor for the whole debt. *Goodwin* v. *Gray*, 22 W. R. 312.

Retainer by Executor.]—A surety having paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree. *Boyd* v. *Brooks*, 34 L. J., Ch. 605 ; 12 L. T. 38 ; 13 W. R. 419.

Executor, surety with testator for another allowed to retain out of estate whole amount, due on bond. *Bathurst* v. *De la Zouch*, Dick. 460.

Retainer by Agent.]—The obligor of several bonds, in which A., his solicitor, joined as surety, conveyed certain real property to A., upon trust to sell, and out of the proceeds of the sale to pay the bond creditors. The creditors did not execute, nor had any notice of the deed :—Held, that the deed was a mere deed of agency, and not binding in favour of the creditors ; but that A. was entitled to retain the estates conveyed to him until he should be discharged from his liability as surety under the bonds. *Wilding* v. *Richards*, 1 Colly. 655 ; 14 L. J., Ch. 211.

Transfer of Security by Surety to Creditor—Liability of Principal to Surety for Money paid.]—Where at the trial of an action for money paid, the jury found that the plaintiff was surety, and the defendant one of the principals, on a promissory note, and it was also proved that the plaintiff had transferred a mortgage security, which was his property, to the holder of the note, who thereupon released him from liability and, which security was valued by the jury (under the direction of the judge) at a certain sum ; but it did not appear that any cash was paid on foot of the security or otherwise, by or on behalf of the plaintiff :—Held (diss. O'Brien, J.), that the plaintiff was entitled to retain the verdict entered for him at the trial for the value of the mortgage. *Barclay* v. *Gooch* (2 Esp. 571) discussed. *Fahey* v. *Frawley*, 26 L. R., Ir. 78.

Amount.]—A surety who compounds a debt for which his principal and himself have become jointly liable, and takes an assignment of that debt to a trustee for himself, can only claim against his principal the amount which he has actually paid. *Reed* v. *Morris*, 2 Myl. & Cr. 361 ; 6 L. J., Ch. 197 ; 1 Jur. 233.

The plaintiff and defendant being joint makers of a promissory note, the defendant as principal, and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default :—Held, in an action on this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages. *Loosemore* v. *Radford*, 9 M. & W. 657 ; 1 D. (N.S.) 881 ; 11 L. J., Ex. 284.

Formerly it was supposed, that in the case where one of several sureties paid the whole debt owing from the principal, his remedy was only in equity for a contribution ; but in modern times it has been held, that if one in the nature of a surety pays a debt, he may maintain an action against the party liable for the debt. *Stirling* v. *Forester*, 3 Bligh, 575 ; 22 R. R. 69.

Annuity bond forfeited when the grantor was discharged under an insolvent act, which provided that future estate should not be discharged ; the penalty, being less than the subsequent arrears, was allowed as the debt, and not only in favour of the purchaser of an annuity, but also of a co-obligor as surety, having compounded with the purchaser, and obtained possession of the securities, by repaying the money advanced with the arrears then due, being at that time less than the penalty. *Butcher* v. *Churchill*, 14 Ves. 569.

Interest.]—A surety, who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest upon the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made until many years after payment. *Petre* v. *Duncombe* 2 L. M. & P. 107 ; 20 L. J., Q. B. 242 ; 15 Jur. 86.

A. as principal and B. as surety joined in granting an annuity for the life of C., and A. assigned to trustees a policy of insurance upon his own life, upon trust to permit C., after the death of A., out of the money insured or the interest thereof, to receive the annuity, and A. and B. executed their joint and several bond conditioned to secure the punctual payment of the annuity. The executors of A. received the

amount of the policy, and invested it upon Government securities. The executor of B. was compelled to pay C. an arrear of the annuity :—Held, that as against the general assets of A. the executor of B. was not entitled to interest on the money so paid by him ; but that he was entitled, as against the sum insured and the interest thereon, to be put in the same situation as if it had been duly applied in payment of the annuity, and therefore to be repaid thereout the money advanced by him with interest. *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141 ; 8 Ir. Eq. R. 164.

Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money, and expenses," which might be incurred by reason of the nonpayment thereof ; one, who, on the insolvency of the other, had made payments on account of his moiety, is not entitled to interest on such payments. *Bell* v. *Free*, 1 Swanst. 90 ; 1 Wils. Ch. 51 ; 18 R. R. 153.

In cases of bond debt, interest is computed only to the commission. In the case of principal and surety, if principal become bankrupt, the surety cannot prove for interest paid by him after date of the commission. *Francis* v. *Rucker*, Ambl. 674.

Surety cannot prove for interest due and paid subsequent to commission under the 6 Geo. 4, c. 16, s. 52. *Wilson*, *Ex parte*, 1 Rose, 137.

A. became surety for payment of two promissory notes upon which his son was liable. He died before the notes were due, and the son being unable to pay them, the trustees of A.'s will borrowed money sufficient for the purpose, and paid the amount due for principal and interest on such notes. By his will A. made his son one of his residuary legatees :—Held, that the son, or his share in the testator's estate, was bound to make good to such estate, in addition to the principal paid by the trustees on account of such notes, interest upon the sums for which the notes were originally made. *Willes* v. *Greenhill*, 30 L. J., Ch. 808 ; 9 W. R. 217.

—— **Compound Interest.**]—B. was a surety for A. in a joint bond to C. and D., for 180,000*l.* conditioned to pay 90,000*l.* with interest at 5 per cent. By a counter bond of equal date, A. was bound to B., in a like penalty, with condition to indemnify B., his heirs, executors, &c., from payment of the said 90,000*l.* and interest, and from all damages he might sustain on account of the nonpayment of the said sum, and interest. After the deaths of A. and B., the executors of B. were called upon, and did pay to C. and D. 22,000*l.* on account of the principal, and several large sums for interest on A.'s debt. In a suit for the administration of A.'s estate, the court allowed the executors of B. to come in as creditors for the several sums so paid by them, and for interest on the 22,000*l.*, but not for interest on the several sums of money paid for interest on the original debt. *Rigby* v. *Macnamara*, 2 Cox, 415 ; 2 R. R. 92.

Priority—Crown Debt]—A surety to the crown, who has paid the debt of his deceased principal, is entitled to the crown's priority in the administration of his principal's estate. *Churchill (Lord). In re, Manisty* v. *Churchill*, 58 L. J., Ch. 136 ; 39 Ch. D. 174 ; 59 L. T. 597 ; 36 W. R. 805.

Sureties of a county treasurer, paying the amount of his recognizance, are not by reason of such payment entitled to priority over the crown, there being a debt due by such treasurer to the crown, ultra the amount of the recognizance. *Reg.* v. *O'Callaghan*, Jon. & C. 154 ; 1 Ir. Eq. R. 439.

—— **Co-sureties.**]—A. mortgaged house to B., and C. and D. were his sureties : money being due for interest, C. paid it to prevent suit. D. lent A. money on equity of redemption, on which C. requested him to include debt, in consideration money, which he did :—Held, that C. shall have his demand first satisfied. *Beckett* v. *Booth*, 2 Eq. Abr. 595.

Costs—No Notice of Liability prior to Writ.]—The plaintiff guaranteed A. that the defendant would, upon demand, from time to time pay to A. what should be due. A demand was made upon the defendant by A., and upon nonpayment a writ was issued against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid. He allowed judgment to go by default, and an execution was levied upon his goods :—Held, that he might recover against the defendant the costs of the writ at the suit of A., but not the costs of the subsequent proceedings. *Pierce* v. *Williams*, 23 L. J., Ex. 322.

Surety in Bond—Whether Specialty Creditor.]—If a surety in a bond (without any counter-security to himself), pays off the bond for his principal, he is merely a simple contract creditor, and not a specialty creditor of the principal debtor. *Simpkins* v. *Poulett*, 2 L. J. (o.s.) Ch. 81.

Evidence of Payment by Surety.]—In an action by the surety on a sheriff's bond against his principal, for the recovery of money alleged to have been paid to the sheriff, the evidence of payment was, that an action having been brought upon the bond against both, they had defended the action by one attorney ; that a compromise had been effected under the authority of the surety ; that the surety had sent a cheque for the agreed sum to the sheriff by post, and that he had subsequently verbally stated to the principal that he had paid the debt and costs in the action, to which the latter made no reply ; and that eight or nine years had elapsed since the compromise :—Held, that there was evidence that the debt had been satisfied by the surety. *Price* v. *Burca*, 6 W. R. 40.

Lien on Property of Principal.]—Sureties having paid the amount of the sums secured by them :—Held, that they had a lien on the principal's property. *Munnings* v. *Bury*, 1 Tam. 147.

A receiver, entitled to shares of the property in the cause as heir-at-law of the testator, and to other shares as purchaser, mortgaged the former shares to his surety, excepting the latter. On default of the receiver the surety had to pay :—Held, that the surety by accepting the mortgage had not waived his general rights and was entitled to a lien on the rest of the receiver's property. *Brandon* v. *Brandon*, 3 De G. & J. 524 ; 28 L. J., Ch. 147 ; 5 Jur. (N.S.) 256 ; 7 W. R. 250.

A factor who becomes surety for his principal, has a lien on the goods sold by him for his principal, to the amount of the sum for which he has so become surety. *Drinkwater* v. *Goodwin*, Cowp. 251.

A surety for a mortgagor, who pays part of the mortgage, is entitled, as against the mortgagor, to a charge on the estate. *Gedye* v. *Matson*, 25 Beav. 310.

Surety for one Partner against another Partner.]—The rights of a surety against his principal are not exactly the same as those of the creditor; and therefore, although a creditor who has recovered judgment against one partner cannot sue another partner, that rule does not take away the rights of a surety for one partner as against another partner. *Kendall* v. *Hamilton* (4 App. Cas. 504), distinguished. *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 55 L. T. 635; 35 W. R. 136.

Recovery of Money paid by Mistake.]—The plaintiff was co-surety with K. in a bond given by B. to the guardians of a union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into B. was a member of a banking firm, into which the moneys of the union were afterwards paid and drawn out by the guardians by cheques in their name. The firm became bankrupt, and B. having ceased to be the treasurer, the guardians demanded of the plaintiff, as such surety, the balance due from B., the late treasurer. The plaintiff, in ignorance of the facts, paid the money:—Held, that the sureties were not liable on the bond, and that the plaintiff having paid the money in ignorance of the facts, was entitled to recover it back. *Mills* v. *Alderbury Union*, 3 Ex. 590; 18 L. J., Ex. 252.

Effect of Indemnity given to Surety.—The plaintiff accepted a bill for the accommodation of R. R. afterwards compounded with his creditors, who executed a release in which the holder of the bill concurred, under a secret understanding between him, the plaintiff, and R. that his rights against the plaintiff should not be prejudiced. R. died, appointing the plaintiff his executor. The plaintiff, at the request of R.'s widow, renounced probate, and allowed her to take out administration, in consideration of which, she and her brother gave him a memorandum, undertaking to indemnify him against all his liabilities as surety for R., on several instruments, and under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed the plaintiff for payment, the plaintiff paid him, and filed a bill against Mrs. R. and her brother for indemnity out of the assets:—Held, that however the case might have stood apart from the memorandum, Mrs. R. had thereby estopped herself from treating the plaintiff's payment to the bill holder as voluntary, and not made in satisfaction of a legal liability, and that she had therefore no defence to the suit; and that although the demand against her brother might be of a legal and not of an equitable nature, yet as he was surety in respect of a demand which, as against his principal, was the proper subject of a suit in equity, he was properly made a party to the suit. *Atkins* v. *Revell*, 1 De G. F. & J. 360.

An indenture was made between A., B., C. and D., which recited the bankruptcy of A., and that he had entered into a composition, with the sanction of the court of bankruptcy, to be paid by instalments secured by promissory notes, and that B., C. and D. had agreed to secure the payment of the last two of the notes upon being indemnified against any loss in respect of their liability on foot of the notes. The deed witnessed that, in pursuance of the agreement, and in consideration of the liability of B., C. and D. on foot of the notes, and in order to indemnify them from any loss in respect thereof, A. charged his stock in trade, and all his real and personal estate, with payment of the amount of the two last instalments of the notes, and gave them powers of attorney, of entry and sale; and out of the proceeds, and after payment of costs, to retain any moneys which they should pay, or should be liable to pay, in respect of the notes; and A. covenanted to indemnify B., C. and D. against payment of the notes. B. was a creditor of A., and took notes signed by A., B., C. and D. for the composition. E., another creditor, took similar notes, and handed them over before they were due to B., in payment of a debt due by himself to B.:—Held, first, that the deed was confined to the liability of the sureties, and did not convert the simple contract debts of A. into specialty debts. *Caldwell* v. *Parker*, Ir. R. 3 Eq. 519; 17 W. R. 955.

Held, secondly, that B. was only a simple contract creditor in respect of notes given to him. *Ib.*

Held, thirdly, that he was a specialty creditor in respect of the notes given to E. *Ib.*

Right to compel Principal to pay accrued Debt.]—When there is an accrued debt, and the surety is liable and admits liability for the amount guaranteed, he has a right to compel the principal debtor to relieve him from his liability by paying off the debt. In order to support such an action it is not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor. *Mathews* v. *Saurin*, 31 L. R., Ir. 181.

A surety may in equity compel his principal to relieve him of his liability by payment of the debt. *Antrobus* v. *Davidson*, 3 Mer. 578; 17 R. R. 130.

Surety depositing money, and indemnifying against expense, &c., may compel creditor to go against principal, and even to prove under commission of bankruptcy for benefit of surety. *Wright* v. *Simpson*, 6 Ves. 734.

The case in which a surety has a right to sue his principal in equity, to be discharged from his liability, is where the creditor has a right to sue his debtor, and refuses to exercise that right, semble. *Padwick* v. *Stanley*, 9 Hare, 627; 16 Jur. 586.

If A. borrows money for B. on a mortgage of his estate, the covenant in the mortgage deed to pay the money will bind him for whom it is borrowed. The mortgagor may file a bill against his debtor to have his estate disencumbered, and so may every surety against his principal, for he shall not be put to his indebitatus assumpsit. *Lee* v. *Rook*, Mos. 318.

Covenant to save harmless decreed in specie; to wit, the principal was decreed to indemnify the surety. *Ranelagh* v. *Hayes*, 1 Vern. 189.

A. is bound for B., and has a counter bond. Equity will compel B. to pay the defendant, though A. is not sued. *Ib.*

Surety for a receiver indemnified out of the balance due to him. *Glossup* v. *Harrison*, 3 Ves. & B. 134; G. Coop. 61.

Payment under fear of Arrest.] — Surety, having paid defendant for fear of arrest, shall recover same in chancery. *Anon.*, Cary, 19.

Rights against Co-surety.]—A surety who pays the debt of his principal has the same rights against his co-surety that he has against the principal. *Woods* v. *Creaghe*, 2 Hog. 50.

3. SECURITIES.

Title to.]—A surety is entitled to the benefit of any security which the creditor has received for the debt, though he has received it after the contract of suretyship. *Campbell* v. *Rothwell*, 47 L. J., Q. B. 144; 38 L. T. 33.

Sureties are entitled to the benefit of every security which the creditor has against the principal. *Mayhew* v. *Crickett*, 2 Swanst. 191; 1 Wils. 424; 19 R. R. 57, 61.

A surety paying off the debt is entitled to the benefit of a security given without his knowledge by the debtor to the creditor, at a different time, to secure another demand in addition to that for which he became surety. *Scott* v. *Knox*, 2 Jones. 778.

A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt. *Wade* v. *Coope*, 2 Sim. 155; 29 R. R. 70.

The right of a surety who pays the debt, to the benefit of subsidiary securities belonging to the principal, is the common equity of the court; therefore, where A. granted land to B., who covenanted to pay rent, and keep premises in repair, and C. executed a mortgage to A. to secure the performance of the covenants, a bill to foreclose (rent being in arrear) filed by A., who afterwards accepted a surrender of the land from B., dismissed; for the subsidiary fund to which C., as surety, was entitled to resort for indemnity being extinguished by A. accepting the surrender, C. was therefore deprived of his remedy over the land. *Harberton* (*Lord*) v. *Bennett*, Beat. 386.

Where the surety pays off debt in bankruptcy, he is entitled to have an assignment of the security to enable him to obtain satisfaction for what he has paid above his own share. *Crisp, Ex parte*, 1 Atk. 133.

—— **Whence Derived.**]—The right of a surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety. Semble. *Yonge* v. *Reynell*, 9 Hare, 809.

—— **Against what Persons.**]—A surety who pays off a debt for which he became answerable, is entitled to all the equities which the creditor could have enforced, and that, not merely against the principal debtor, but also against all persons claiming under him. *Drew* v. *Lockett*, 32 Beav. 499; 9 Jur. (N.S.) 786; 8 L. T. 782; 11 W. R. 843.

In 1853, L. mortgaged real estate to E., and D. joined in that mortgage as surety for L. Subsequently thereto, L. further mortgaged the same estate to C., and in 1854 and 1855 executed several other mortgages to S., who then had notice of the first mortgage. In 1858 the first mortgage was transferred to S. The legal estate in the property comprised in that mortgage and the subsequent mortgages afterwards became vested in S. A portion of the real estates had been sold by E., and S. claimed a priority over D. in respect of the unsold part of the property. On a bill by D., to ascertain the priorities of the several incumbrancers:—Held, that D. was entitled to the unsold realty in priority to S. *Ib.*

A. mortgaged his estate to C., and B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D., who had notice of the first mortgage. The first mortgage was subsequently paid off, partly by B., the surety, but D. got a transfer of the legal estate:—Held, that the surety had still priority over D. for the amount paid by him under the first mortgage, as surety for A. *Ib.*

Marshalling—In what Cases.]—A. having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mortgages B. became surety for repayment of the amount borrowed. A. subsequently became bankrupt, and B. was compelled as surety to pay part of the debt. Upon A.'s death:—Held, as against his assignee in bankruptcy, that B. was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay. *Heyman* v. *Dubois*, 41 L. J., Ch. 224; L. R. 13 Eq. 158; 25 L. T. 558.

A., being indebted to B., lodges several securities for money with him as collateral securities for the debt; A. afterwards borrows a further sum of money of B., for which C. becomes his surety. A. becomes bankrupt, and B. calls upon C. to pay the second debt. The securities in the hands of B. being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in reduction of the second debt. *Praed* v. *Gardiner*, 2 Cox, 86; 2 R. R. 8.

Indorsing Acceptance.]—The indorser of a bill of exchange is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship. *Duncan, Fox & Co.* v. *North and South Wales Bank*, 50 L. J., Ch. 355; 6 App. Cas. 1; 43 L. T. 706; 29 W. R. 763—H. L. (E.)

S. C. R., one of the partners of R. & Sons, in December, 1874, deposited with the N. & S. W. Bank the title deeds of two of his own freehold properties, and signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W. Bank might advance to the firm in the way of discounts. In November, 1875, D. & Co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest, which was declined. D. & Co. were customers of the N. & S. W. Bank. R. & Sons said if D. & Co. would inquire of those bankers they would find it would be all right with their bills. The bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than a nominal liability by putting their names on the bill. D. & Co. thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, R. & Sons stopped payment. The bill became due in February, and was dishonoured. D. & Co., who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills, brought an action against the N. & S. W. Bank to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be

sureties to the bankers for what was due upon the bill:—Held, that D. & Co. were sureties on the bill, and that as such they were entitled to the benefit of these securities. *Ib.*

Mortgage.]—In December, 1854, S. assigned certain premises and a policy of assurance to secure the repayment of a sum of 200*l.* advanced to him by W., and interest. The proviso for redemption was that, on payment of the money, W. would reassign the premises and policy unto S., his executors, administrators or assigns, or as he or they should direct. F., by the same indenture, as surety, covenanted for himself only, with W., that while the 200*l.* or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums. W. at four different periods between May, 1856, and May, 1866, advanced moneys amounting to 530*l.* to S. on the security of the same premises. S. made default in the payment of interest. W. died in 1878, and his executors made a demand upon F. for all arrears, which he paid, and he also paid the premiums on the policy of S.:—Held, that F. was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854. *Forbes* v. *Jackson*, 51 L. J., Ch. 690; 19 Ch. D. 615; 30 W. R. 652.

A., B. and C. executed to D. a mortgage of B.'s lands (comprised in the petition for sale), and of C.'s lands, to secure 2,914*l.* 9*s.* 9*d.*, of which 900*l.* was B.'s debt, and the remainder C.'s debt. The mortgage contained a proviso that, as between A., B. and C., A. was a surety only, and that B. and C. respectively were sureties only for portion of the said sum; yet, with regard to D., they were to be considered as principal debtors, so as not to be released by time being given to any other or others of them, or by any act or omission of D., whereby, as sureties only, they would be released. B. subsequently executed to D. two other mortgages of the lands comprised in the petition. A. having paid D. the full amount of the debt secured by the first mortgage, claimed to stand in D.'s place for 900*l.*, being B.'s debt, and the moiety of 2,014*l.* 9*s.* 9*d.*, being C.'s debt, for which both he and B. were joint sureties, and to be placed on the final schedule on foot of, and in the priority of, the first mortgage:—Held, first, that A.'s claim was valid, and that he was not estopped by the special proviso of the mortgage from relying on his equitable rights of surety. *Kirkwood, In re*, 1 L. R., Ir. 108.

Held, secondly, that a surety joining in a mortgage is entitled on paying off the original mortgage debt to get the benefit of all the securities, held by the original mortgagee, without paying off subsequent mortgages. *Ib.*

Held, thirdly, that the doctrine of tacking is applicable only in the case of existing debt. *Ib.*

D., a partner in a banking firm in New York, in which firm H. and two other persons were also partners, made two promissory notes in the name of H., D., & Co. payable to W. at a bank in New York. The notes came, by several indorsements, into the possession of I., a merchant at New York, and he, on presenting them at maturity for payment, found that they were dishonoured. D. had notice of the dishonour, and subsequently, in consideration of the amount of the notes, conveyed to I. land, which was declared to be intended as a security for payment of the notes and interest. H. being in England, the notes were indorsed to W., and he, in accordance with instructions, sued H. for the amount, and having received information that H. intended to leave the country, he caused him to be arrested. H. was discharged from custody on G. and F. becoming sureties in a bond to the sheriff, and they (H. having absconded) afterwards had to pay the amount of the judgment entered in the action against him. G. and F. then applied to W. for the mortgage executed by D., and were informed that he had nothing to do with it. On bill filed by G. and F. against W., I., S. H., and G. D.:—Held, that he was entitled to have the mortgage delivered up to him; to be paid the costs of the suit out of the amount of the judgment; and to recover against S. H. and G. D. the whole amount of principal, interest, and costs in respect of the notes. *Goddard* v. *White*, 2 Giff. 449; 6 Jur. (N.S.) 1364; 3 L. T. 313.

In a suit by A. against B. and C., a conveyance of an estate by A. to B. was declared void, and set aside for fraud, except as to an intermediate mortgage of the estate made by B. to D., to secure a sum of money lent by D. to B., and for which C. had joined B. as his surety in a bond and covenant to D.; and the decree also directed B. to redeem the estate, and procure its reconveyance to A., and, if he did not do so, gave A. the right to redeem, and to use the name of B. for that purpose, and to recover from B. the money which A. should pay to D. for such reconveyance; and the bill was dismissed against C. A. afterwards procured an assignment of D.'s mortgage to a trustee, and, in the name of the mortgagees, brought an action against C. on his covenant and bond:—Held, that if A. had redeemed D., the debt would have gone as against C.; that C., as the surety of B., would, on payment of the mortgage debt, be entitled to the benefit of the security held by D., such security not having been disturbed by the decree; that the charge of participation by C. in the fraud, whereby B. had been enabled to create the mortgage on the estate, was not a ground for depriving C. of such right; and that C. was, therefore, in a suit for an injunction to restrain A. from suing him on the bond and covenant, entitled to such relief. *Yonge* v. *Reynell*, 9 Hare, 809.

The circumstance of the dismissal, as against C., of the bill brought by A. against B. and C., which prayed that the mortgage debt might be paid by B. and C., was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel C. to pay the debt, though C. might have no equity to be relieved from his legal liability to pay it. *Ib.*

A. was tenant for life of lots 1 and 2, to which B. was entitled in remainder; B., and A. as his surety, mortgaged lot 2, B. alone covenanting to pay. By a contemporaneous deed, B. conveyed his interest in the other lot on trusts to indemnify A. as his surety: A. paid large sums for interest on the mortgage:—Held, that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on lot 1. *Cooper* v. *Jenkins*, 32 Beav. 337; 1 N. R. 383.

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee. *Copis* v. *Middleton*, Turn. & R. 224; 2 L. J. (O.S.) Ch. 82.

A. mortgaged his own estate, and his wife joined him in charging hers; this is a pledge, and the wife shall stand in the mortgagee's place. *Parteriche* v. *Powlett*, 2 Atk. 384. In *Clinan* v. *Cooke* (1 Sch. & Lef. 35; 9 R. R. 3) Lord Redesdale said this case was imperfectly reported by Atkyns.

Sale of Mortgaged Property.]—S., in May, 1850, assigned his interest in a fund in court to J. to secure payment of a loan, and a bond was at the same time entered into by S., and the petitioner and her brother as sureties, as a further security. All the parties resided at Calcutta. In consequence of the terms of the bond not having been complied with by S., a stop order, at the request of the petitioner, was in March, 1853, obtained by J. The petitioner had, however, in February, 1853, at Calcutta, on the demand of the attorney of J., paid the debt and interest. In May, 1853, the stop order was, on the application of S., with the consent of J., discharged, but the mortgage deed remained in the possession of the agents of J. The residue of the fund belonging to S. was, by an order of December, 1855, ordered to be paid over to his appointees, and thereupon the surety presented a petition, praying that so much of the fund as might be necessary might be sold and paid to her in satisfaction of her demand against S.:—Held, that the petitioner was entitled to the relief which she prayed, and that she had adopted the proper means to obtain redress. *Allen* v. *De Lisle*, 3 Jur. (N.S.) 928; 5 W. R. 158.

The court will not, sitting in bankruptcy, on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of the debt secured by recognizance, or for payment of any other security except a mortgage. *Usher, Ex parte*, 1 Ball & B. 197.

Life Policy—Right to Sum Insured.]—The money payable on a policy of insurance on the life of A. deposited with the insurance company as a security for a loan to B. is to be paid to the surety of B., satisfying the loan, and cannot be set off against a debt due by A. to the insurance company of which B.'s surety had no notice. *Jeffery's Policy, In re*, 20 W. R. 857.

Vendor's Lien—Delivery Order.]—On the 3rd of March goods belonging to C., lying at the St. Katharine Dock, in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt-day, the 18th of March, the plaintiff's clerk lodged the order at the London office of the Docks Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the Dock House with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the Docks Company, who refused to act upon it. In an action by the plaintiffs, claiming as against the Docks Company, C., and D., to be entitled to the goods:—Held, that D. was the surety, and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendor's lien had passed to D; that the title to the goods was in D. *Imperial Bank* v. *London and St. Katharine Docks Co.*, 46 L. J., Ch. 335; 5 Ch. D. 195; 36 L. T. 233.

Promissory Note—Set-off against Debt due from Surety to Principal.]—A surety for a debt of a company paid the debt after the date of an order for winding up the company under the Joint Stock Companies Acts, 1856 and 1857. Among the securities for the debt in the hands of the creditor was a promissory note of the company:—Held, that the surety was entitled to set off against a debt due from him to the company an equal amount of the money due from the company on the note. *Moseley Green Coal and Coke Co., In re, Barrett's Case*, 4 De G. J. & S. 756; 12 L. T. 193; 13 W. R. 559.

Judgment.]—A co-debtor who has paid the entire debt in respect of which judgment has been recovered against himself and the other co-debtors, is entitled to an assignment of such judgment, and it is no defence to an action by him against the judgment creditor for refusing to assign it, to plead that such judgment had become satisfied by payment by such co-debtor after he had been taken in execution on the judgment. *Batchellor* v. *Lawrence*, 9 C. B. (N.S.) 543; 30 L. J., C. P. 39; 6 Jur. (N.S.) 1306; 3 L. T. 508; 9 W. R. 373.

The plaintiff was the drawer of a bill of exchange for 106*l.* as surety for M., the acceptor. The bill was dishonoured at maturity, and the defendant sued the plaintiff and M. on the bill. Against M. he obtained judgment by default, and against the plaintiff on the trial of the action. The plaintiff paid the amount. The plaintiff applied to the defendant for an assignment of the judgment against M. The defendant refused to assign, and the plaintiff brought an action:—Held, that the plaintiff was primâ facie entitled to recover as damages the value of specific assets which would have been available for execution under the judgment, if assigned, and that it was not incumbent on him in the first instance to shew that there were no other assets available. *Oddy* v. *Hallett*, 1 Cab. & E. 532.

A surety is entitled to the benefit of all securities obtained by the creditor from the principal for the debt; and where a surety pays a debt secured by separate judgments obtained against himself and the principal, upon their joint and several bond, he may compel the creditor to assign to him the judgment obtained against the principal. *Mara* v. *Ryan*, 2 Jones, 715.

Where a creditor recovered judgment on a bill of exchange (in which the plaintiff was joined as surety) against the principal debtor, and also against the bail in the action, and the surety "paid and satisfied" both judgments, and took assignments thereof:—Held, that he could not recover on the judgment against the bail. *Armitage* v. *Baldwin*, 5 Beav. 278.

A. brought separate actions against B. and C. for the payment of the amount of a joint and several promissory note given by B. and C., his surety, to A., and recovered judgment in both actions; A. issued out execution only against C., the surety, who thereupon paid the debt and costs. C. dying, his administratrix filed a bill against A. and B. for an assignment of the judgment obtained by A. against B., the principal debtor:—Held, that as the debt was discharged, the judgment was satisfied, and could not be enforced at law against B., and that a court of equity would not compel an assignment, and that judgment was only available at law for the costs of the action against the principal. *Dowbiggen* v. *Bourne*, 2 Y. & Coll. 462; Younge, 111; 6 L. J., Ex. Eq. 82; 1 Jur. 102.

B. became surety for S. by bond and several judgment of 1807; and S. afterwards became surety for B. to nearly the same amount by bond of 1814. A suit for the administration of B.'s assets having been instituted by a judgment creditor of 1816, decrees to account and for a sale were pronounced in 1822. S., having in 1821 been obliged to pay the debt for which he was B.'s surety, procured the creditors of 1807 to prove the debts under the decree:—Held, that they were entitled to be paid the sum reported due to them, but that they should assign their judgment against S. to a trustee for B.'s creditors. *Peoples* v. *Stewart*, Hayes, 90.

As to the assignment of a judgment to a trustee for the benefit of a co-surety, see *Scott* v. *Lowry*, Hayes, 95, n.

A. and B. join in executing a bond and warrant to C., who entered judgment thereon, and issued execution against A.; he, being merely a surety, filed a bill to have judgment assigned upon payment of the debt, which was decreed. *Hill* v. *Kelly*, 1 Ridgw. L. & S. 265.

The principal in a bond being arrested gave bail, and judgment is had against the bail; on a bill by the sureties, who had been sued on the original bond, and paid the money, decreed the judgment against the bail to be assigned to them in order to reimburse them what they had paid with interest and costs. *Parsons* v. *Briddock*, 2 Vern. 608.

Where a judgment on a joint and several bond has been obtained against one of the obligors only, and the co-obligor pays the debt, the judgment is not thereby extinguished; and the co-obligor having obtained an assignment of the judgment is a specialty creditor against the estate of the other. *Kent* v. *Canter*, Wall. Lyn. 364. See *S. C.*, *id.* 366, n.

As to the assignment of a judgment to a surety who has paid the debt, see note to *Kent* v. *Canter*, Wall. Lyn. 364.

Under 19 & 20 Vict. c. 97, *see* infra.

Right to Benefit of Proof in Bankruptcy.]—A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate for the arrears of the annuity subsequent to the commission. *Watkins* v. *Flannagan*, 3 Russ. 421; 1 Glyn & J. 199; 6 Madd. 280. And see *S. C.* at law, 3 B. & Ald. 186.

Bond.]—Bill of surety in a bond, to have it assigned after having paid its amount, dismissed with costs as useless. *Gammon* v. *Stone*, 1 Ves. 339.

Assignment of bond to co-obligor who pays it is of no use, since even the principal may plead payment to action in name of obligee; but action on the case lies, or perhaps indebitatus assumpsit. *Woffington* v. *Sparks*, 2 Ves. 569.

The plaintiff joined the testator as surety in a bond, which he had paid after the death of the testator, taking assignment of the bond; he is only a simple contract creditor of the testator. *Jones* v. *Davids*, 4 Russ. 277.

Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal. *Copis* v. *Middleton*, Turn. & R. 224; 2 L. J. (o.s.) Ch. 82. S. P., *Simpkins* v. *Poulet*, 2 L. J., Ch. 81.

It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule, however, must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. *Ib.*

As to the assignment of a bond to a surety who has paid the debt, see note to *Kent* v. *Canter*, Wall. Lyn. 364.

A. is indebted by bond (in which J. is bound as surety), and also by simple contract, to B.; A. states an account of both debts with B., and makes a bill of sale for securing the balance, which proves deficient. On a bill by the surety, decreed the money arising by the bill of sale should be applied towards discharge of both debts in proportion. *Perris* v. *Roberts*, 1 Vern. 34.

Surety paying off specialty debts is to be considered as a specialty creditor. *Robinson* v. *Wilson*, 2 Madd. 434.

A., together with B. and C. as his sureties executed a bond to D., for securing 300*l.* and interest; the debt is paid by C., with the proper money of A., but C. neglects delivering up the bond to A. to be cancelled; C. afterwards procures this bond to be assigned as a collateral security for a debt of his own:—Held, that this assignment was a gross fraud in C., and a perpetual injunction was granted to restrain all further proceedings upon the bond. *May* v. *Harman*, 4 Bro. P. C. 156.

Recognizance — Crown Debt — Priority.] — Upon the appointment of A. to the office of county treasurer in 1831, he, together with four other persons, B., C., D. and E., entered into security by recognizance, whereby A. acknowledged himself indebted to the king in 7,000*l.* sterling; by the same instrument B. and C. acknowledged themselves to be jointly and severally indebted in 5,000*l.* sterling; and D. and E. in like manner in 2,000*l.* sterling. In the condition (which was that A. should duly account, pursuant to the 4 Geo. 4, c. 33) the instrument was described as "the foregoing recognizance." In 1837 A. resigned the office of treasurer, being a defaulter to the amount of 18,000*l.* and upwards, of which sum about 4,000*l.* was due to the crown, and the residue to the county:—Held, that this was a recognizance securing a single sum of 7,000*l.* and no more:—Held, also, that 7,000*l.* British was the amount thereby secured, although the amount which the 4 Geo. 4, c. 33, required such treasurer

to secure was 7,000*l.* Irish; and that upon payment of that sum by A., the principal, he was entitled to have the recognizance of himself and sureties vacated; but on payment of that sum by the sureties they were not entitled as against the crown to the benefit of the recognizance acknowledged by A., the principal. *Reg.* v. *O'Callaghan*, Jon. & C. 154; 1 Ir. Eq. R. 439.

Under 19 & 20 Vict. c. 97.]—This act applies to a contract entered into before the passing of the act provided a breach of it has taken place, and payment has been made by the surety after the passing of the act. *De Wolf* v. *Lindsell, Cochran, In re*, 37 L. J., Ch. 293; L. R. 5 Eq. 209; 17 L. T. 487; 16 W. R. 324.

The court has no power under this provision to enforce by order the remedy there given. *Phillips* v. *Dickson*, 8 C. B. (N.S.) 391; 29 L. J., C. P. 223; 6 Jur. (N.S.) 401; 2 L. T. 185; 8 W. R. 390.

A surety is not entitled to have an assignment of the principal security unless he pays the debt in full. *Ewart* v. *Latta*, 4 Macq. H. L. 983.

Where two properties are mortgaged by A. to B. for distinct sums, and C. is surety for the one only, the right of B. to retain all the securities until repaid both debts overrides the right of C. to have the benefit of the securities for that debt for which he is surety. *Farebrother* v. *Wodehouse*, 23 Beav. 18; 26 L. J., Ch. 81; 2 Jur. (N.S.) 1178; 5 W. R. 12.

A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not. *Pearl* v. *Deacon*, 24 Beav. 186; 3 Jur. (N.S.) 879; 5 W. R. 702. S. P., *Strange* v. *Fooks*, 4 Giff. 408; 11 W. R. 983.

—— **Satisfaction of Judgment.**]—The right of a co-surety under 19 & 20 Vict. c. 97, who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the circumstances that such surety has not obtained an actual assignment of the judgment. *M'Myn, In re, Lightbown* v. *M'Myn*, 55 L. J., Ch. 845; 33 Ch. D. 575; 55 L. T. 834; 35 W. R. 179.

—— **Breach of Trust—Costs Paid by Co-trustee.**]—A. and B. were trustees. B. was guilty of a breach of trust. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate. A. afterwards paid money on account of these costs, after the passing of the 19 & 20 Vict. c. 97; and it was held that the money was paid by A. in the character of surety, and therefore that he was entitled, under the 5th section, to claim as a specialty creditor on account of it. *Lockhart* v. *Reilly*, 1 De G. & J. 464; 27 L. J., Ch. 54.

—— **Right of Distress.**]—A right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5. *Russell, In re, Russell* v. *Schoolbred*, 29 Ch. D. 254; 53 L. T. 365—C. A.

Discharge of Surety by Loss of Securities.]—*See* ante, cols. 1214, 1215.

Given by Principal to Surety—Covenant to continue Mortgagee as Consignee.]—Merchants in London agreeing to become sureties for a West Indian planter, on being secured by a conveyance of his plantation, in trust, with a covenant that they should be continued as consignees till the expiration of five years after the reimbursement of what they might advance:—Held, entitled to the benefit of this covenant. Whether a covenant to continue a mortgagee as consignee after payment of the debt is valid, quære. *Bunbury* v. *Winter*, 1 Jac. & Walk. 255; 21 R. R. 159.

—— **Priority of Creditor.**]—A. bound with his father for the debts of the father, who enters into a statute to the son to pay the debts, and indemnify the son; one of the creditors delivers up his bond, and takes a mortgage from the father. The son shall not set up the statute to defeat the mortgage. *Legriel* v. *Barker*, 2 Vern. 39.

—— **To one Co-surety—Duty to bring into Hotchpot.**]—A surety who has obtained from the principal debtor a counter-security for the liability which he has undertaken is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security. *Steel* v. *Dixon*, 50 L. J., Ch. 591; 17 Ch. D. 825; 45 L. T. 142; 29 W. R. 735.

Five sureties executed a guarantee to a bank, by which they jointly and severally undertook to repay to the bank the balance for the time being owing to them by a customer on his current account to the extent of 2,000*l.* Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than 2,000*l.* to the bank, whereupon the bank called upon the sureties to pay them 2,000*l.* under the guarantee. The sureties paid this sum in unequal amounts. The principal debtor afterwards died, and the policy money was received by the surety with whom the policy had been deposited:—Held, that, inasmuch as the surety with whom the policy had been deposited was bound, upon the principle of *Steel* v. *Dixon* (17 Ch. D. 825), to bring the policy money into hotchpot for the benefit of his co-sureties, the deposit in effect enured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guarantee. *Berridge* v. *Berridge*, 59 L. J., Ch. 533; 44 Ch. D. 168; 63 L. T. 101; 38 W. R. 599.

A., one of three sureties who had become bound to the extent of 2,000*l.* to a corporation for the due accounting of the office of its treasurer, B., received formal notice from the corporation that B. was a defaulter, and on the next day took from B. a deposit note of a bank for 2,300*l.*, which had been placed in the bank by B., one month previously, in the name of his daughter. On a bill filed by the corporation against B., who had absconded, and the three sureties, to make good the amount found due by B. ultra the 2,300*l.*:—Held, establishing the liability of the sureties, that the circumstances under which A. received the 2,300*l.* were such as ought to have induced him to make

inquiry, and that, having neglected to do so, he was bound to restore that amount, with interest. *Berwick-upon-Tweed Corporation* v. *Murray*, 7 De G. M. & G. 497; 26 L. J., Ch. 201; 3 Jur. (N.S.) 847; 5 W. R. 208.

Given by Third Party to Creditor.]—Settlement by a husband of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife of the interest to become due, and of the principal sum in the event of there being no children of the marriage:—Held, the surety not entitled to any remedy in equity under the assignment in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement, a charge of fraudulent concealment not being sufficiently established; and even if fraud had been fully made out against the wife, it seems it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor. *Jackson* v. *Hobhouse*, 2 Mer. 483; 16 R. R. 200.

D. ACTION AGAINST SURETY.

1. GENERALLY.

Who may Sue.]—Where a father, on his son's entering as an underwriter at Lloyd's, gave the committee of that body a letter by which he held himself responsible for all his son's engagements in that capacity, in an action on the guarantee by the committee:—Held, that the committee of Lloyd's, and the corporation of Lloyd's, as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons, on the ground, as to the outsiders, that the brokers through whom the son's engagements with them were contracted were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their benefit. *Lloyd's* v. *Harper*, 50 L. J., Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452—C. A.

Parties.]—All obligors in joint and several bond, principals, and sureties must be parties generally. Exception where the surety is insolvent or has paid nothing. *Cockburn* v. *Thompson*, 16 Ves. 326.

—— **Principal.**]—The bill stated that the plaintiff, with the parol consent of the defendant, a surety, had by deed released the principal debtor, and that, having brought an action at law against the surety, it had been held, that the surety was released. The bill prayed payment by the surety of the debt:—Held, on demurrer, that the principal debtor was a necessary party to the suit. *Brooks* v. *Stuart*, 1 Beav. 512; 8 L. J., Ch. 279.

—— **Representative of Deceased Surety.**]—One of three sureties having died after claims against them had been established in a suit, and after a sum of money had been paid by them into court:—Held, that, for the purposes of the suit, a representative of the deceased surety was a necessary party, though the court refused to declare in the suit as constituted the liabilities of the sureties inter se. *Berwick-upon-Tweed Corporation* v. *Murray*, 7 De G. M. & G. 497; 26 L. J., Ch. 201; 3 Jur. (N.S.) 847; 5 W. R. 208.

If a bill be brought against principal and one surety, and it is admitted that the other is dead insolvent, and there are no personal assets, his representatives need not be made parties. *Madox* v. *Jackson*, 3 Atk. 406. And see *Angerstein* v. *Clark*, Dick. 738.

Right of Set-off.]—In an action by the payee of a joint and several note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defence, to plead a plea of set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose. *Becherraise* v. *Lewis*, 41 L. J., C. P. 161; L. R. 7 C. P. 372; 26 L. T. 848; 20 W. R. 726.

The plaintiff signed and delivered to the defendant the following document: "In consideration of your having, at my request, agreed to become a director of the Surrey Gas Association, and to be and act as director, I hereby undertake and agree to guarantee, indemnify, and save you harmless from and against all losses, costs, charges, damages, and expenses which you may bear, incur, sustain, or be put to by reason thereof, or on account of actions as director, and I further agree to accept a transfer of twenty-four of your shares in the association when requested by you, such transfer to be at my own expense, costs, and charges, and I undertake to pay all calls for and in respect of such shares." The plaintiff having afterwards sued the defendant for a debt:—Held, that the defendant might set off the expenses incurred by him as a director as money paid for the plaintiff's use. *Hutchinson* v. *Sydney*, 10 Ex. 438; 3 C. L. R. 174; 24 L. J., Ex. 25; 3 W. R. 65.

A declaration that in consideration the plaintiff would accept, for the defendant's accommodation, a bill of exchange, and would deliver it to him in order that he might negotiate it for his own use, the defendant promised to indemnify and save harmless the plaintiff from any loss or damage by reason thereof, and that the plaintiff accepted the bill, yet the defendant did not indemnify and save harmless the plaintiff from loss or damage by reason thereof, and the plaintiff, as acceptor, was obliged to and did pay the holder the amount of the bill with interest, and the costs of an action brought on the bill, and the plaintiff also incurred costs and expenses in defending and settling the action. Plea to the plaintiff's claim in respect of the amount of the bill and interest, a set-off. Another plea to the costs of the action, and the costs and expenses incurred in defending and settling the action, that the whole of these were incurred at the defendant's request, concluding with a set-off:—Held, that the first plea was good, as the defendant might sever so much of the plaintiff's claim as was liquidated, and plead a set-off to that; and that the second plea was bad as pleaded to costs incurred, but not paid. *Crampton* v. *Walker*, 3 El. & El. 321; 30 L. J., Q. B. 19; 7 Jur. (N.S.) 43; 9 W. R. 98.

A guarantee, being a mere contract of indemnity, cannot form the subject of a set-off.

Morley v. *Inglis*, 5 Scott, 314; 4 Bing. (N.C.) 58; 6 D. P. C. 202; 3 Hodges, 270; 7 L. J., C. P. 11.

A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes, C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration de bonis non of B., and sued A. on the bond:—Held, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. *Jones* v. *Mossop*, 3 Hare, 568; 13 L. J., Ch. 470; 8 Jur. 1064.

Joint Debt of Defendants—Debt due from Plaintiff to Co-surety.]—Action on a covenant to pay all liabilities which the plaintiff might incur under a deed of assignment made between the plaintiff and other parties. The defendant pleaded that the covenant was the joint and several covenant of himself and one Wilson, and that before action the plaintiff was indebted to Wilson in an amount exceeding the plaintiff's claim against the defendant; and that Wilson had assigned the plaintiff's debt to himself and the defendant in equal shares as tenants in common. As to one-half of the plaintiff's claim the defendant claimed to set off one half of the debt so assigned, and as to the other half, the defendant said that he was entitled to be exonerated by his co-surety Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and was entitled to set off the share remaining vested in Wilson against this part of the plaintiff's claim:—Held, that the defence was no answer to the plaintiff's claim. *Bowyear* v. *Pawson*, 50 L. J., Q. B. 495; 6 Q. B. D. 540; 29 W. R. 664.

Right of Creditor to Benefit of Counter-security given by Debtor to Surety.]—A creditor is not entitled to the exclusive benefit of a counter-security given by his debtor to the person who guarantees the payment of the debt. Dictum in *Maure* v. *Harrison* (1 Eq. Cas. Abr. 93; 20 Vin. Abr. 102) disapproved. *Walker, In re, Sheffield Banking Co.* v. *Clayton*, 61 L. J., Ch. 234; [1892] 1 Ch. 621; 66 L. T. 315; 40 W. R. 327.

Principal primarily Liable.]—The recognizance of a surety for a tenant will not be put in suit unless an attempt has been made to enforce the rent from the tenant by attachment, or it is shewn that such a proceeding would be useless. *Newman* v. *Mills*, 1 Hog. 291.

The East India Company having compelled payment from a surety in India by their power over him as one of their servants, without an account or proceeding against the principal, though solvent, and otherwise under harsh circumstances, he was restored to the same situation by a decree for repayment, with interest at 5 per cent., upon giving security for repayment in case in a future suit by the company he should be held liable; the court would not, in the circumstances, give Indian interest. *Law* v. *East India Co.*, 4 Ves. 825.

A. is principal in a recognizance of 5,000*l.*, and B. and C. sureties. A. afterwards jointures his wife, before marriage, in some lands, without notice either to the wife or her friends of this recognizance, and devises his real and personal estate to B., one of his sureties, and dies. First the personal estate of A., the principal, shall be applied towards the recognizance; then his lands devised, the devisee being a volunteer; next the paraphernalia of the wife of A., the principal; and lastly, the two sureties shall contribute to make up the deficiency. *Tynt* v. *Tynt*, 2 P. Wms. 542; Mos. 192.

Proof in Bankruptcy of Surety.]—An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and by a judgment for 2,100*l.* entered up against A. and C. The annuity remained unpaid from January, 1823, A. having left the country; and in February, 1824, C. became bankrupt, and afterwards obtained his certificate. C. having died, B. filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity nor the sum due on the judgment was provable under C.'s commission, and therefore that his certificate was not a bar to the plaintiff's demand. *Johnson* v. *Compton*, 4 Sim. 37.

Form of Judgment against Co-sureties.]—In a decree against sureties who were jointly and severally liable, the Lord Chancellor refused to make any declaration for contribution between them equally. *Berwick-upon-Tweed Corporation* v. *Murray*, 7 De G. M. & G. 497; 26 L. J., Ch. 201; 3 Jur. (N.S.) 847; 5 W. R. 208.

Right of Surety to Restrain Action.]—A surety has no equity to restrain an action against him by the creditor on the ground that the creditor has instituted proceedings in equity under which he may obtain relief against the principal, in the absence of circumstances to prevent the surety from recovering over against his principal. *Jackson* v. *Digby*, 2 W. R. 540.

Evading Execution.]—A surety is no more justified in placing the whole of his property out of the reach of liability to pay the debt than if he were the principal debtor. *Goodricke* v. *Taylor*, 2 De G. J. & S. 122; 3 N. R. 678; 10 Jur. (N.S.) 414; 10 L. T. 113; 12 W. R. 632.

Whether Surety a Necessary Party to Action against Principal or Other Surety.]—A. having a general power of appointment over an estate in the event of his surviving his father, joined with B. and C., his sureties, in a covenant to pay an annuity to the plaintiff, and A. covenanted that if he should survive his father, he would create a term in the estate for securing the annuity. A.'s father died, and A. granted other annuities to the plaintiff, but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, and one of them, on behalf of himself and the others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, the plaintiff filed his bill against A., the trustees, and the plaintiff in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself and the other incumbrancers might be declared, that he might redeem the securities which should appear to be prior to his own, and might have the benefit of the decree as to that part of his demand for

which he should not be entitled to priority over the trust deed:—Held, on demurrer, that the sureties were not, but that all the creditors who had executed the deed were, necessary parties. *Newton* v. *Egmont*, 4 Sim. 574.

A. borrowed of the plaintiff a sum of money, which was secured by the joint bill of A. and B., his surety; part of the money was further secured by the joint and several bond of A. and his sureties, B. and C. A. afterwards further secured it by an assignment of his claims against a partnership. To a bill by the plaintiff to obtain payment from that partnership:—Held, that C. was not a necessary party. *Adams* v. *Thompson*, 6 L. J., Ch. 109.

2. Pleadings.

Claims.]—If B., by a guarantee, undertakes to A. to answer for the payment of goods to be sent by him to C., A. cannot maintain indebitatus assumpsit against B. for the price of the goods sent to C. accordingly, but must declare specially on the guarantee. *Mines* v. *Sculthorpe*, 2 Camp. 215.

A. drew a bill nominally for a specific purpose, which he was authorised to do, and got it discounted with some bankers who held a guarantee from B. for that particular bill; A. applied the money to other purposes, and B. was obliged to pay the banker under his guarantee. Semble, that A. subjected himself to a special action on the case. *Jones* v. *Fleming*, 7 B. & C. 217; 6 L. J. (o.s.) K. B. 113.

It is not necessary in a declaration against a person, on his undertaking to be answerable for or to pay the debt of another, to state an agreement, a note, or a memorandum, or the terms of any such, or the parties thereto, or that it was in writing or signed by the defendant. *Lilly* v. *Hewitt*, 11 Price, 494.

It is not necessary to aver a request made to the party himself, in the first instance, to pay the debt before the guarantor is resorted to; at least an averment, that he had neglected and refused to repay the money, is sufficient for the purpose of maintaining the action against the guarantor. *Ib.*

A declaration stated that S. was in the custody of the warden of the Fleet, in execution at the suit of the plaintiff, upon a judgment, and that in consideration that the plaintiff would cause him to be discharged, and would take his warrant of attorney for the debt and costs, the defendant undertook that S. should be forthcoming to satisfy the amount of the judgment to be entered up on the warrant of attorney on the 18th July, 1840, at the office of Mr. A., and also that one day's previous notice of meeting S. should be given to Mr. A. Averment, that the plaintiff did discharge S. out of custody, and took a warrant of attorney for the debt and costs. Breach, that S. was not forthcoming to satisfy the amount of the judgment so to be entered up as aforesaid at the day and place agreed on, nor was one day's notice given to Mr. A.:—Held, sufficient, on motion in arrest of judgment, without an averment that judgment was actually entered up on the warrant of attorney. *Page* v. *Jarvis*, 8 M. & W. 136; 10 L. J., Ex. 239; 5 Jur. 412.

A declaration upon an undertaking to indemnify and save harmless the plaintiff from all actions which might be brought by C. for or in respect of rent then due or to become due for premises, stating that C. brought an action against the plaintiff for rent "claimed to be due" for the occupation of the premises for a certain time then elapsed, that the plaintiff was forced and obliged to pay the same, and that the defendant had failed to indemnify him, is bad, for not shewing that the rent in respect of which C. brought his action was due at the time of the defendant's promise, or became due afterwards. *Lesenbery* v. *Evans*, 3 Man. & G. 210; 3 Scott (N.R.) 476.

—— **Construction.**]—A declaration on a guarantee omitted in the description of the contract the following clause: "This guarantee is only to extend to secure moneys becoming due in respect of dealing up to, and inclusive of, the day of receipt, by" (plaintiff), "of a written notice from me" (the guaranteeing party) "to discontinue this guarantee":—Held, no variance. *Jones* v. *Clarke*, 3 Q. B. 194; 11 L. J., Q. B. 206.

A declaration stated that the defendant promised that in the event of A'M. making default in payment of 15*l.* 3*s.*, the defendant would, on such default being made, immediately pay the plaintiff that sum; whereas the terms of the guarantee, as proved, were as follows: "In the event of A'M. making default, I will, immediately on such default being made, and a letter being sent to me at 62, Gower street, Bedford square, giving me notice of such default, pay," &c.:—Held, as the declaration alleged an absolute, while the terms of the guarantee conveyed only a qualified conditional promise to pay on a letter being sent as a condition precedent, that there was a variance between the guarantee declared on and the guarantee proved. *Higgins* v. *Dixon*, 2 D. & L. 124; 14 L. J., Q. B. 329; 10 Jur. 376.

A breach assigned in a declaration, upon a guarantee that the plaintiff would sell and deliver goods to A., the defendant guaranteed the payment in case A. did not pay for them, was, that the defendant had not guaranteed the payment or paid. The defendant pleaded that he had guaranteed the payment:—Held, that the words in the breach were not to be understood as used disjunctively, and that proof that the defendant had executed the instrument of guarantee did not entitle him to a verdict on that issue. *Boyd* v. *Moyle*, 2 C. B. 644.

In an action on the following guarantee: "Whereas W. C. is indebted to you in a sum of money, and may have occasion to make further purchases from you, as an inducement to you to sell him such goods, and continue your dealing with him, I hereby agree and undertake to guarantee you in 100*l.*, payable to you in default on the part of W. C. for two months," the declaration stated the promise to be, to guarantee the plaintiffs in 100*l.* "payable on default of W. C. on two months' notice thereof to the defendant": — Held, a variance. *Allan* v. *Kenning*, 2 M. & Scott, 768; 9 Bing. 618.

A declaration on a guarantee stated the consideration of the instrument to be, that the plaintiff would give credit to a third person "in manner then and there agreed upon between them"; by the correspondence produced in evidence to support such guarantee, the terms on which the credit was stated to be given were "to be agreed upon":—Held, that the substance of the consideration was properly set out, and consequently that there was no variance. *Irving* v. *Mackenzie*, 1 Br. & B. 523.

In an action on a guarantee, the declaration

stated that the defendants undertook to indemnify A. for holding goods in his warehouse on their behalf, and delivering the same up to them when requested so to do: on the production of the instrument, it appeared that the defendants only guaranteed him for holding the goods in his warehouse on their behalf:—Held, that this was no variance, as it must be implied that he was to deliver them up to the defendants. *Sampson* v. *Burton*, 4 Moore, 515; 2 Br. & B. 89.

A declaration on a guarantee stated that P. kept an account with a banking company, and was indebted to them in 800*l.* for money advanced by them to him, and that it was proposed that they should advance to P. more money; and thereupon an agreement was entered into between the company and the defendants, and signed by them, as follows: "We, the undersigned, hereby indemnify (the company) to the extent of 1,000*l.*, advanced or to be advanced to P., but this indemnity to cease when P. shall have paid 1,000*l.* to the credit of his account." The evidence was, that at the time the guarantee was given, the sum of 1,400*l.* was due from P. to the company for money already advanced:—Held, that the guarantee, construed with reference to the facts existing at the time it was given, did not disclose a good consideration, and that if the preliminary averments in the declaration were to be taken as a statement of part of the consideration, they were put in issue by non assumpsit, and were not proved. *Bell* v. *Welch*, 9 C. B. 154; 19 L. J., C. P. 184; 14 Jur. 432.

Recovery on Common Counts.]—Where, on the trial of an action upon a guarantee, for the payment of work done for a third person, the plaintiff at first shaped his case upon the guarantee, but afterwards resorted to the common counts, and made out the defendant's liability as a principal, and recovered a verdict on those counts:—Held, that the verdict could not be disturbed. *Edge* v. *Frost*, 4 D. & R. 243.

A defendant undertook to see the plaintiff paid for certain goods supplied by him to A., at the defendant's request. After the goods had been supplied, and A. had made default in payment, the defendant acknowledged his liability under the guarantee, and promised to pay the plaintiff the price of the goods. Neither the guarantee nor the subsequent promise was in writing:—Held, that the plaintiff was entitled to recover on an account stated. *Wilson* v. *Marshall*, 15 Ir. C. L. R. 467.

Defences—Summary Judgment.]—A surety whose principal has not admitted the debt claimed by the plaintiff, and who has received no particulars of demand, will be allowed to defend an action on a specially-indorsed writ without paying money into court or giving security. *Lloyd's Banking Co.* v. *Ogle*, 45 L. J., Ex. 606; 1 Ex. D. 262; 34 L. T. 584; 24 W. R. 678.

—— **New Agreement.**]—In an action on a contract of guarantee, it is a good bar, that before breach a new contract has been made to pay absolutely. *Taylor* v. *Hillary*, 1 C. M. & R. 741; 3 D. P. C. 461; 1 Gale, 22; 5 Tyr. 373; 4 L. J., Ex. 72.

A declaration stated that the plaintiff engaged C. as collecting clerk, and required security previously to employing him, and, in consideration that the plaintiff would employ C., the defendant gave his guarantee. Plea, that before the defendant made the promise, and before the plaintiff required the security, the plaintiff and C. had agreed together that the plaintiff should employ C., which agreement was in force at the time of the defendant's promise:—Held, that this was a denial that C. was employed at the request of the defendant, and, therefore, that the plea traversed the consideration alleged, and amounted to the general issue. *Lyall* v. *Higgins*, 3 G. & D. 585; 4 Q. B. 528; 12 L. J., Q. B. 241; 7 Jur. 644.

—— **Statute of Frauds.**] — A declaration stated, that the defendant guaranteed the payment of goods furnished by the plaintiff to H., at the defendant's request. Plea, that, before breach of that undertaking, it was agreed that the plaintiff should supply goods to H., and that they should be paid for at the end of three months by a joint bill at four months, to be accepted by the defendant, which agreement the plaintiff, before breach of the former declared on, accepted in full discharge of such former agreement, and released the defendant from performing it:—Held, that the second agreement did not require to be in writing, pursuant to 29 Car. 2, c. 3, s. 4, being an agreement by which the defendant became absolutely bound as an original debtor; and not being an accord and satisfaction, but a substituted contract, afforded a good defence to the action without alleging performance. *Taylor* v. *Hillary*, supra.

The objection that there is no note in writing of a promise to pay the debt of another within 29 Car. 2, c. 3, s. 4, need not be pleaded specially. *Eastwood* v. *Kenyon*, 11 A. & E. 438; 3 P. & D. 276; 9 L. J., Q. B. 409; 4 Jur. 1081.

In an action on a guarantee, the defendant may shew, under the general issue, that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument. *Raikes* v. *Todd*, 1 P. & D. 138; 8 A. & E. 846; 1 W. W. & H. 619; 8 L. J., Q. B. 35.

To an action upon a guarantee, a plea that the promise declared on was a special promise for the debt of another, and that no agreement in respect thereof, nor any memorandum or note thereof in writing, was signed by the defendant, was bad on special demurrer, as amounting to an argumentative denial of the contract or promise alleged. *Reade* v. *Lambe*, 6 Ex. 130; 2 L. M. & P. 67; 20 L. J., Ex. 161.

—— **Breach of alleged Condition.**]—A. and B. gave a joint and several guarantee to be responsible for the printing account of a company; B. afterwards became the secretary of the company; A. was sued separately on the guarantee, and pleaded equitably, that he gave it on the faith that some other person than B. should be secretary, which the plaintiff well knew and assented to; and that he had never consented that B. should be secretary:—Held, bad. *Burbridge* v. *Child*, 10 Jur. (N.S.) 106.

Replication.]—Where a defendant pleads that the contract declared upon was a guarantee for the debt of another, and that no memorandum thereof, stating the consideration, was or is in writing signed by the defendant, or any person authorised by him; the plaintiff may reply, that a memorandum of agreement in writing, stating the consideration, was signed by the defendant, without setting out such memorandum in the replication. *Wakeham* v. *Sutton*, 2 A. & E. 78;

4 N. & M. 114; 4 L. J., K. B. 33. *S. P.*, *Lysaght* v. *Walker*, 5 Bligh (N.S.) 1.

The defendant and P. agreed for the sale by P. to the defendant of the "put or call" of some foreign railway shares, at a certain price per share, at any time before or on the 18th February, 1844. Before that day the defendant agreed to resell the option to the plaintiff, and to guarantee the performance of the agreement by P. On the 16th February the plaintiff required the delivery of the shares pursuant to the terms of the agreement, but it was at the same time verbally agreed between him and the defendant and P., that they should be delivered by P. to the plaintiff, not on the 18th February, but on the 2nd March, at Paris. To an action on this agreement the defendant pleaded, that on the 18th February it was agreed between the plaintiff and P., without the knowledge or consent of the defendant, that the shares should not be delivered according to the notice given by the defendant to P. (i.e. for the 18th February), but that the contract should be carried over, and the delivery of the shares postponed until the 1st March; and so that P. made default with the leave and licence of the plaintiff. The replication denied that it was so agreed:—Held, that this put in issue not only the fact of the agreement, but also the fact that it was made without the knowledge or consent of the plaintiff. *Hargreaves* v. *Parsons*, 13 M. & W. 561; 14 L. J., Ex. 250.

3. Evidence.

Judgment against Principal not binding on Surety apart from Agreement.]—In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor. *Young, Ex parte, Kitchin, In re*, 50 L. J., Ch. 824; 17 Ch. D. 668; 45 L. T. 90—C. A.

A judgment in an action inter partes is only binding on the parties to the action and those claiming under them, except in a case where there is an express contract by C. to indemnify B. against an action brought against him by A. In such a case judgment in the action by A. against B. will be conclusive in an action by B. against C. upon the contract of indemnity, because that is the real meaning of such a contract. *Parker* v. *Lewis*, 43 L. J., Ch. 281; L. R. 8 Ch. 1035; 29 L. T. 199; 21 W. R. 923, 928.

Accounts of Principal.]—An account delivered by a principal charging himself is evidence against his surety. *Lysaght* v. *Walker*, 5 Bligh (N.S.) 1.

A rate collector's bond executed by him and sureties was upon the conditions that the collector should collect the rates and pay the amount so collected to the treasurer, that the collector should deliver true and perfect accounts, and should, when required, deliver up his books and pay to the treasurer such money as upon the balance of any accounts should appear to be in his hands. The rate collector absconded, and an action was commenced against the sureties, claiming 223*l.*; the only evidence of the receipt by the collector of this sum was the entries made by him in his accounts:—Held, that these entries were admissible in evidence against the sureties. *Abbeyleix Guardians* v. *Sutcliffe*, 26 L. R., Ir. 332.

Limitation of Liability.]—To an action on a guarantee, the defendant pleaded that the guarantee was given by him on terms which limited his liability thereunder; and the plaintiff traversed this plea:—Held, that, in this state of the record, the plaintiff was not at liberty to object to the admissibility of evidence to prove what those terms were, on the ground that they were not shewn to have been reduced into writing. *Galley* v. *Taylor*, 2 Car. & K. 551.

Nature of Service.]—A declaration stated the consideration to be that A. "would then engage" C. as traveller, and averred that "A. did then engage C."; it was proved that A. had previously employed him in that capacity on one occasion:—Held, that this proof was sufficient. *Norton* v. *Powell*, 4 Man. & G. 42; 11 L. J., C. P. 202.

Delivery of Goods.]—On a guarantee to pay for goods sold and delivered to a third person, what such person had said respecting the goods sold to him is not evidence to charge the person giving the guarantee; the delivery of them must be proved. *Evans* v. *Beattie*, 5 Esp. 26. And see *Bacon* v. *Chesney*, 1 Stark. 192.

Evidence that, according to the custom of trade, the plaintiffs delivered coals to N. K. daily, and that at the end of every month he gave a bill payable in two months, is not sufficient to charge the defendant upon a guarantee for the payment of coals to be delivered to N. K. at a credit of two months from the delivery. *Hall* v. *Hadley*, 5 Bing. 54; 2 M. & P. 136; 6 L. J. (O.S.) C. P. 216.

If, in an action on a guarantee for payment for goods to be supplied to A., the plaintiff avers that goods were supplied to A., and the defendant pleads non assumpsit, this admits the supply of the goods to A., and no proof is required in support of the averment, and the plaintiff need not give any evidence that the goods were supplied, except with the view of shewing the amount of damages. *Taylor* v. *Hillary*, 7 Car. & P. 30.

Notice.]—A declaration stated that, in consideration that R. J. in his lifetime (of whom the plaintiff was administratrix) would execute a bond to W. J., in the penal sum of 600*l.*, the defendant undertook that he would save harmless and indemnify R. J., his executors and administrators, from any loss or damage, by reason of his executing the bond; the declaration then averred the execution of the bond by R. J., his death, and the grant of administration to the plaintiff; and that she, as administratrix, became liable to pay and satisfy the bond to W. J., of which the defendant had notice; but that he did not indemnify the plaintiff, as such administratrix, from loss or damage by reason of the execution of the bond; by means whereof she, as administratrix, was called upon, and forced, and obliged to pay, and did pay to W. J., 310*l.*, secured by the bond, and a further sum for the costs of an action against her. Plea, that the plaintiff, as administratrix, was not called upon, or forced, or obliged to pay, nor did she pay to W. J., the moneys in the declaration mentioned, nor was she damnified, as therein mentioned. The bond, when produced on the

trial, appeared to be subject to a condition for repayment of the sum secured, with interest, "at or before the expiration of six months' notice to be given to pay the same," and there was no proof of such notice having been given. The defendant had notice of the action being commenced against the plaintiff on the bond (which was stayed by a judge's order on payment of debt and costs), and did not come in to defend it:—Held, that this was sufficient to entitle the plaintiff to recover on the above issue. *Jones* v. *Williams*, 7 M. & W. 493; 9 D. P. C. 252; 10 L. J., Ex. 120.

If, in an action on a bond against a surety, nonpayment by the principal, after a notice in writing required by the condition, is averred in the declaration, and the defendant suffers judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. *Barwise* v. *Russell*, 3 Car. & P. 608.

Negligence of Party Guaranteed.]—The condition of a bond recited a deed of dissolution of partnership between the plaintiff and T., in which was recited an agreement that, subject to the adjustment of the partnership accounts as therein mentioned, the stock-in-trade and partnership effects should belong absolutely to T., and all debts due from the partnership should be paid by T.; and that T., and the defendant as his surety, should indemnify the plaintiff by their joint and several bond against the partnership debts; and the condition was that T. and the defendant, or one of them, should indemnify the plaintiff against the payment of the partnership debts, and all costs, and all actions to be brought in respect thereof. To a declaration on this bond, which set out the condition, and a breach of it in nonpayment of a debt due from the partnership to M., who, in consequence, sued the plaintiff and T. for it, the defendant pleaded that, if the plaintiff was damnified, it was through his own default:—Held, that under this plea the defendant could not give in evidence the deed of dissolution, to shew that it contained certain stipulations as to the adjustment of the accounts, which the plaintiff had not performed, not having paid over to T. a balance alleged to be due to the latter on such adjustment. *White* v. *Ansdell*, 1 M. & W. 348; 1 Tyr. & G. 785; 5 L. J., Ex. 180.

—— **Reduction of Damages.**]—Held, also, that the defendant could not shew, in reduction of damages, that the costs of T.'s defence to the action brought by M. were much less than the costs incurred by the plaintiff. *Ib.*

E. OTHER INDEMNITIES.

1. EXPRESS.

Indemnity or Guarantee—Statute of Frauds.]—*See* ante, cols. 1139, 1140.

On Assignment of Leasehold.]—Under an agreement to assign a lease, the defendant agreed to pay the rent and taxes to become due in respect of the premises after a certain day, and to indemnify the plaintiff against the rent and covenants contained in the lease, and from all loss which he might incur by the nonpayment of such rent, or non-observance of the covenants. No legal assignment was made, but the defendant was let into possession, and some of the plaintiff's goods, which had been left upon the premises, were distrained for the rent and taxes. In an action upon the agreement for not indemnifying, the declaration alleged that goods or chattels of the plaintiff were in and upon the premises with the leave and licence of the defendant, and were liable to be seized and taken; and afterwards the goods were lawfully seized and taken as a distress for arrears of rent due under the lease in respect of the premises, and sold. The defendant pleaded that no goods or chattels of the plaintiff were at any time in and upon the premises with the leave and licence of the defendant, nor was any part of the goods lawfully seized or taken as and for a distress, or sold or disposed of as alleged:—Held, that the statement relating to the leave and licence was immaterial; and that the substance of the plea was, that the plaintiff's goods had not been seized; and that as the facts involved in the issue raised thereon had been found for the plaintiff, the verdict upon such issue should have been entered for him. *Groom* v. *Bluck*, 2 Man. & G. 567; 2 Scott (N.R.) 89; 10 L. J., C. P. 105.

In an action by a lessee against the assignee of a lease for a breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in a lease, he sought to recover the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney, incurred in unsuccessfully defending an action brought against him by the lessor for a breach of one of the covenants in the lease committed after the assignment:—Held, that the lessee was entitled to recover the extra costs as well as the taxed costs. *Howard* v. *Lovegrove*, 40 L. J., Ex. 13; L. R. 6 Ex. 43; 23 L. T. 396; 19 W. R. 188.

On the dissolution of a partnership between H. and R., H. assigned to R. all his interest in two houses belonging to the partnership held under subleases from C. and D., and R. covenanted to pay the rents and observe the covenants and keep H. indemnified against them. R.'s executors sold the houses to B., and B. to a company which went into liquidation. The landlords C. and D. thereupon sued H. for the rent, and he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On the 15th of March, 1883, D. assigned his reversion to H., and in May, 1883, H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the company, and covenanted thenceforth to pay the rent and observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house, and for the amount of the dilapidations in that house:—Held, that the right of H., under R.'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due and paid. Further, this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s executors might have against the persons entitled to the houses at the end of 1882, and that an assignor who pays rent has no lien on the term, and so cannot be prejudiced by its subsequent assignment. Neither was the right defeated on

the ground that H., on paying the rent, became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, and had therefore discharged the estate of R. by releasing a remedy to the benefit of which R. as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5 :—Held, therefore, that H. was entitled to prove against R.'s estate for the rent paid in 1882 on both houses, and that he was entitled to prove for the Lady Day rent on D.'s house; but that H. was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair; nor for the Lady Day rent of C.'s house. *Russell. In re, Russell* v. *Shoolbred*, 29 Ch. D. 254; 53 L. T. 365—C. A.

To Agent making Distress.]—A. gave authority to B. to distrain on the goods of C., and gave him an indemnity against all costs and charges that he might be at "on that account." B. made the distress, and his men being told by the son of C. that a certain cask contained spent liquor of no value, they took the cask to pieces, and let the liquor run off; it was, in fact, cochineal dye belonging to D. For the wasting of it, D. recovered damages against B. in trover:—Held, that B. could not recover the amount of those damages from A. in an action on the indemnity, and that such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress. *Draper* v. *Thompson*, 4 Car. & P. 84.

A landlord signed a warrant of distress in the following form: "I hereby authorise R. I., or his agent, as my agent, to seize and distrain the goods on the premises in possession of M. G., for 9*l.*, being the amount of rent due to me; and for your so doing this shall be your sufficient warrant, authority and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at, or brought against you or your agent on this account." A servant of R. I. having distrained, an action was brought against him by the tenant, for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action the plaintiff was nonsuited:—Held, that, assuming that the servant had done nothing wrong, the indemnity extended to the costs of defending the action brought against him. *Ibbett* v. *De la Salle*, 6 H. & N. 233; 30 L. J., Ex. 44.

—— **Stamping.**]—An undertaking whereby a party describing a distress to be taken for rent claimed to be due to him, engages to indemnify the bailiff who makes the distress, does not require an agreement stamp. *Cox* v. *Bailey*, 6 Scott (N.R.) 798; 6 Man. & G. 193.

To Acceptor of Bill—Voluntary Payment—Estoppel.]—The plaintiff accepted a bill for the accommodation of R. R. afterwards compounded with his creditors, who executed a release, in which the holder of the bill concurred, under a secret understanding between him, the plaintiff, and R., that his rights against the plaintiff should not be prejudiced. R. died, appointing the plaintiff his executor. The plaintiff, at the request of R.'s widow, renounced probate, and allowed the widow to take out administration, in consideration of which Mrs. R. and her brother gave him a memorandum, undertaking to indemnify him against all his liabilities as surety for R. on several instruments, and under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed the plaintiff for payment, the plaintiff paid him, and filed a bill against Mrs. R. and her brother for indemnity out of the assets:—Held, that however the case might have stood apart from the memorandum, Mrs. R. had thereby estopped herself from treating the plaintiff's payment to the bill-holder as voluntary, and not made in satisfaction of a legal liability, and that she had therefore no defence to the suit; and that although the demand against her brother might be of a legal and not of an equitable nature, yet as he was surety in respect of a demand which, as against his principal, was the proper subject of a suit in equity, he was properly made a party to the suit. *Atkins* v. *Revell*, 1 De G. F. & J. 360.

Liability for Interest.]—A. covenants to indemnify lands settled on B. from certain debts, the interest in which B. is afterwards obliged to pay: B. is entitled under the covenant to come against the estate of A. for the sums so paid for interest, together with interest thereon. *Fergus* v. *Gore*, 1 Sch. & Lef. 107.

Costs—Title to Lands.]—The defendant conveyed premises to the plaintiff, and covenanted for good title. An action was afterwards brought against the plaintiff by a party having a better title, and the plaintiff compromised it for 550*l.*:—Held, that the plaintiff, in an action for breach of covenant, might recover the whole sum paid, and his costs as between attorney and client in the compromised suit, though he had given no notice of that suit to the defendant. For, in an action on a general guarantee, the only effect of such want of notice to the indemnifying party is to let in proof on his part that the compromise was improvidently made; and it lies on him to establish that fact, which was not done in the present case. *Smith* v. *Compton*, 3 B. & Ad. 407; 1 L. J., K. B. 146.

—— **Action undertaken at Request.**] — In consideration of the plaintiff's having, at the instance of the defendant, consented to pay to the holder the amount of a dishonoured bill of exchange on which the defendant was liable as indorser, and to bring an action on the bill in the plaintiff's own name against the acceptor, the defendant gave to the plaintiff the following guarantee: "I hereby agree to be answerable to you for all costs, damages, and expenses, which you may sustain by reason of trying the action, and relating and incidental thereto." The plaintiff brought the action against H., who obtained the verdict. H.'s costs of suit were taxed and paid by the plaintiff. The bill of costs of the plaintiff's own attorney in the same suit having been delivered to, but not paid by the plaintiff, he sued the defendant on the guarantee:—Held, that he was entitled to recover, as damages, not only the costs which he had paid to H., but also those for which he was thus liable to his own attorney. *Spark* v. *Heslop*, 1 El. & El. 563; 28 L. J., Q. B. 197; 5 Jur. (N.S.) 730; 7 W. R. 312.

An action having been commenced against a surety on a promissory note, he agreed, that, if the plaintiff would take proceedings against the principal, he (the surety) would pay the extra costs occasioned thereby; the plaintiff having done so, afterwards issued execution against the surety for the balance due on the note, and also the extra costs; the court ordered the execution to be reduced to the extent of the costs included in it. *Evans* v. *Pugh*, 2 D. P. C. 360.

—— **Action for Debt Clearly Due.**]—A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due unless authorised by him to defend. *Gillett* v. *Rippon*, 1 M. & M. 406.

—— **Sheriff.**]—A sheriff, sued for a wrongful arrest, defended the action without communicating with the execution creditor, who was liable to indemnify him:—Held, in a subsequent action by the sheriff against the execution creditor, that, to entitle the sheriff to recover the costs of defending the former action, it should be submitted to the jury to say whether the course pursued in defending the former action was reasonable, under all the circumstances of the case. *Caldbeck* v. *Boon*, Ir. R. 7 C. L. 32.

—— **Expenses of proposed Railway Company.**]—By an agreement whereby the plaintiff agreed to allow his name to be put on the list of the provisional committee of a railway company, and the defendants undertook to indemnify the plaintiff from all personal responsibility, and to hold him harmless against all costs, charges and expenses that had been or might be incurred in and about the formation of the company, their meetings, advertisements, surveys and other expenses of carrying out the company, applying for an act of parliament, or anything relating thereto:—Held, that this was an indemnity against lawful claims only, and therefore did not apply to the costs incurred in the defence of an action improperly brought against the plaintiff as a member of the provisional committee, and the costs of a chancery suit which arose out of the action. *Lewis* v. *Smith*, 9 C. B. 610; 19 L. J., C. P. 278.

The plaintiff and defendant being members of a committee of a proposed railway company, by an agreement under seal, which recited that debts and liabilities had been incurred, and that it was probable that further disputes would arise respecting the liability of the members and the committee of management; and that the plaintiff being desirous of being relieved from all such questions and disputes had proposed to contribute and pay a sum to the defendants towards the payment of their claims, upon their agreeing to indemnify him, and to guarantee him that the sums mentioned in the first schedule had been paid, the defendants guaranteed that the sums mentioned in the first schedule had been paid, and also that they would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages and expenses which he might sustain or be put to by reason thereof, and at their own costs and charges defend him against all actions and suits which should be commenced or prosecuted against him for the recovery thereof, or any part or parts thereof. After the making of this agreement, an order was obtained in the Court of Chancery, under 11 & 12 Vict. c. 45, for winding up the affairs of the company. The plaintiff was adjudged to be a contributory, and a sum was directed to be collected, such sum being composed of one of the sums mentioned in the second schedule to the agreement, and the rest of it consisting of costs and expenses occasioned by and incidental to the proceedings under the winding-up. The plaintiff having been ordered to pay a proportion of the sum directed to be collected, and having paid the same, brought an action against the defendants under the agreement:—Held, that the agreement merely protected the plaintiff against the claims mentioned in the schedules, and against the costs and expenses to which the plaintiff might be put by reason of the enforcement of those claims; and consequently, that the plaintiff was not entitled to recover beyond the amount of the sum mentioned in the second schedule, and which was included in the amount directed to be collected, and that the costs and expenses which he had been compelled to pay were not of the character contemplated by the agreement, and could not be recovered by him from the defendants. *Tanner* v. *Woolmer*, 8 Ex. 482; 22 L. J., Ex. 259.

—— **Covenant on Assignment of Lease.**]—See *Howard* v. *Lovegrove*, supra, col. 1318.

—— **Alleged Wrongful Distress.**]—See *Ibbett* v. *De la Salle*, supra, col. 1319.

Charge on Property—In Favour of Co-partners—Extent of Liability.]—A banker took three gentlemen into partnership without an inquiry being made into the accounts, and gave them a charge on all his estates, by way of indemnity against all his liabilities at the time they entered into partnership:—Held, to be only an indemnity against what they should be called on to pay, on account of his liabilities, out of their private means, independent of the banking business. *Grylls* v. *Grylls*, 18 W. R. 85.

—— **Where Property alleged to be Sufficient proves Insufficient.**] — Where, for providing for payment for bills, a third person charged certain property for the benefit of acceptor by way of security, alleging it to be sufficient in value above incumbrances, but which turned out to be otherwise:—Held, that the acceptor was entitled to have so much as he had paid, and interest, as the property was insufficient to pay, raised and paid out of the general estate of the deceased third person. *Ingram* v. *Thorp*, 7 Hare, 67.

Conveyance of Estate by way of Indemnity—Right to Reconveyance.]—Upon the occasion of a bond being executed by A. and B. to secure money lent to A., the title deeds of an estate purchased by A. were deposited with B. as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to B., and it was agreed that he should also hold it as an indemnity. After the death of B. his executor delivered up the title deeds to A. upon a false representation by him that the bond had been paid off:—Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson* v. *Cox*, Turn. & R. 395; 24 R. R. 79.

Right of Action where no Loss incurred.]—A company entered into a contract with a business

firm in the Argentine Republic to indemnify them against a particular claimant, the company being at liberty to use the name of the firm in defending any action brought by the claimant, and the firm agreeing to give all assistance required. At the time when this contract was entered into an action had been commenced in this country by the particular claimant: it was defended by the company in the name of the firm, and in their pleadings the company stated that E. had become the surviving partner of the firm. Judgment was given in the action against the firm, but no execution had been issued, and it appeared that E., who resided in the Argentine Republic, had no property in this country. E. brought an action against the company to enforce the contract of indemnity:—Held, that as it appeared that E. had no property in this country, and as no steps had been taken to enforce the judgment in the Argentine Republic, she was not damnified by the judgment against the firm, and was not therefore entitled to relief under the contract of indemnity. *Eddowes* v. *Argentine Loan Co.*, 63 L. T. 364—C. A.

A surety on a bond to secure a money debt was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having devised property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the court:—Held, that the surety, though he had not actually paid anything, was entitled to maintain a bill against the executors for administration, payment of the debt and indemnity. *Wooldridge* v. *Norris*, L. R. 6 Eq. 410; 16 W. R. 965.

Held, also, that it was not necessary that the bill should be filed on behalf of all the creditors. *Ib.*

Specific Performance before Breach.]—In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability. *Johnston* v. *Salvage Association*, 19 Q. B. D. 460; 57 L. T. 219; 36 W. R. 56; 6 Asp. M. C. 167.

Injunction to restrain Action.]—The defendant sued at law on an indemnity bond; the plaintiff filed this bill for an injunction, without offering to make any recompense for the damage actually sustained; the bill was dismissed. *Godbolt* v. *Watts*, 2 Anstr. 543.

Parties to Action—Privity.]—The defendant by his answer insisted that he was entitled to have relief over against A. for whatever he should be decreed to pay the plaintiff. There was not any privity between A. and the plaintiff:—Held, that A. was not a necessary party to the suit. *Att.-Gen.* v. *Trimleston (Lord)*, 5 Ir. Eq. R. 511.

2. IMPLIED.

Against Payment of Rent.]—A lessee of a farm for an unexpired term at a yearly rent, payable quarterly, gave up possession to the defendant, under an invalid assignment of the unexpired residue of the lease. He entered, occupied and paid the reserved rent quarterly to the lessor for the lessee. The lessor never accepted or objected to the defendant as his tenant. The defendant quitted on a quarter-day without giving the lessee any notice to quit:—Held, that a promise by the defendant to indemnify the lessee against the rent for any period after the defendant had ceased to occupy, could not be inferred as a matter of law. *Crouch* v. *Tregoning* or *Tregonning*, 41 L. J., Ex. 97; L. R. 7 Ex. 88; 26 L. T. 286; 20 W. R. 536.

A., who held certain lands under lease at a rent, gave possession of a small part thereof to B., on the terms that he was to hold rent free, and make certain expenditure in buildings, which was done. C. afterwards acquired the residue of the holding from A., subject to this arrangement, and for many years paid the entire rent reserved by the lease. One year's rent being due, the landlord brought an ejectment, and B. paid the rent claimed in order to save the lands from eviction:—Held, that he was entitled to recover the amount from C. in an action for money paid. *Murphy* v. *Davey*, 14 L. R., Ir. 28.

Against Distress—On Sub-Tenant.]—A defendant held premises under a lease from H. at a certain rent, and entered into an agreement with one N. for the sale of all the household furniture, &c., on the premises for a certain sum, to be paid by instalments, covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted, with a power of distress for nonpayment of the rent. N. was let into immediate possession under this agreement, and paid the rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of N.:—Held, that there was an implied duty on the defendant to indemnify N. from the consequences of the nonperformance of his covenants with the superior landlord, and that case was the proper form of action for the breach of such implied duty. *Hancock* v. *Caffyn*, 1 M. & Scott, 521; 8 Bing. 358; 1 L. J., C. P. 104.

The plaintiff took of the defendant a house at a yearly rent, under an agreement, by the terms of which the latter undertook that, up to the date of the agreement, he had paid, or would pay, "all arrears of rent, rates, taxes, or assessments"; and the former agreed, that "from and after that day, the same should be kept paid by him for the time he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent:—Held, that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a yearly rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid. *Upton* v. *Fergusson*, 3 M. & Scott, 88.

To a breach of contract by a lessee, to indemnify his sub-lessee against the rent payable to the superior landlord, it is no answer that at the

time of the distress made by the superior landlord (the breach complained of) there was more rent due than that distrained for. *Briant* v. *Pilcher*, 16 C. B. 354; 1 Jur. (N.S.) 1020; 3 W. R. 483.

—— **On Goods of Stranger.**]—There is no obligation upon the owner of land, arising from the mere circumstance of a stack of wheat being lawfully there, to indemnify the owner of the stack from the loss occasioned by a seizure and sale of the stack by the ecclesiastical commissioners, by virtue of 6 & 7 Will. 4, c. 71, for a tithe rentcharge upon such land. *Griffinhoofe* v. *Daubuz*, 5 El. & Bl. 746; 25 L. J., Q. B. 237; 2 Jur. (N.S.) 392; 4 W. R. 131—Ex. Ch.

—— **To Bailiff.**]—The defendant, an attorney, employed the plaintiff to levy a distress for rent upon the premises of an auctioneer, urging him to make the levy forthwith, assigning as a reason that there was a large quantity of furniture in the auction room; and by the warrant, he directed him to distrain "the several goods and chattels on the premises." Acting upon these instructions, the plaintiff caused all the goods upon the premises to be seized. Some of the goods so seized turning out to be protected from distress, the owners brought actions, and eventually the goods were restored to them, and the plaintiff incurred costs:—Held, that, under the circumstances, an indemnification of the plaintiff against the consequences of pursuing the defendant's instructions was implied by law. *Toplis* v. *Grane*, 7 Scott, 620; 5 Bing. (N.C.) 636; 2 Arn. 110; 9 L. J., C. P. 180.

Held, also, that the plaintiff's conduct in the premises did not exhibit such a degree of negligence and want of skill, as to afford an answer to an action for his work and labour. *Ib.*

Goods Lawfully Seized for Another's Debt.]—As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor; and the right to indemnity exists although there may be no agreement to indemnify, and although there may be in that sense no privity between the owner of the goods and the debtor. *Edmunds* v. *Wallingford*, 54 L. J., Q. B. 305; 14 Q. B. D. 811; 52 L. T. 720; 33 W. R. 647; 49 J. P. 549—C. A. Affirming 1 Cab. & E. 334.

The defendant bought the business of an ironmonger in his own name for his two sons; he paid the greater part of the purchase-money. The banking account of the business was kept by him, and he drew the cheques on that account. A society having obtained judgment in an action against the defendant, certain goods of his sons were seized by the sheriff: the sons claimed the goods; but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, and the goods were sold. They realised 1,300*l.*, and this sum was paid into court in the action by the society against the defendant as a security for what might be found due to the society from the defendant upon taking certain accounts. The defendant's sons were afterwards adjudicated bankrupts, and the plaintiff was appointed their trustee. The defendant agreed with the plaintiff that in consideration of his son's goods having been seized and sold on behalf of the society in respect of an alleged claim against him, he would pay 300*l.* per annum to the plaintiff until he should have paid a sufficient sum to pay the trade creditors of his sons in full. The plaintiff having brought the present action to recover 1,200*l.* due by virtue of the abovementioned agreement, or in the alternative 1,300*l.*, the value of the goods seized:—Held, that even if the defendant's express promise to pay 1,200*l.* was not legally binding upon him, nevertheless the action was maintainable; for although the decision upon the interpleader summons did not estop the defendant from shewing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, and the goods of his sons had been legally taken for his debt; the defendant, therefore, was bound to indemnify his sons, and the plaintiff, as their trustee in bankruptcy, was entitled to have judgment entered for him for the sum of 1,200*l.*, which he was willing to accept instead of 1,300*l.*, the value of the goods seized. *Ib.*

Delivery of Goods claimed by Third Parties.]—The plaintiffs were in possession of certain trucks, which were claimed by the defendant, and also by the proprietors of a colliery. A correspondence took place between the plaintiffs and the defendant, in which the plaintiffs asked for an indemnity if they should deliver up the trucks to the defendant. The defendant, without giving any answer as to the indemnity, wrote requiring the plaintiffs to send the trucks back to him, which they thereupon did. The colliery proprietors then brought an action against the plaintiffs for conversion of the trucks; and their claim proving well founded, the plaintiffs were obliged to pay a sum of money, in settlement of the action, which they sought to recover from the defendant upon a contract of indemnity:—Held, that there was, under the circumstances of the case, evidence of an implied promise to indemnify. *Dugdale* v. *Lovering*, 44 L. J., C. P. 197; L. R. 10 C. P. 196; 32 L. T. 155; 23 W. R. 391.

The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal and agent, or employer and employed. *Ib.*

After Sale of Shares.]—The plaintiff, being the holder of shares in a mine worked on the cost-book principle, sold them to the defendant, and delivered to him a transfer paper in the usual form, signed by the plaintiff, but with blank spaces for the name of the transferee. By taking this paper to the secretary of the mine, and filling up the blanks with his name, the defendant might have had himself registered as the owner of the shares. A call was made, which the plaintiff was compelled to pay, as he continued to be the registered owner of the shares, the defendant having taken no steps to have himself registered:—Held, that there was an implied contract on the part of the defendant to indemnify the plaintiff against calls made upon the shares while they remained the property of the defendant. *Walker* v. *Bartlett*, 18 C. B. 845; 25 L. J., C. P. 263; 2 Jur. (N.S.) 643; 4 W. R. 681—Ex. Ch.

Retirement of Director.]—H. and W. were two of the directors of a banking company. It was

agreed at a meeting of directors that H. should retire from being a director and a shareholder on the terms embodied in a minute, as follows:—"H.'s shares to be taken at par. Release and indemnity may be arranged by the solicitors of the parties. (Signed) F. K., chairman." H. retired, and his shares were cancelled. W. was not present at the meeting at which this minute was passed, but was aware of the transaction, and expressed no disapprobation though he did no act to ratify it. It was subsequently determined, under the winding up of the company, that the cancellation of H.'s shares was invalid, and that he was a contributory:—Held, that W. was not under any liability to indemnify H. against the liabilities of the company arising after H.'s retirement. *Walker, Ex parte, St. Marylebone Banking Co., In re*, 26 L. J., Ch. 261; 2 Jur. (N.S.) 1216; 5 W. R. 26—L.JJ.

Expenses of Captain of Ship.]—When the owners of a ship instruct the captain to make purchases in a foreign country, and to draw bills upon them in payment, the promise implied by law is not a promise to accept or pay the bills, but a promise to indemnify the captain against any loss or damage sustained by him from having drawn the bills. *Huntley* v. *Sanderson*, 1 C. & M. 467; 3 Tyr. 469; 2 L. J., Ex. 204.

Where a master of a ship which was damaged by perils of the sea (being exclusively the agent of the shipowner, in ordering repairs or borrowing money on bottomry bond for such repairs) hypothecated at a foreign port by a bottomry bond for necessary repairs, the ship, freight and cargo, amongst which were the plaintiff's goods, and in consequence of the ship and freight realising less than the sum borrowed, the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond:—Held, that the plaintiff might maintain an action against the owner of the ship on an implied promise to indemnify. *Benson* v. *Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch.

A captain of a ship, in order to avoid expense, accepted the offer of a company to tranship some goods temporarily on board one of their vessels. The goods were afterwards removed to another vessel for the greater convenience of the company, but it was unfit to hold the goods, and they were lost. The captain, at the end of his voyage, declined to pay the value of the goods to the consignees, who held the bills of lading; he was then sued, and judgment was given against him. In an action to be reimbursed the damages, and the costs of the proceedings against the captain:—Held, that the company was bound to pay the value of the goods only, and not the costs of the action, as it ought not to have been defended. *Ronneberg* v. *Falkland Islands Co.*, 17 C. B. (N.S.) 1; 34 L. J., C. P. 34; 10 Jur. (N.S.) 940; 10 L. T. 530; 12 W. R. 714.

The plaintiffs were the registered mortgagees of forty-eight sixty-fourth shares in a ship, the defendants being the owners of the residue of such shares. The captain, having incurred a debt for necessary disbursements made by him, instituted proceedings in rem against the ship and arrested her in the Admiralty Division. The plaintiffs, in order to obtain the release and get possession of the ship, paid the captain's claim, together with the costs of the proceedings:—Held, that as the plaintiffs were compelled under pressure of law to pay the sum in question in order to release the ship from arrest and get possession of her, there was an implied promise on the part of the defendants to repay them that sum, inasmuch as the mortgagor and the defendants (the co-owners) were liable to the captain for the disbursements made by him. *The Orchis*, 59 L. J., P. 31; 15 P. D. 38; 62 L. T. 407; 38 W. R. 472; 5 Asp. M. C. 501—C. A.

On Sale of Equity of Redemption.]—There is an implied promise by the purchaser of an equity of redemption to indemnify the vendor against the mortgage debt. *Bridgman* v. *Daw*, 40 W. R. 253.

Mortgagee postponing Charge at Mortgagor's Request.]—Where, at the request of a mortgagor, a second mortgagee postpones his charge for the purpose of facilitating a further charge for the benefit of the mortgagor, the court will imply a promise on the part of the mortgagor to indemnify the second mortgagee, and allow a proof against the bankrupt mortgagor's estate for the amount which the second mortgagee would have received out of the proceeds of sale of the estate if he had not consented to postpone his charge. *Ford, Ex parte, Chappell, In re*, 55 L. J., Q. B. 406; 16 Q. B. D. 305—C. A.

Bail.]—A. entered into a recognizance of bail for B. on the removal by certiorari of an indictment for conspiracy. B. was convicted, and the recognizance was estreated for nonpayment of the prosecutor's costs:—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones* v. *Orchard*, 16 C. B. 614; 24 L. J., C. P. 229; 1 Jur. (N.S.) 936.

Request to get Bills accepted against Bill of Lading—Forgery.]—The defendant, a merchant at Newcastle, was a customer of the plaintiffs, bankers at Newcastle, whose London agent was the Union Bank of London. H., a merchant at Wolgast, in Prussia, wrote to the defendant that he was inclined to consign to him a cargo of wheat, and asking for how much, and at what date, the defendant would open for him a credit in London. The defendant wrote in reply: "You may draw against transmittal of bill of lading at 30*s.* to 32*s.* per quarter in advance for your best yellow wheat, on our account, at fourteen days, one, two, or three months' date on the Union Bank of London." H. afterwards wrote to the defendant that he was about to consign to him 8,320 scheffels of wheat, shipped by the vessel "Anna," Captain K., and that he annexed duplicate bill of lading. On the same day H. wrote to the Union Bank that he had drawn on them six bills of exchange for 400*l.* each, for account of the defendant. The Union Bank having no instructions, sent the letter to the plaintiffs. Messrs. B. and C. afterwards presented to the Union Bank, for acceptance, six bills of exchange for 400*l.* each, drawn and indorsed by H., together with a paper writing, purporting to be a bill of lading, indorsed by H. in blank. The plaintiffs having sent to the defendant the letter which H. addressed to the Union Bank, the defendant came to the plaintiffs' bank, and had some conversation with the manager, respecting the cargo of wheat supposed to have been shipped by H., when the defendant said, "it was a large amount, and that they must only accept against the bill

of lading." The defendant then wrote to the plaintiffs, as follows: "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H. for 2,400*l.*, against properly indorsed bill of lading of 8,320*l.* scheffels of wheat, per 'Anna,' F. K., master, on our account." The Union Bank, at the request of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the draft became due it was discovered that the bill of lading was forged, and that no cargo was shipped on board the "Anna." H. was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills, and debited the plaintiffs with the amount:—Held, that the plaintiffs were entitled to recover the amount from the defendant on an implied contract to indemnify them. *Woods* v. *Thiedemann*, 1 H. & C. 478; 10 W. R. 846.

Breach of Trust.]—Where there are two trustees and the management of the trust is left in the hands of one, and the acting trustee commits a breach of trust, the passive trustee is not entitled to an indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is the solicitor for the trust, or has derived a personal benefit from the breach of trust. *Lockhart* v. *Reilly* (25 L. J., Ch. 697) and *Thompson* v. *Finch* (8 De G. M. & G. 560) distinguished. *Bahin* v. *Hughes*, 55 L. J., Ch. 472; 31 Ch. D. 390; 54 L. T. 188; 34 W. R. 311—C. A. *See further* TRUST AND TRUSTEE.

Voluntary Payments.]—It has always been clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another in such circumstances that an option is allowed him to adopt or decline the benefit; in this case, if he adopts the benefit, he will be liable to repay the money expended; but if he declines the benefit, he will not be liable. But sometimes the money is expended for the benefit of another person in such circumstances that he cannot help accepting the benefit, in fact, that he is bound to accept it; in this case he has no opportunity of exercising any option, and he will be under no liability—per Lord Esher, M.R. *Leigh* v. *Dickeson*, 54 L. J., Q. B. 18; 15 Q. B. D. 64; 52 L. T. 791; 33 W. R. 539.

Against Costs.]—If A. at the desire of B. commence an action for his benefit, A., being liable to the attorney for the costs, may maintain an action against B., on such indemnity, although he has not paid the attorney. *Bullock* v. *Lloyd*, 2 Car. & P. 119.

—— **Consequences of Accident.**]—The plaintiffs were contractors for the construction and maintenance of a tramway belonging to a tramway company with the company, and in order to carry out their contract they entered into a contract with the defendants, by which they undertook the construction and maintenance of the asphalte paving of the tramway. When H. was lawfully driving along the public highway on which the tramway was, he was by reason of a hole in the asphalte paving of the tramway (due to the negligence of the defendants in carrying out their contract), thrown out of his cart and injured. He therefore commenced an action to recover compensation against the tramway company, who at once gave notice of the action to the plaintiffs, who passed on the notice to the defendants, and claimed to be indemnified by them. The defendants repudiated all responsibility or liability, and refused to have anything to do with the defence of the action. The action was eventually compromised by the plaintiffs, who paid to H. 110*l.* for damages and costs, and also incurred costs themselves in defending the action up to the compromise and in compromising to the amount of 18*l.* 1*s.* 4*d.*:—Held, that the plaintiffs could not recover the costs paid to H., or the costs incurred in defending or compromising the action, although the costs were reasonably incurred, and though the plaintiffs did in fact benefit the defendants in so incurring them by reducing the claim of H. *Fisher* v. *Val de Travers Asphalte Paving Co.*, 45 L. J., C. P. 479; 1 C. P. D. 511; 35 L. T. 366.

H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with a railway company for the carriage by them of the pictures over a part of the distance. The pictures were damaged on the journey by the negligence of the company. H. thereupon brought an action against the plaintiffs, who gave notice of it to the company, and requested them to defend it. They refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the company to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The company paid the damages into court, and disputed their liability as to the costs:—Held, that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the default of the company, the contracts between H. and the plaintiffs, and between the plaintiffs and the company, having been separate and independent. *Baxendale* v. *L. C. & D. Ry.*, 44 L. J., Ex. 20; L. R. 10 Ex. 35; 32 L. T. 330; 23 W. R. 167—Ex. Ch.

—— **Of Distress.**]—See *Toplis* v. *Grane*, supra, col. 1325.

—— **Caused by Action of Captain of Ship.**]—*See* supra, col. 1327.

To Trustees.]—*See* TRUST AND TRUSTEE.

To Executors and Administrators.]—*See* EXECUTOR AND ADMINISTRATOR.

On Sales of Land.]—*See* VENDOR AND PURCHASER.

To Agent by Principal.]—*See* PRINCIPAL AND AGENT.

Against Calls.]—*See* COMPANY.

PRINTS AND ENGRAVINGS.

See COPYRIGHT.

PRISON.

1. *Prison*, 1331.
2. *Officers*, 1332.
3. *Prisoners.*
   a. Treatment of, 1334.
   b. Expenses caused by, 1335.
   c. Proceedings against, 1336.
   d. Escape—*See* CRIMINAL LAW.
   e. Bail—*See* CRIMINAL LAW.
4. *Colonial*—*See* COLONY.

1. PRISON.

Lands purchased for Prison Purposes vesting in Prison Commissioners.]—In 1867 the justices of the county of M. bought land covered with houses subject to leases for long terms, several years of which remained unexpired The land and the houses were conveyed to the clerk of the peace for the county "upon trust for the justices of the county of M., for the purposes of the Prisons Act, 1855, and upon or for no other trust, intent, or purpose whatsoever." The land and houses were never used as part of the prison. An action having been brought to try whether the reversion in the land and houses was in the prison commissioners or the justices, the defendant proposed to adduce as evidence the minutes of the proceedings of the justices in order to shew that the land had been bought for the purpose of rendering the prison more commodious or safe:—Held, that the reversion in the land and the houses standing thereon had passed to the prison commissioners by virtue of the Prisons Act, 1877. *Prison Commissioners* v. *Middlesex (Clerk of the Peace)*, 51 L. J., Q. B. 433; 9 Q. B. D. 506; 46 L. T. 864; 30 W. R. 881; 46 J. P. 740—C. A.

Per Jessel, M.R.: That the conveyance having been executed, the minutes of the proceedings of the justices were inadmissible as evidence shewing the purpose for which the land and houses had been bought. *Ib.*

Order made by Justices for Enlargement of—Necessary Notice.]—By 28 & 29 Vict. c. 126, s. 24, the necessity for the alteration or enlargement of an existing prison shall be proved by the presentment of two or more visiting justices, and the consideration of such a presentment shall not be entertained unless not less than three weeks' notice has been given in some newspaper, circulating in the district of the prison authority, of their intention to take the same into consideration at a time and place to be stated in the notice. Due notice having been given that the presentment of justices as to certain gaols would be taken into consideration at the April quarter sessions for a county, the presentment was taken into consideration at those sessions, and it was resolved that the matter should be referred to a select committee to inquire into it, and report to the October sessions. At the October sessions the report was taken into consideration without any fresh notice having been given, and an order was made in conformity with the report:—Held, that the power of adjournment was inherent in the sessions, and that it was competent to the court to adjourn the matter from the April to the October sessions; that they had in effect done so, though not formally: that a fresh notice for the October sessions was not necessary; and that the order was therefore valid. *Reg.* v. *Westmoreland JJ.*, 9 B. & S. 288; 37 L. J., M. C. 115; L. R. 3 Q. B. 457; 18 L. T. 326; 16 W. R. 753.

Newgate.]—The corporation of London was not authorised by 4 Geo. 4, c. 64, to make any orders for the regulation of Newgate, which prevented justices of the peace for the county of Middlesex from committing persons charged with misdemeanor to that gaol. *Rex* v. *Cope*, 6 A. & E. 226; 1 N. & P. 515; 7 Car. & P. 720; 6 L. J., M. C. 81.

The clerk of the sessions of gaol delivery of Newgate is not entitled to any fee in respect of convicts sentenced to imprisonment with hard labour. *Reg.* v. *Baker*, 2 N. & P. 375; 7 A. & E. 502.

—— **For Criminal Offenders only.**]—By 52 Geo. 3, c. ccix., Newgate is made a prison for the reception of criminal offenders only; therefore a person committed by civil process cannot be detained there. *Masters, In re*, 33 L. J., Q. B. 146; 9 L. T. 733.

By 12 & 13 Vict. c. 14, s. 2. in default of distress whereon to levy a poor or highway rate with costs, two justices are empowered to issue their warrant of commitment against the person in default to the common gaol or house of correction for any time not exceeding three calendar months, unless the sums therein mentioned be sooner paid. Defaulters in payment of rates, the payment of which might be enforced under this statute, were committed to Whitecross-street prison and Newgate:—Held, that the warrants of commitment were civil and not criminal process, and therefore the commitment to Whitecross-street prison was right, and the commitment to Newgate was wrong. *Reg.* v. *Whitecross-street Prison (Governor)*, 6 B. & S. 371; 34 L. J., M. C. 193: 11 Jur. (N.S.) 970: 12 L. T. 543; 13 W. R. 1017; 10 Cox, C. C. 134.

House of Correction in Coldbath-fields.]—The governor of the house of correction in Coldbath-fields is justified in refusing to receive a person committed for default in payment of rates under 20 & 21 Vict. c. cxviii. s. 14, relating to Islington. *Reg.* v. *Coldbath-fields (Governor)*, 6 B. & S. 352; 34 L. J., M. C. 137; 13 W. R. 681, 1017; 10 Cox, C. C. 125.

Inquest on Prisoner—Jurisdiction.]—Notwithstanding the transfer of prisons to the secretary of state by the Prison Act, 1877, a prison, as to which no rules have been made under s. 30 of the act, and which at the commencement of the Prison Act, 1865, was a prison belonging to a county, is still the county prison, although locally situate within the limits of a city, and therefore the jurisdiction to hold inquests on prisoners dying in such prisons is in the coroner for the city, and such jurisdiction is not affected by s. 171, sub-s. 1, of the Municipal Corporations Act, 1882. *Reg.* v. *Robinson*, 19 Q. B. D. 322; 57 L. T. 275; 35 W. R. 843; 16 Cox, C. C. 287; 52 J. P. 22.

2. OFFICERS.

Liability—Detaining Wrong Person.]—The keeper of a prison who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person; and though acting bonâ fide, and without the means of

ascertaining the identity of the individual named in the warrant, he is liable to an action for false imprisonment, if by the mistake of the officer to whom it was directed, it was executed against another. *Aaron* v. *Alexander*, 3 Camp. 35; 13 R. R. 742. And see *White* v. *Taylor*, 4 Esp. 80.

—— **False Imprisonment — Protection of Warrant.**]—The governor of a prison is protected in obeying a warrant of commitment, valid on the face of it, and an action for false imprisonment will not lie against him for the detention of a prisoner in pursuance of the terms of such warrant. The plaintiff having been convicted by a court of summary jurisdiction and sentenced to seven days' imprisonment, a warrant of commitment was issued directing that the plaintiff should be imprisoned in a certain gaol for seven days. The plaintiff was arrested on August 24, and lodged in prison on August 25. The governor of the gaol kept the plaintiff in prison until and during August 31:—Held, that, whether or not the plaintiff's sentence ran from August 24 or August 25, the governor was protected by the warrant, and was not liable to an action for false imprisonment in respect of the plaintiff's detention on August 31. *Henderson* v. *Preston*, 57 L. J., Q. B. 607; 21 Q. B. D. 362; 36 W. R. 834; 52 J. P. 820—C. A. Affirming 59 L. T. 334; 16 Cox, C. C. 445.

M. was committed for a contempt of court in not answering to a bill in chancery. She was taken to gaol under a warrant addressed to the gaoler, which shewed on the face of it the cause of her committal. The plaintiff in the suit did not bring her to the bar of the court within thirty days; but the gaoler did not discharge her:—Held, that the duty was cast in express terms on the gaoler by 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, to discharge the person in his custody under such circumstances, and as the warrant gave him notice, he was bound to discharge her after the lapse of thirty days, without an order from the sheriff or the Court of Chancery; and that an action of trespass would lie against him for detaining her. *Moone* v. *Rose*, 38 L. J., Q. B. 286; L. R. 4 Q. B. 486; 20 L. T. 606; 17 W. R. 729.

The plaintiff, having obtained judgment against F. in an action of assault and false imprisonment, sued out a ca. sa., whereon F. was taken and committed to the Queen's prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge, under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape:—Held, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially, in a matter over which he had jurisdiction. *Thomas* v. *Hudson*, 14 M. & W. 353; 2 D. & L. 873; 14 L. J., Ex. 283; 9 Jur. 627.

The plaintiff was imprisoned under an attachment for a contempt incurred by him in disobeying an order of the chancery division, which directed him to lodge a certain sum of money to the credit of a cause. The attachment order did not specify the length of time for which the plaintiff was to be detained in custody. At the expiration of a year from the date of his arrest, the plaintiff required the defendant, who was governor of the gaol in which he was imprisoned, to discharge him, but the defendant refused to do so, on the ground that the plaintiff had not obtained an order for his discharge from the court out of which the process of contempt had issued:—Held, that until such order had been obtained, the plaintiff was not entitled to be discharged, and therefore that, as no such order had been made, an action for false imprisonment did not lie for the detention of the plaintiff in custody under the attachment order for a period exceeding a year. *Greaves* v. *Keene*, 4 Ex. D. 73; 40 L. T. 216; 27 W. R. 416. S. P., *McCombe* v. *Gray*, 4 L. R., Ir. 432.

Superannuation—Compensation—Liability of County to Pay.]—At the time of the passing of the Prisons Act, 1877, C. was the governor of a prison, which, pursuant to that statute, was transferred to the Secretary of State for the Home Department. The justices of M. had been the local authority having control of the prison. C. retired from his appointment soon after the coming into force of that act, and the commissioners of the treasury awarded to C. an annuity of 56*l.* 13*s.* 4*d.*, and apportioned it as follows:—42*l.* 6*s.* 8*d.* to be borne by the justices of M., and 13*l.* 6*s.* 8*d.* to be borne by grants provided by parliament. At the time of his retirement C. was less than sixty years of age, and he had not become incapable from sickness, age, or infirmity, or injury, of executing his office in person, and he retired for the purpose of facilitating improvements in the management of the prison. The justices having declined to pay the sum of 42*l.* 6*s.* 8*d.*:—Held, that the commissioners had jurisdiction to apportion the annuity granted to C. in the manner above mentioned, and that a mandamus would lie to compel the justices of M. to pay the amount apportioned upon them. *Middlesex JJ.* v. *Reg.* 53 L. J., Q. B. 505; 9 App. Cas. 757; 51 L. T. 513; 33 W. R. 49; 15 Cox, C. C. 542; 48 J. P. 104—H. L. (E.)

3. Prisoners.

a. Treatment of.

"Criminal Prisoner"—Meaning of.]—A person committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solicitor, though not duly qualified, is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner shall mean any prisoner charged with or convicted of a crime." Such a person is not entitled to be treated as a misdemeanant of the first class by 40 & 41 Vict. c. 21, s. 41. *Osborne* v. *Milman*, 56 L. J., Q. B. 263; 18 Q. B. D. 471; 56 L. T. 808; 35 W. R. 397; 51 J. P. 437—C. A. Reversing 16 Cox, C. C. 138.

A person who is committed to prison in default of distress for nonpayment of a sum of money adjudged to be paid by a court of summary jurisdiction on an information under s. 31 of the Vaccination Act, 1867, is a "criminal prisoner" within the meaning of the Prisons Act, 1865, s. 5, and must be treated as such while in prison. *Kennard* v. *Simmons*, 50 L. T. 28; 15 Cox, C. C. 397; 48 J. P. 551.

Hard Labour—Nonpayment of Penalties.]—The 5th section of the Summary Jurisdiction

Act, 1879, authorises the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the act on which the conviction is founded authorises the infliction of imprisonment with hard labour as a punishment for the offence. *Reg.* v. *Tynemouth JJ.*, 55 L. J., M. C. 181; 16 Q. B. D. 647; 54 L. T. 386; 16 Cox, C. C. 74; 50 J. P. 454.

Whether a statute which authorises the punishment of an offence with a penalty, or in the discretion of the court, with imprisonment with or without hard labour, is an act which authorises the punishment of imprisonment with hard labour within the meaning of the exceptions in s. 5 of the Summary Jurisdiction Act, 1879, quære. *Reg.* v. *Tynemouth JJ.* (16 Q. B. D. 647) not followed. *Reg.* v. *Turnbull*, 16 Cox, C. C. 110.

Classification of.]—Trespass will lie against the governor of a prison for causing a prisoner to be removed by force, or threats of force, from one division of the prison to another, in which he ought not by law to be confined, although he acts in obedience to a rule issued by the secretary of state, if such rule is not in accordance with the statutes as to the classification of the prisoners. *Cobbett* v. *Grey*, 4 Ex. 729; 19 L. J., Ex. 137.

The secretary of state is also liable to an action if he improperly directs the gaoler so to remove all persons of a certain class, and a gaoler does remove a person coming within that class. *Ib.*

Removal when Insane.]—A prisoner for debt in the Queen's prison who becomes insane may be removed to Bethlehem hospital by a warrant of a secretary of state, upon the proper medical certificates, under s. 14 of the Queen's Prison Act (5 & 6 Vict. c. 22). *Gore* v. *Grey*, 15 C. B. (N.S.) 56; 33 L. J., C. P. 109; 10 Jur. (N.S.) 203; 9 L. T. 693; 12 W. R. 213—Ex. Ch.

b. Expenses caused by.

Reformatory—Expense of providing requisite Clothing for Prisoner.]—By the Prisons Act, 1877, the "prison authority," constituted under the Prisons Act, 1865, s. 5, is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1867, ss. 14, 23; for expenses of that description fall within the definition of "maintenance of a prisoner" contained in the Prisons Act, 1877, s. 57, and must be defrayed out of moneys provided by parliament, under s. 4. *Prison Commissioners* v. *Liverpool Corporation*, 49 L. J., Q. B. 431; 5 Q. B. D. 332; 42 L. T. 838; 29 W. R. 6; 44 J. P. 616—C. A.

Maintenance of, when Removed to Asylum—Upon what Funds Chargeable.]—Where a pauper prisoner without a settlement becomes insane during confinement in a prison to which the Prison Act, 1877, applies, the expenses of inquiring into his insanity and of removing him to a county lunatic asylum, and of his maintenance in such asylum during the currency of his sentence, are, by ss. 4 & 57 of that act, to be defrayed out of moneys provided by parliament; and the effect of those sections is to repeal the provisions of 3 & 4 Vict. c. 54, s. 2, which made the county liable. *Mews* v. *Reg.* 52 L. J., M. C. 57; 8 App. Cas. 339; 48 L. T. 1; 31 W. R. 385; 15 Cox, C. C. 185; 47 J. P. 310—H. L. (E.)

Liability of Boroughs for Maintenance.]—By 5 & 6 Vict. c. 98, s. 18, a borough with a separate court of sessions, sending its prisoners to the county gaol without any special contract, shall pay the expenses incurred in the conveyance, transport, maintenance, safe custody and care of every such prisoner, according to the time he shall remain in custody there, at the average daily cost of each prisoner according to the whole number of prisoners confined in the prison, including in such expenses all expenses of "repairs, alterations, additions and improvements in or to the prison":—Held, that any such borough is bound to contribute, in the proportion above mentioned, not only towards the cost of the necessary and ordinary repairs of the county gaol, but towards the cost of enlarging it, according to 28 & 29 Vict. c. 126. *Reg.* v. *Wigan Corporation*, 39 L. J., M. C. 68; L. R. 5 Q. B. 267; 21 L. T. 715; 18 W. R. 455.

Conveying Prisoner to Prison, Expenses of.]—A metropolitan police magistrate, having summarily convicted an offender and adjudged her to be imprisoned, made out a warrant for her commitment; in obedience to which warrant the plaintiff, a police constable, duly conveyed her to prison. By reason of such conveyance the plaintiff incurred certain expenses which the prisoner had no means to defray. The magistrate subsequently made an order under 27 Geo. 2, c. 3, directed to the defendant, ordering him to pay to the plaintiff the amount of such expenses. The defendant refused to comply with the order, on the ground that the liability to pay the expenses of conveying prisoners to prison had been transferred from the county to the secretary of state by s. 4 of the Prisons Act, 1877, which provides, that "After the commencement of the act all expenses incurred in respect of the maintenance of prisons to which the act applies and of the prisoners therein shall be defrayed out of moneys provided by parliament." A similar question arose with regard to the expenses of conveying from the police court to the prison a man committed to take his trial for felony:—Held, that the expenses of conveying prisoners to prison were by s. 4 transferred to the secretary of state, and that the word "therein" in that section pointed to the class of prisoners to whose maintenance the act was intended to apply, not to the period of time from which the liability for such maintenance was to commence. *Mullins* v. *Surrey (Treasurer)*, 51 L. J., Q. B. 145; 7 App. Cas. 1; 45 L. T. 625; 30 W. R. 157; 15 Cox, C. C. 9; 46 J. P. 276—H. L. (E.)

c. Proceedings against.

Prisoner wishing to argue Case in Person.]—The court cannot grant a habeas corpus to a party to a suit, in custody, to enable him to appear in court merely for the purpose of arguing his case in person. *Weldon* v. *Neal*, 54 L. J., Q. B. 399; 15 Q. B. D. 471; 33 W. R. 581.

A prisoner who conducts in person an action in which he is the plaintiff, is not entitled to a habeas corpus to bring him to chambers, to oppose a summons for leave to plead several matters, unless the judge, in his discretion,

thinks that there is an urgent necessity for his presence. *Ford* v. *Graham*, 1 L. M. & P. 604; 10 C. B. 369.

Right to see Witness who is also a Prisoner.]—A. was to be tried for felony at the assizes for the county of W., and B., a material witness for A., was committed to the W. city prison for further examination on a charge of felony:—Held, that before the trial of A. the governor of the W. city prison ought to allow A.'s attorney to see B. in his presence. *Rex* v. *Simmonds*, 7 Car. & P. 176.

Service of Process.]—A governor of a prison, in compliance with an order of the visiting justices, refused to allow the process of the court to be served upon a prisoner undergoing a criminal sentence. The court granted a rule nisi for an attachment against the governor, on the condition that the rule was not to be served or acted upon unless he persisted in refusing to allow service. *Danson* v. *Le Capelain*, 7 Ex. 667; 21 L. J., Ex. 219.

Service of subpœna to appear and answer upon the deputy governor of the house of correction in Coldbath-fields:—Held, under the circumstances of the case, to be good service on a defendant a prisoner there, so as to found an application for leave to enter an appearance for a defendant under the 8th Order of August, 1841. *Newenham* v. *Pemberton*, 2 Colly. 54; 9 Jur. 637.

Where a detainer for debt was lodged against a person in custody on a criminal charge, who was afterwards convicted and sentenced to a year's imprisonment:—Held, that the creditor was not bound to declare during that period. *Altroffe* v. *Lunn*, 9 B. & C. 395.

Where a defendant was in a county gaol, in the custody of the sheriff, on a criminal charge, a writ of capias might be lodged with the sheriff, who was then bound to detain the defendant. An order of the court to detain was not necessary. *Grainger* v. *Moore*, 5 D. P. C. 456.

A writ of capias under 1 & 2 Vict. c. 110, s. 3, was not a step in the action, but was altogether collateral to it. *Ireland* v. *Berry*, D. & M. 505; 5 Q. B. 551; 13 L. J., Q. B. 140.

Application for Discharge.]—A prisoner has a right to apply de die in diem for his discharge, and is not prejudiced by a former application having been unsuccessfully made. *Hallett* v. *Cresswell*, 1 B. C. Rep. 1; 3 D. & L. 561; 15 L. J., Q. B. 129.

Charging in Execution.]—Where a defendant was in custody on a criminal charge, it was not necessary for the plaintiff to charge him in execution, in a civil suit, by habeas corpus ad satisfaciendum, within two terms after the commitment to prison. *Gibbs* v. *King*, 2 D. & L. 806; 1 C. B. 1; 14 L. J., C. P. 85; 9 Jur. 113.

Where a defendant was brought up in custody of a gaoler for the purpose of being charged in execution, and it appeared that a commissioner of bankrupts had on the preceding day granted an interim order for his protection, the court refused to allow him to be charged in execution. *Sloman* v. *Williams*, 4 D. & L. 49.

It was no ground of objection to the defendant's being charged in execution, that the plaintiff had, on a former occasion, repudiated the action. *Revell* v. *Wetherell*, 3 C. B. 605.

It was no cause to shew against a motion to charge a defendant in execution, who has been brought up on a habeas corpus ad satisfaciendum, that the warrant of attorney on which the judgment has been signed was given without consideration, and the judgment signed in breach of good faith. *Cooke* v. *Wright*, 5 D. & L. 274.

A defendant was arrested upon process, which was set aside by the court as having been improperly issued:—Held, that the illegality of the original arrest could not be shewn as cause against his being charged in execution at the suit of another plaintiff, by whom he had been detained, but that his discharge from such detainer could only be obtained on a substantive motion. *Stanford, In re*, 1 D. (N.S.) 183; 4 Scott (N.R.) 23; 3 Man. & G. 409.

A prisoner in custody, under process of contempt of the Court of Common Pleas, was liable to be charged in execution upon a judgment in that court in the ordinary way. *Wade* v. *Wood*, 1 C. B. 462.

Supersedeas.]—A defendant arrested upon an order, under 1 & 2 Vict. c. 110, s. 3. was supersedeable, unless the plaintiff proceeded to execution within two terms inclusive after judgment. *Walter* or *Walker* v. *De Richmont* or *Richment*, 2 D. & L. 507; 6 Q. B. 544; 14 L. J., Q. B. 22.

A prisoner once supersedeable was always so. *Hallett* v. *Cresswell*, 1 B. C. Rep. 1; 3 D. & L. 561; 15 L. J., Q. B. 129; 10 Jur. 266.

But this only held so long as he remained in the same custody and under the same process. *Rose* v. *Christfield*, 1 Term Rep. 591.

Where the nature of the charge was altered, it had been repeatedly determined to be otherwise. *London Assurance Co.* v. *Perkins*, 1 Term Rep. 591, n.

As against a prisoner, a final judgment was complete at the time of signing without carrying in the roll. *Colbron* v. *Hall*, 5 D. P. C. 535.

If after judgment the defendant was superseded for want of being charged in execution, and then an action of debt was brought on that judgment, and judgment recovered thereon, the defendant might be taken in execution on such second judgment. *Ismay* v. *Dervin*, 2 W. Bl. 982.

A defendant who had once become supersedeable for want of being charged in execution could not afterwards be charged in execution on the same judgment. *Hewitt* v. *Melton*, 1 C. & M. 579; 3 Tyr. 503; 2 D. P. C. 71; 2 L. J., Ex. 214.

PRIVILEGE.

Of Members of Parliament.]—*See* PARLIAMENT.

Of Witnesses.]—*See* EVIDENCE.

Of Solicitors.]—*See* SOLICITOR.

In Actions for Defamation.]—*See* DEFAMATION.

From Arrest.]—*See* SHERIFF.

PRIVILEGED COMMUNICATIONS.

Non-actionable.]—*See* DEFAMATION.

Non-production, &c., of.]—*See* DISCOVERY—EVIDENCE.

Witnesses.]—*See* EVIDENCE.

PRIVY COUNCIL.

Appeals from Colonies.]—*See* COLONY.

In Ecclesiatical Matters.]—*See* ECCLESIASTICAL LAW.

In Maritime Matters.]—*See* SHIPPING.

In Matters relating to Patents.]—*See* PATENT.

PRIZE OF WAR.

See WAR.

PROBATE.

Of Wills.]—*See* WILL.

Duty.]—*See* REVENUE.

PROCLAMATIONS.

See CROWN—FINES AND RECOVERIES.

PRODUCTION OF CESTUI QUE VIE.

See ESTATE.

PRODUCTION OF DEEDS AND DOCUMENTS.

See DISCOVERY — MORTGAGE — VENDOR AND PURCHASER.

PROFESSIONAL CONFIDENCE.

See DISCOVERY — EVIDENCE — FRAUD — BARRISTER—SOLICITOR.

PROFIT A PRENDRE.

See COMMON — CUSTOM—EASEMENT — FISH AND FISHERY.

PROHIBITION.

See CROWN OFFICE.

PRO INTERESSE SUO, EXAMINATION.

See EVIDENCE.

PROLIXITY.

See PRACTICE — DISCOVERY (INTERROGATORIES).

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROMOTER.

See COMPANY.

PROOF OF DEBTS.

In Bankruptcy.]—*See* BANKRUPTCY.

In Winding-Up.]—*See* COMPANY.

In Administration.]—*See* EXECUTOR AND ADMINISTRATOR.

PROPERTY-TAX.

Deduction of.]—*See* LANDLORD AND TENANT —VENDOR AND PURCHASER—WILL.

See also REVENUE.

PROSPECTUS.

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PROTECTION ORDER.

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PROTEST.

See BILLS OF EXCHANGE—NOTARY.

PROVIDENT SOCIETY.

See BUILDING SOCIETY — FRIENDLY SOCIETY—INDUSTRIAL SOCIETY.

PROXY.

Appointment—Right of.]—The 7 & 8 Vict. c. 21, s. 6, did not abrogate the right of appointing a general proxy, with a 30*s.* stamp, under 55 Geo. 3, c. 184. *Trinity House of Hull* v. *Beadle*, 13 Q. B. 175; 18 L. J., Q. B. 78; 13 Jur. 557.

—— **Validity of.**]—The liquidator of a company in voluntary liquidation, in his affidavit of proof in bankruptcy of a debt due to the company, described himself as the liquidator of the company, and at the foot of the affidavit there was a proxy in this form: "I appoint T. and D. jointly and severally my proxy," which was signed by the liquidator in his own name, without adding any description or stating that he acted in the name and on behalf of the company:—Held, that the proxy was good. *Taylor, Ex parte, Pooley, In re*, 36 L. T. 679; 25 W. R. 641—C. A.

By the 65th of the articles of association of a steamship company, it was provided that votes might be given personally or by proxy. Article 66 provided that the instrument appointing a proxy should be in writing under the hand of the appointor, and should be attested by one or more witness or witnesses, and that no person should be appointed a proxy who was not a member of the company. Article 68 gave a form of proxy containing an attestation clause. By a special resolution article 68 was repealed, and a new form given without an attestation clause, but the resolution did not purport to repeal article 66:—Held, that, as the special resolution did not purport to affect article 66, the provision requiring the signature to be attested remained in force, and that it was not merely directory, but that attestation was essential to the validity of a proxy, and that unattested proxies must be rejected. *Harben* v. *Phillips*, 23 Ch. D. 14; 48 L. T. 334; 31 W. R. 173—C. A.

—— **Revocation.**]—A proxy made by a canon to act for him in his absence, in all corporate business, is not revoked by the canon making the proxy having, in an intermediate period, appeared and acted for himself. *Eyre* v. *Lovell*, 3 Dougl. 67.

—— **Stamp.**]—A note in writing, signed by proprietors under a local act, authorising others to act for them in the nomination and appointment of a special commissioner, requires to be stamped. *Reg.* v. *Kelk*, 12 A. & E. 559; 4 P. & D. 185; 9 L. J., Q. B. 362.

See also COMPANY.

PUBLIC DOCUMENT.

See EVIDENCE.

PUBLIC HEALTH.

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PUBLIC OFFICER.

A. JUDICIAL CAPACITY.
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A. JUDICIAL CAPACITY.

1. JUDGES.

a. Particular Cases.

Lord Chancellor.] — The Lord Chancellor, though "Chancellor of Great Britain," has only certain statutory powers in Scotland, which are not of a judicial nature. *Stuart* v. *Bute* (*Marquis*), 9 H. L. Cas. 440.

Although the holder of the great seal is Lord Chancellor of Great Britain, and by statute has important functions to exercise in Scotland, his jurisdiction as a judge is limited to the realm of England. *Stuart* v. *Moore*, 4 Macq. H. L. 49; 7 Jur. (N.S.) 1129; 4 L. T. 382; 9 W. R. 722.

Master of the Rolls.]—*See* generally, as to the jurisdiction of the Master of the Rolls in England and Ireland. *Shaw*, *Ex parte*, Beat. 34.

The Master of the Rolls has no authority to inquire whether the keeper of the Queen's prison obeys the regulations established for the government of his prison, or give directions as to the mode of treatment of the prisoners committed to his custody for contempt. *Oldfield* v. *Cobbett*, 11 Beav. 258.

One of Superior Courts at Westminster.] — Judge of the Court of Chancery is not a judge of one of the superior courts at Westminster within the meaning of s. 14 of the 1 & 2 Vict. c. 110. *Miles* v. *Presland*, 4 Myl. & C. 431. Affirming 2 Beav. 300.

b. Liability to Actions.

Act done in Course of Judicial Office.]—No action will lie for any act done or word spoken in the exercise of judicial office though said or done maliciously and contrary to good faith and honesty. *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668; 14 R. 79; 71 L. T. 382—C. A.

If an action is brought against a judge of record for an act done in his judicial capacity, a plea that he so did it will be a sufficient justification. *Mostyn* v. *Fabrigas*, Cowp. 172.

An action does not lie against a judge of one of the superior courts for a judicial act, though alleged to have been done maliciously and corruptly. *Fray* v. *Blackburn*, 3 B. & S. 576. S. P., *Dicas* v. *Brougham* (*Lord*), 6 Car. & P. 249—Ex. Ch.; *Johnson* v. *Cooke*, 17 S. J. 30.

The judge of a consular court, vested by treaty with plenary civil jurisdiction over all British subjects within the limits of the jurisdiction, while sitting and acting as judge of such consular court, is entitled to the same degree of protection which is accorded by the law of England to a judge of a court of record, and no action will lie for an act done by such judge within his jurisdiction in his judicial capacity. *Haggard* v. *Pélicier*, 61 L. J., P. C. 19; [1892] A. C. 61; 65 L. T. 769—P. C.

A sheriff substitute ordered a passage in certain pleadings drawn by a practitioner in his court to be struck out. He refused. The sheriff substitute suspended him for a month. The practitioner's action for damages held to be unsustainable. To support an action under such circumstances against a judge, express malice must be alleged, not malice involved in the act, or to be inferred from it. *Hamilton* v. *Anderson*, 3 Macq. H. L. 363.

No action will lie against a judge of a court of record for any act done by him in the exercise of his judicial functions. *Ward* v. *Freeman*, 2 Ir. C. L. R. 460—Ex. Ch.

An action will not lie against a judge for acts judicially done by him. A warrant granted by the chief justice of the Queen's Bench in chambers, returnable into that court, to arrest a party for a breach of the peace, is such a judicial act as will protect him against an action for false imprisonment. *Tauffe* v. *Downes*, 3 Moore, P. C. 36, n.

Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction; and it lies upon the plaintiff, in every such case, to prove that fact. *Calder* v. *Halket*, 3 Moore, P. C. 28.

A judge of a court of record is answerable in an action for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends. *Houlden* v. *Smith*, 14 Q. B. 841; 19 L. J., Q. B. 170; 14 Jur. 598.

A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction; and a matter of fact so adjudicated by him cannot be put in issue in an action against him. *Kemp* v. *Neville*, 10 C. B. (N.S.) 523; 31 L. J., C. P. 158; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.

An action lies against a judge of an ecclesiastical court who has acted beyond the jurisdiction of the court, as where a party was excommunicated for refusing to obey an order of the ecclesiastical court which it had no authority to make, or where the party had not been previously served with a citation or monition, nor had due notice of the order. *Beaurain* v. *Scott*, 3 Camp. 388; 14 R. R. 759.

An action was held not to lie against a vicar-general of a bishop for excommunicating a party for contumacy in not taking upon him administration of an intestate's effects, to whom he was next of kin, and who had intermeddled with the goods, although the citation by which he was cited was void, by reason that it required him to appear and take administration without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, viz. the granting administration, and there was no malice. *Ackerley* v. *Parkinson*, 3 M. & S. 411; 16 R. R. 317.

No action will lie against the judge of a court of record (a coroner) for an act done by him in his judicial capacity. *Garrett* v. *Ferrand*, 6 B. & C. 611; 9 D. & R. 657; 5 L. J. (O.S.) K. B. 221. S. P., *Thomas* v. *Churton*, 2 B. & S. 475; 31 L. J., Q. B. 139; 8 Jur. (N.S.) 795; 6 L. T. 320.

If the judgment of commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass. *Radnor* (*Earl*) v. *Reeve*, 2 Bos. & P. 391; 5 R. R. 630.

An action will not lie against a county court judge for words spoken by him while hearing a cause, although they are alleged to be spoken falsely and maliciously, and without any reason-

able or probable cause, and not bonâ fide in the discharge of his judicial duties. *Scott* v. *Stansfeld*, 37 L. J., Ex. 155; L. R. 3 Ex. 220; 18 L. T. 572; 16 W. R. 911.

The steward of a hundred court, or of a court baron, is not responsible for the misfeasance in the execution of process of the bailiffs of the lord of the hundred or manor, to whom process of execution awarded by such court is usually directed. *Bradley* v. *Carr*, 3 Man. & G. 221; 3 Scott (N.R.) 523. S. P., *Holroyd* v. *Breare*, 2 B. & Ald. 473; 21 R. R. 361. *Tinsley* v. *Massam*, M. & M. 52; 2 Car. & P. 582.

Where, however, the steward directs process to persons named by the party suing out such process, taking an indemnity for such party, he is liable. *Ib.*

An action will lie against a sheriff or his deputy if he refuses to sign a bill of exceptions. *White* v. *Hislop*, 4 M. & W. 73; 6 D. P. C. 693; 7 L. J., Ex. 204; 2 Jur. 470.

c. Salary.

Assignment—Amount Payable on Death.]—The 6 Geo. 4, c. 85, regulating the payment of the salaries and pensions to the judges of his majesty's courts in India, enacts, "that when a chief justice or puisne judge hath departed, or shall depart, this life while in possession of such office, and after the expiration of six calendar months from the time of his arrival in India for the purpose of taking upon him the office of chief justice or puisne judge, the court of directors shall, and they are hereby required to pay, or direct and cause to be paid out of the territorial revenues from which the salary of such chief justice or puisne judge so dying shall be payable, to the legal personal representatives, over and above what may have been due to such chief justice or puisne judge, at the time of his death, a sum equal to the amount of six calendar months' salary." Sir John David Norton died while holding the office of puisne judge of the supreme court of Madras, having previously assigned, as a security for money advanced, the sum of 2,500*l.*, which would be payable to his personal representatives:—Held, first, that the meaning of the legislature was, that this sum should form part of the general assets of the judge, and that "legal personal representatives" were to be construed executors or administrators. *Arbuthnot* v. *Norton*, 5 Moore, P. C. 219; 3 Moore, Ind. App. 435; 10 Jur. 145.

Held, secondly, that the judge had complete power of assigning such contingent interest, either inter vivos or by will, and that this was a good assignment. *Ib.*

Held, thirdly, that this assignment was not against public policy, it being unlike salary in this respect, that the judge could, by no possibility, receive it in his lifetime, and the assignment could, therefore, not diminish his income. *Ib.*

"Property" of Bankrupt vesting in Trustee—Pension.]—The effect of ss. 15 and 17 of the Bankruptcy Act, 1869, is to vest in the trustee in a bankruptcy all the "property" of the bankrupt of whatever nature, including the matters dealt with by s. 23 and ss. 87 to 95, but subject to the exceptions and qualifications introduced by those sections. The pension of a retired judge of a crown colony, granted by the secretary of state for the colonies, and voted annually by the legislature of the colony, is, in case of the bankruptcy of the judge, "property" which vests in the trustee of the bankruptcy, but it is "income" of the bankrupt within s. 90 of the Bankruptcy Act, 1869, and is subject to the power thereby given to the court to determine how much of it shall be set aside for the benefit of the bankrupt's creditors. *Huggins, Ex parte, Huggins, In re*, 51 L. J., Ch. 935; 21 Ch. D. 85; 30 W. R. 878—C. A.

Liability to Pay—Chancellor of Durham.]—By the 6 & 7 Will. 4, c. 19, the temporal jurisdiction, including all jura regalia of the bishopric of Durham, was transferred from the bishop to the crown, and by the 6th section of that act the rights of any persons holding any office by patent were reserved, and the revenues of the see were made chargeable with the same fees and stipends in respect of any office in the county of Durham as the same had theretofore been subject to. Under the authority of the acts constituting the ecclesiastical commissioners, and by an order in council in 1836, the surplus revenues of the see of Durham, after providing for the bishopric, were directed to be paid to the ecclesiastical commissioners, and such surplus was made chargeable with the payment of the fees and stipends granted out of the revenues of the see by the last or any preceding bishop to any officer of the palatinate who held his office by patent at the time of the passing of the act 6 & 7 Will. 4, c. 19. The office of chancellor of the palatinate was created by patent before the time of Henry VIII., and the fees in respect of such office were about 27*l.* In the year 1788 the then bishop made a voluntary grant of 100*l.* to the chancellor, payable out of the revenues of the bishopric, for each sitting of the chancellor's court, and from that period down to 1836, 100*l.* was entered in the accounts of the bishopric under the headings, sometimes "new stipends" and sometimes "new stipend due this sitting." The ecclesiastical commissioners having refused to pay the present chancellor, who was appointed in 1852, any more than the sum for which there was evidence of a grant by patent:—Held, that, having regard to the period during which the 100*l.* had been de facto paid, and irrespective of the question whether the payment of that sum could ever have been enforced by action at law, the surplus revenues of the bishopric in the hands of the ecclesiastical commissioners were liable for the payment of the sum of 100*l.* for each sitting of the chancellor. *Temple* v. *Ecclesiastical Commissioners*, 3 De G. M. & G. 418; 23 L. J., Ch. 673; 18 Jur. 45; 2 W. R. 112.

d. Where Interested.

Lord Chancellor interested as Shareholder—Appeal.] — A company filed a bill in equity against the defendant in a matter largely involving the interests of the company. The Lord Chancellor had an interest as shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant. The cause was heard before the vice-chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the vice-chancellor:—Held, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge on the cause, and that his decree was therefore voidable,

and must consequently be reversed. *Dimes* v. *Grand Junction Canal Co.*, 3 H. L. Cas. 759; 17 Jur. 73.

Observations on the inconvenient operation of a remote interest in the subject-matter of a cause operating to disqualify the judge. *L. & N. W. Ry.* v. *Lindsay*, 3 Macq. H. L. 99.

In Rating Matters.] — On appeal against a valuation of ratable property under a local act to the sessions for a borough, the recorder who tried the appeal reduced the rate, and ordered that the costs should be paid by the respondents. The amount of costs not being then ascertained, he adjourned the case to the next sessions. At these sessions a deputy recorder appointed under 6 & 7 Vict. c. 89, s. 8, presided. The costs were, in fact, taxed by the recorder, who reduced them; but the order for costs was drawn up at the sessions at which the deputy recorder presided, and formally entered as of such sessions; the deputy recorder, however, not otherwise taking any part in the matter. The respondents were the parish officers of a parish comprised in a union which comprehended several other parishes, and the deputy recorder was a rated inhabitant in one of such other parishes; all the parishes contributed to a common fund for the relief of the poor:—Held, that the order for costs must be considered as the order of the deputy recorder, and was voidable on account of his interest; and that the 16 Geo. 2, c. 18. s. 1, was inapplicable as applying only to cases where justices act as such in the making of orders out of court, and not to the exercise of appellate jurisdiction. *Reg.* v. *Cambridge (Recorder)*, 8 El. & Bl. 637; 27 L. J., M. C. 160; 4 Jur. (N.S.) 334; 6 W. R. 80. *See* 40 Vict. c. 11.

Counsel Raised to the Bench.]—A counsel in a cause being afterwards raised to the bench is not thereby precluded from taking part in the hearing and discussion of that cause; but he may properly (unless his doing so would entail great inconvenience and expense on the parties, or perhaps, from his being, as in chancery, the sole judge of the court, amount to a denial of justice) decline to take part in such hearing and decision. *Thellusson* v. *Rendlesham*, 7 H. L. Cas. 429.

Relationship.] — The relationship which is formed by marriage is not dissolved by the death of one of the parties without issue; so that a husband whose wife died childless cannot afterwards act as a judge in a cause to which her nephew is a party. *Becquet* v. *Lempriere*, 1 Knapp, 376.

Personal Interest.]—A member of the London County Council sat and voted at the hearing of an application for a music and dancing licence which was refused. Several weeks previously he had attended a meeting of persons who afterwards served notices upon the council of their intention to oppose the application. At this meeting the witnesses it was proposed to call at the hearing were present and their evidence was discussed. He took no part in this discussion, but on being requested to do so explained the procedure before the licensing committee, and also said that, assuming the facts to be as stated, the matter should be placed before the committee, but he declined to give any opinion as to what importance the committee or council would attach to them. He took no further part in the meeting and the terms of the notices of opposition were not settled there, and he did not at any time take part in assisting to settle them or in advising thereon:—Held, that the facts did not furnish sufficient grounds for inferring such bias in favour of the promoters as to disqualify the member from voting on the application and thereby to invalidate the council's decision. Per Wright, J.: That the strict rule as to interest other than pecuniary, is not applicable without qualification to bodies really exercising administrative functions, even though these involve something of a judicial character. *Reg.* v. *London County Council, Edwardes, Ex parte*, 15 R. 66; 71 L. T. 638.

The county council in determining applications for music and dancing licences are acting judicially and are bound by the same principles as are binding on justices in determining questions which come before them for judicial decision.—The London county council delegated to a committee of their body the hearing of applications for music and dancing licences. The committee by a majority recommended that a licence which had been applied for should not be granted. The applicant thereupon applied to the county council for a licence. At the hearing before the county council certain members of that body, who were also members of the committee and had voted in the majority against granting a licence at the hearing before the committee, instructed counsel to represent them before the county council and oppose the application for a licence. The councillors so instructing counsel were present at the hearing, but did not vote. The council by a majority refused the application for a licence:—Held, that the presence at the hearing of those members of the county council who had instructed counsel to oppose the application vitiated the proceedings, and a rule for a mandamus to hear and determine the application according to law was accordingly made absolute. *Reg.* v. *London County Council, Akkersdyk, Ex parte*, 61 L. J., M. C. 75; [1892] 1 Q. B. 190; 66 L. T. 168; 40 W. R. 285; 56 J. P. 8.

The General Council of Medical Education and Registration, acting under the powers of the Medical Act, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect, and removed his name from the register of medical practitioners. The proceedings were instituted by the managing body of a company called the Medical Defence Union, whose object was to protect the characters of medical practitioners and to suppress and prosecute unauthorised practitioners. Two out of twenty-nine persons who held the inquiry were members of the Medical Defence Union, but not of the managing body of the union:—Held (Fry, L.J., dissenting), that the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry; and the court refused to interfere with the decision of the council. *Leeson* v. *General Medical Council*, 59 L. J., Ch. 233; 43 Ch. D. 366; 61 L. T. 849; 38 W. R. 303—C. A.

The chancellor of a consistory court being by his appointment an independent judge, it is no ground for prohibition in a cause tried in the consistory court before him that the bishop of the diocese was interested in the cause. *Medwin*,

Ex parte, 1 El. & Bl. 609 ; 22 L. J., Q. B. 169 ; 17 Jur. 1178.

Justices of the Peace.]—*See* JUSTICE OF THE PEACE.

e. Amotion.

By Governor and Council of Colony.] — The governor and council of a colony or plantation have power, under 22 Geo. 3, c. 75, to amove a judge from his office for misbehaviour or neglect of duty. *Montague* v. *Van Diemen's Land* (*Lieutenant-Governor*), 6 Moore, P. C. 489.

Where a judge availed himself of his judicial office, through an incident connected with the constitution of the Supreme Court in Van Diemen's Land, to obstruct his creditor from recovering a debt due from him, and, upon an investigation by the governor and council, was found to be involved to a large extent in bill transactions and pecuniary embarrassment : —Held, sufficient to justify the governor and council in removing him from office. *Ib.*

—— **Opportunity of Defence.**]—The amotion was made, under an order of the governor and council, calling upon the judge to shew cause why he should not be suspended from office :—Held, that although there was some irregularity in pronouncing such an order for amotion, when the judge had only been called upon to shew cause against an order of suspension, yet, that as the facts justified the order of amotion, and the judge had sustained no prejudice by such irregularity, the order of amotion ought not to be reversed. *Ib.*

But where the governor and council amoved a judge without giving him notice, or affording him an opportunity of answering the charges brought against him, and upon which the order of amotion was founded, such order was held illegal and reversed. *Willis* v. *Gipps*, 5 Moore, P. C. 379.

Colonial Judge—Secretary of State.]—Removal from his position by the secretary of state is the only remedy which can be had against a colonial judge who maliciously overstrains his judicial office to the prejudice of a litigant. *Anderson* v. *Gorrie*, 14 R. 79 ; [1895] 1 Q. B. 668 ; 71 L. T. 382—C. A.

Lapse of Time.]—On a memorial presented to the Queen in council by the House of Assembly of the Island of Grenada, complaining of the judicial conduct of the chief justice of that island as illegal and oppressive, being referred to the judicial committee, it appeared from the evidence, that during the fourteen years in which the chief justice had held office he had displayed on the bench several instances of intemperate, and in some cases illegal, conduct ; but these acts were committed many years before the presentation of the memorial, without any complaint at the time of the chief justice's misconduct ; the only act of recent date complained of being the fining of two magistrates for taking depositions in the third instead of the first person. The judicial committee reported to the crown that, having regard to the length of time which had elapsed since all the acts complained of, except that of fining the magistrates (which, though erroneous and improper, had been committed by the chief justice in the execution of his duty), they could not, sitting judicially, advise the crown to remove the chief justice for misconduct. *Grenada* (*Island*) v. *Sanderson*, 6 Moore, P. C. 38.

f. Other Matters.

Private Communications to.] — Observations upon the irregularity and impropriety of private communications to a judge upon a matter publicly before him, such communications being a high contempt of court. *Dyce Sombre, In re*, 1 Mac. & G. 116 ; 1 Hall & T. 285 ; 13 Jur. 857.

Judge acting as Arbitrator.] — Questions having arisen between the official liquidator of a company and a mortgagee with whom the trustees had deposited deeds belonging to the company, with respect to the validity of the security, the parties signed an agreement that their rights should be determined in a summary way by the judge acting in the matter of the winding-up :— Held, that this was a submission to the judge personally, and that no appeal could be brought to the Court of Appeal in Chancery. *Durham County Permanent Benefit Building Society, In re, Wilson, Ex parte*, 41 L. J., Ch. 164 ; L. R. 7 Ch. 45.

Patent of Precedence.]—Where a judge of a district court in Canada was removed from that court to another district court, and the letters-patent appointing him judge to the latter court also granted him precedence over the judges of that court whose commissions were of later date than his own :—Held, that such grant of precedence was valid, and that the judge had a right to rank and take precedence accordingly. *Bedard, In re*, 7 Moore, P. C. 23 ; 13 Jur. 641.

Duty at Trial.]—*See* PRACTICE.

Death—Effect of.]—A plaint was heard before a deputy judge of a county court, and he, after death of the judge whose deputy he was, sent a written statement of his decision to the judge's successor, who received and entered it as his judgment. The court (without expressly deciding that the judgment so entered was void) granted a rule nisi for a prohibition against proceeding upon it, in order to give the parties an opportunity of applying to the new judge for a rehearing. *Hoey* v. *M'Farlane*, 4 C. B. (N.S.) 718 ; 4 Jur. (N.S.) 785.

2. OTHER OFFICERS.

Removal and Suspension.] — The supreme court at Calcutta has power by the Charter of Justice of 1774 (14 Geo. 3) to remove or suspend officers of that court, on account of misconduct, and this power of removal is not limited to acts done by such officer in his limited character, but includes transactions distinct from those of his office. *Grant, In re*, 7 Moore, P. C. 141.

An officer of the court, being a shareholder and director of the Union Bank at Calcutta, was a party to deceptive statements, contained in the half-yearly reports of the concern, as to the state of the affairs of the bank, and also availed himself, in his character as director, to obtain credit to a considerable amount upon his personal security only, which, by the condition of the deed of co-partnership of the bank, amounted to a breach of trust. No charge or

imputation, with respect to his judicial functions, was brought against him :—Held, that there were sufficient grounds for calling upon the court to protect the administration of justice by suspending such officer for so misconducting himself. *Ib.*

The masters in ordinary in chancery have power to appoint and dismiss their clerks at pleasure, notwithstanding the 3 & 4 Will. 4, c. 84, provides salaries for those clerks out of a public fund, mentions them as officers of the court, assigns to them duties of a responsible nature, and affixes penalties for their misconduct. *Ward, In re*, 7 L. J., Ch. 137.

Distribution of Business.]—Though the respective duties of the master's chief clerk and copying clerk are nowhere exactly defined, they are sufficiently distinguished in their general features by the provisions of the Chancery Regulation Act relating to those officers, as well as by previous practice. And the masters are not at liberty to distribute the business of their offices between their two clerks in such a manner as habitually to allot to the copying clerk duties which, it is to be inferred from that act, were intended to be exclusively performed by the chief clerk; although with proper limitations, and on proper occasions, the masters are entitled to require either of their chief clerks to perform any official duty in which his assistance may be required, and for the performance of which he may be competent. Any solicitor of the court has a right to complain by petition of an irregularity being shewn to exist. The Lord Chancellor may interfere to correct it, though no actual evil be proved to have resulted from it. *Master's Clerks' Case*, 1 Ph. 650. *S. C.*, nom. *Whiting, In re*, 15 L. J., Ch. 242.

Effect of Death.]—A commissioner in bankruptcy obtained leave of absence, and the Lord Chancellor, under 17 & 18 Vict. c. 119, appointed the registrar attached to his court to act in his stead for two months. The commissioner died before the two months expired :—Held, that an order made by the registrar sitting under this appointment, dated the day after the death of the commissioner, was void. *Corles, Ex parte, Palmer, In re*, 3 De G. & J. 484; 28 L. J., Bk. 15; 5 Jur. (N.S.) 110; 7 W. R. 220.

Where an appointment has been made under 9 & 10 Vict. c. 95, s. 25, which authorises in populous districts the appointment of two persons "to execute jointly the office of clerk, under such regulations as to the division of the duties and emoluments of the office as shall from time to time be made," the death of one does not vacate the office as to the other. *Reg.* v. *Wake*, 8 El. & Bl. 384; 27 L. J., Q. B. 11; 4 Jur. (N.S.) 68; 6 W. R. 36.

Crier and Tipstaff.]—The court will not on motion refuse to allow the usual fees payable on the swearing in of attorneys to the secondary, the tipstaff, and deputy crier. *Ince* or *Price, In re*, Longf. & T. 584.

Semble, these fees are now legally established. *Ib.*

Primâ facie, the crier and the tipstaff are entitled between them to the fee of one guinea upon the admission of attorneys, but the court-keeper is not entitled to the fee of ten shillings and sixpence, the secondary is entitled to the fee of one guinea for swearing attorneys into office. *Admission of Attorneys, In re*, 4 Ir. Eq. R. 685.

Of Inferior Courts—Protection of, in Execution of Duty.]—In trover, the defendant pleaded that the supposed grievance was committed after the passing of this statute, and within the jurisdiction of the inferior court thereinafter mentioned; and that, before and at the time of the grievance, the defendant had been duly appointed to act as a bailiff in the execution of the process of the court of the tolzey of Bristol, which, at the passing of the act, had, by charter, jurisdiction for the recovery of debts and damages in personal actions arising within the city and county of Bristol; and that no notice of action was given to him pursuant to the act :—Held, first, that the plea brought the defendant within the protection of s. 9 of 7 & 8 Vict. c. 19. *Braham* v. *Watkins*, 16 M. & W. 77; 4 D. & L. 42; 16 L. J., Ex. 9.

Held, secondly, that the jurisdiction of the inferior court was sufficiently shewn. *Ib.*

Held, thirdly, that the defendant's duty as bailiff was sufficiently set forth. *Ib.*

Trover against a sheriff and two bailiffs. Plea, by the sheriff, not guilty; and by the bailiffs, a justification under process issued out of the ancient common law county court. Issue joined on the first plea, and to the other a new assignment, alleging the conversion to be the retaining possession by the bailiffs, after the sheriff had issued a supersedeas :—Held, that, upon the record, there ought to be a verdict for the sheriff, as he was not liable for the wrongful acts of his bailiffs, after the supersedeas issued. *Brown* v. *Copley*, 8 Scott (N.R.) 350; 2 D. & L. 332; 7 Man. & G. 558; 13 L. J., C. P. 164; 8 Jur. 577.

Officers of the Court of Passage are not protected in the case of process executed under an interpleader order made without jurisdiction, though good on the face of it, if such order was obtained on their own application. The relief or remedy, the power to grant which is conferred on superior courts by s. 89 of the Judicature Acts, 1873, only refers to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as interpleader. *Speers* v. *Daggers*, 1 Cab. & E. 503.

A justification under a writ out of an inferior court, tested on a day not being a court day, is bad. *Humphries* v. *Longmore*, 6 C. B. 363; 6 D. & L. 128; 17 L. J., C. P. 328.

Quære, whether a borough court established by charter, pursuant to 5 & 6 Will. 4, c. 76, and 7 Will. 4 & 1 Vict. c. 78, having jurisdiction for the recovery of debts and damages, and in ejectment between landlord and tenant, is a court within the 7 & 8 Vict. c. 19. Assuming that it is :—Held, that one who de facto executes the process of the court under the serjeant-at-mace, but who has not been appointed by the recorder (the sole judge of the borough court), is not a bailiff within the statute, so as to be entitled to a month's notice of action. *Tarrant* v. *Baker*, 2 C. L. R. 78; 14 C. B. 199; 23 L. J., C. P. 21; 18 Jur. 15.

An act of parliament establishing a court of requests provided that the defendant in any action commenced for anything done in pursuance of the act, or on account of any order of the court, might give the special matter in evidence under the general issue :—Held, that this

enactment protected not merely the officers of the local court, but also the plaintiff in the suit there, who had voluntarily accompanied and aided the officer in seizing the goods of his debtor under an order of execution. *Culverson* v. *Melton*, 2 M. & Rob. 200.

Where it is the regular course of proceeding of an inferior court, on a verdict being found therein, for the judges of the court to issue execution for the debt in case of nonpayment, and levy the amount, the fact of the plaintiff's bringing his plaint in the inferior court, and not countermanding the execution, renders him liable in trespass for the seizure, unless he justifies under the process of the inferior court. *Coomer* v. *Latham*, 16 M. & W. 713; 16 L.J., Ex. 175.

The steward of a hundred court, or of a court baron, is not responsible for the misfeasance in the execution of the process of the bailiffs of the lord of the hundred or manor, to whom process of execution awarded by such court is usually directed. *Bradley* v. *Carr*, 3 Man. & G. 221; 3 Scott (N.R.) 523.

Where, however, the steward directs process to persons named by the party suing out such process, taking an indemnity from such party, he is liable. *Ib.*

If a public officer is guilty of a misfeasance in the exercise of the powers intrusted to him by law, and in the discharge of his duty, he is liable to an action for any damage resulting from that act, without proof of malice or want of probable cause. *Brasyer* v. *Maclean*, 44 L. J., P. C. 79; L. R. 6 P. C. 398; 33 L. T. 1.

—— Mandamus to Deputy Steward—Balance.]—By a local act, the commissioners of a court of requests were empowered to order debts, when recovered by its process, to be paid by instalments, and under such terms and conditions as might appear reasonable and just to them. They made an order, whereby the payments were directed to be paid to a person who was then the deputy steward of the court; payments were made to him, and, in consequence of the plaintiffs not applying for them, a large sum had accumulated in his hands, when his principal died, and he was removed:—Held, that the commissioners, not having revoked his authority, nor issued any other order, a mandamus would not lie at the suit of the succeeding steward to compel the deputy to pay over the accumulations to such successor. *Reg.* v. *Watson*, 2 N. & P. 595.

Institution of Suits by.]—It is against public policy to allow an officer of the court to institute suits, in the conduct of which he had a direct personal interest. *Kerakouse* v. *Serle*, 4 Moore, P. C. 459.

B. WHEN APPOINTED BY GOVERNMENT.

1. Liability of.

Lord Lieutenant of Ireland.]—An action is not maintainable in an Irish court against the lord lieutenant during his term of office for any act done by him in his political capacity. *Sullivan* v. *Spencer* (*Earl*), Ir. R. 6 C. L. 173.

The suppression by a lord lieutenant of a political meeting in the Phœnix Park is an act done by him in his political capacity. If such an action is brought against the lord lieutenant, the court will stay the proceedings without requiring him to plead his privilege. *Ib.*

No action is maintainable against a lord lieutenant of Ireland in an Irish court during his continuance in office, for any act done by him quâ lord lieutenant, and when such an action has been brought, the court will, on motion, direct that the writ of summons and plaint be taken off the file, without putting the lord lieutenant to his plea. *Luby* v. *Wodehouse*, 17 Ir. C. L. R. 618.

Dismissal.]—Semble, a contract of service with the crown for a fixed term of years is determinable at the pleasure of the crown. *De Dohse* v. *Reg.*, 66 L. J., Q. B. 422, n.—H. L. (E.)

Commissioners of Works and Public Buildings.]—By 18 & 19 Vict. c. 95, the commissioners of works and public buildings are incorporated and empowered to take land compulsorily for the purpose of building public offices:—Held, that the commissioners do not represent the crown. *Wood's Estate, In re, Works and Public Buildings Commissioners, Ex parte*, 55 L. J., Ch. 488; 31 Ch. D. 607; 54 L. T. 145; 34 W. R. 375—C. A.

Woods and Forests.]—The commissioners of woods and forests are not, under the 7 Geo. 4, c. 77, entitled to sue or liable to be sued, for the specific performance of contracts entered into with and by them. *Nurse* v. *Seymour* (*Lord*), 13 Beav. 254. *But see* 23 & 24 Vict. c. 34.

The commissioners were authorised, with the consent of the lords of the treasury, to demise, or previous to any demise, to contract to demise. The bill alleged that the commissioners having first obtained the consent required, determined to demise, and afterwards contracted to demise to the plaintiff, and prayed a specific performance:—Held, on demurrer, that the bill could not be sustained. *Ib.*

An act of parliament empowered the commissioners of woods and forests to make certain new streets according to a particular plan therein referred to, and to lease and enter into agreement for leasing the grounds in the lines of the new streets. Under this power leases were granted of two plots of ground, upon which the lessees erected two particular houses, in the line of one of the new streets. Each of the leases described the plot of ground which it demised, as being "on the north side of a new street then forming there, called," &c., "and as fronting towards the south on the said new street." The plan referred to in the act of parliament exhibited an open space in front of the sites of these houses, but that plan was not mentioned in either of the leases. The intended streets were completed, and the space in front of the houses was left open. The commissioners of woods and forests and the paving committee of the parish afterwards gave permission to certain persons to erect an equestrian statue in the open space, and those persons proceeded to place it upon a part of that open space, but without interfering with the line of the carriage-way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging that upon the treaty for the leases, the lessees were shewn

the plan of the intended new street, and parts adjacent, by which it appeared that the space in question was to be quite open and free from all obstructions, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue; they also alleged that the proposed erection would diminish the value of their property, and be a public and private nuisance:—Held, that these circumstances did not entitle the lessees to an injunction to restrain the erection of the statue. *Squire* v. *Campbell*, 1 Myl. & Cr. 459; 6 L. J., Ch. 41.

The commissioners of woods and forests having no power under the statute 57 Geo. 3, c. 97, to make sale of any royalties, honours, hundreds, manors, lordships or franchises, "or any rights, members or appurtenances thereof," belonging to the crown, within the ordering and survey of the exchequer, contracted for the sale of the crown manor of E., and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments and appurtenances thereto belonging":—Held, that this being in effect a contract for sale by the crown, the advowson of E., which was appended to the manor, did not pass under the contract, and consequently, that the purchaser was bound to take a conveyance of the manor without the advowson. *Att.-Gen.* v. *Sitwell*, 1 Y. & Coll. 559; 5 L. J., Ex. Eq. 86.

Semble, that if the contract had been between subject and subject, the advowson would have passed, although, at the time of the contract, it was not known by either party to be appendant to the manor, and, therefore, the sale of it was not in contemplation. *Ib.*

Injunction granted to restrain the commissioners of woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. *Rankin* v. *Huskisson*, 4 Sim. 13.

Trinity House.]—The Trinity House is not a department of the state, so as to be exempt from liability for negligence of its servants. *Gilbert* v. *Trinity House Corporation*, 56 L. J., Q. B. 85; 17 Q. B. D. 795; 35 W. R. 30.

Upon Contracts.]—An officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. *Macbeath* v. *Haldimand*, 1 Term Rep. 172; 1 R. R. 177.

In a suit against her majesty's deputy commissary general for Natal, and as such representing her majesty's commissariat department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employés, and for general damage:—Held, on exceptions by the defendant to the jurisdiction of the court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; and that there was no cause of action against him. The government revenue cannot be reached by a suit against a public officer in his official capacity. Quære, whether the court would have had jurisdiction if a petition of right had been presented and the crown had ordered that right should be done. *Palmer* v. *Hutchinson*, 50 L. J., P. C. 62; 6 App. Cas. 619; 45 L. T. 180—P. C.

Nor even when contracting by deed, on account of government, is he personally answerable. *Unwin* v. *Wolseley*, 1 Term Rep. 674. See *Thompson* v. *Pearce*, 1 Br. & B. 25; 3 Moore, 260.

No action lies against a public servant of the crown contracting on behalf of the crown upon any implied warranty of authority to make the contract. *Dunn* v. *Macdonald*, 66 L. J., Q. B. 420; [1897] 1 Q. B. 555; 76 L. T. 444; 45 W. R. 355—C. A.

In one case, however, a person entering into a charterparty in his own name, on behalf of the government, was held to be personally liable. *Cunningham* v. *Collier*, 4 Doug. 233.

The principal secretary of state for war is not personally liable in an action for breach of a contract entered into by him on behalf of the war department. *O'Grady* v. *Cardwell*, 20 W. R. 342.

Indebitatus assumpsit for goods sold and delivered, and verdict for plaintiff. Defendant brought a bill suggesting that he was master of the buckhounds, and acted only in relation to his office; and that the king ought to pay for these goods. Defendant pleaded the verdict and demurred, for that the matter was suable at law. Plea overruled. *Graham* v. *Stamper*, 2 Vern. 146.

C. contracted with the commissioners of the admiralty to convey the mails from Calais to Dover during the continuance of the contract, and the commissioners for and on behalf of her majesty agreed to pay to him from and out of the moneys to be provided by parliament, 18,000*l.* per year; the contract to continue from the date until A.D. 1870:—Held, that there was no obligation on the part of the commissioners to employ C. under the contract, parliament not having provided moneys for the payment. *Churchward* v. *Reg.*, L. R. 1 Q. B. 173; 14 L. T. 57.

The lords commissioners of the admiralty are empowered to sue and be sued in respect of certain matters under a collective name; an action lies against them in respect of some of such matters. A writ of summons directed to them in that name having been served upon one of the commissioners, the court refused to set aside the writ, although it appeared upon the plaintiff's affidavit, on shewing cause, that the cause of action was one for which the defendants were not suable in their collective name. *Williams* v. *Admiralty* (*Lords Commissioners*), 2 L. M. & P. 456; 12 C. B. 420; 20 L. J., C. P. 245; 16 Jur. 42.

For Money and Interest.]—It is clear that a suit may be sustained against a public officer having in his hands money issued by government for the use of an individual for the recovery of such money. But where the government has ordered the money to be withheld, the question is only between government and the individual or his assignee, and this court has no jurisdiction. *Priddy* v. *Rose*, 3 Mer. 102; 17 R. R. 24.

Quære, whether a right can legally exist in an officer of the crown to sell the soil of the crown, and not account for the proceeds; but, if it can legally exist, such right ought to be established by evidence cogent and invincible. *Att.-Gen.* v. *Mathias*, 4 Kay & J. 579; 27 L. J., Ch. 761; 4 Jur. (N.S.) 628; 6 W. R. 780.

Receiver of a public trust having a salary, making interest of balances in his hands, is

accountable to the trustees for interest made ultra, notwithstanding prior accounts settled without demanding it. *Lonsdale* (*Earl*) v. *Church*, 3 Bro. C. C. 41. *And see* 7 Price, 45.

Public functionaries must account for interest made by them on any considerable balances in their hands of the money, being the proceeds of public property sold by them pursuant to appointment; although they have necessary payments to make in course of their duty; if their instructions direct payment of proceeds into the bank, and point out a course of supplying themselves for such necessary payments. *Crauford* v. *Att.-Gen.*, 7 Price, 2.

Previously to 1833, the clerk of the patents received the fees paid by the patentees for his own use, but by 3 & 4 Will. 4, c. 84, he received a fixed salary, and was required to hand over all the fees to the exchequer:—Held, that he was liable to account to the crown in equity in respect of such fees, and in respect of all interest and profits made by the use of them, and that an information for this purpose was properly filed in the Court of Chancery. *Att.-Gen.* v. *Edmunds*, 37 L. J., Ch. 706; L. R. 6 Eq. 381; 18 L. T. 505.

The funds voted by parliament for the public service are not trust funds in the hands of the secretaries of state who receive them from the treasury; and the Court of Chancery has no jurisdiction to take any account of the application of such funds. *Grenville-Murray* v. *Clarendon* (*Earl*), 39 L. J., Ch. 221; L. R. 9 Eq. 11.

The crown, by royal warrant, "granted to the secretary of state for India in council for the time being" certain booty taken in war "in trust for the use of" certain persons, who had been adjudged entitled to it upon a reference to the Court of Admiralty, to be distributed among them, with a further provision that in case any doubts should arise in the course of the distribution the decision of the secretary of state should be final, unless the crown should otherwise order:—Held (1) That the secretary of state for India in council could only sue or be sued as a corporation under 21 & 22 Vict. c. 106, s. 65, in proceedings which might have been taken by or against the late East India Company; (2) That the royal warrant constituted the secretary of state for India in council an agent of the crown for the purpose of the distribution of the fund under the control of the crown, but did not constitute him a trustee for the persons interested subject to the control of a court of equity. *Alexander* v. *Wellington* (*Duke*) (2 Russ. & My. 35) discussed. *Brown* v. *Harris* (13 Ves. 552) distinguished. *Kinloch* v. *Secretary of State for India*, 51 L. J., Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845—H. L. (E.)

But an action cannot be maintained against the secretary at war, by a retired clerk of the war office, for his retired allowance, on the grounds that the secretary is only chargeable in his public and official character, and that an action cannot be maintained against him as such, for anything done by him in that character, although it may amount to a breach of employment, as it would tend to expose him to an infinite number of actions, to be brought by any persons who might suppose themselves aggrieved; although he may have received the money applicable to such specific purposes. *Gidley* v. *Palmerston* (*Lord*), 7 Moore, 91; 3 Br. & B. 275; 24 R. R. 668.

For Torts.]—If a public officer is guilty of a misfeasance in the exercise of the powers intrusted to him by law, and in the discharge of his duty, he is liable to an action for any damage resulting from that act, without proof of malice or want of probable cause. *Brasyer* v. *Maclean*, 44 L. J., P. C. 79; L. R. 6 P. C. 398; 33 L. T. 1.

An action for trespass committed or intended is not maintainable against officials of the crown or government sued in their official capacity or as an official body. *Raleigh* v. *Goschen*, 67 L. J., Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90.

Such an action will, however, lie against such officials in respect of acts actually done or directed by them if sued in their individual capacity, even although such acts be done by the authority of the government. *Ib.*

The secretary of state is liable to an action if he improperly directs a gaoler to remove a prisoner to a part of a prison in which he ought not to be confined, and the gaoler so removes him. *Cobbett* v. *Gray*, 4 Ex. 729; 19 L. J., Ex. 137.

An action will lie against the secretary of state for war, like any other corporation, for misuser of land vested in him; but, semble, when land has been acquired under the authority of parliament for military purposes, and is vested in the secretary of state for war, an action will not lie against him for a nuisance occasioned by the reasonable user of such land for military purposes under his direction. *Hawley* v. *Steele*, 46 L. J. Ch. 782; 6 Ch. D. 521; 37 L. T. 625.

An action of trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for an injury committed by him in Minorca. *Mostyn* v. *Fabrigas*, Cowp. 161.

—— **Seizure of Ship.**] — No action lies against a commander of a British ship of war for seizing and detaining a vessel on suspicion of her being hostile prize; though he afterwards dismiss her without libelling her in the Court of Admiralty: and though he detain her partly on suspicion of matters which are merely causes of forfeiture if she is British. *Faith* v. *Pearson*, 6 Taunt. 439; 2 Marsh. 133; 4 Camp. 357; Holt, 113.

By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be felony; by s. 16, any vessel suspected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the act. Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man of war, of which the defendant was commander. At the time of the seizure the defendant bonâ fide believed that there was reasonable ground for suspecting that an offence had been committed against the act:—Held,

no action would lie against the defendant. *Burns* v. *Nowell*, 49 L. J., Q. B. 468; 5 Q. B. D. 444; 43 L. T. 342; 29 W. R. 39; 44 J. P. 828—C. A.

If a ship was seized as forfeited under the 12 Car. 2, c. 18, by a governor of a foreign country belonging to Great Britain, the owner could not maintain trespass against the party seizing, although the latter did not proceed to condemnation; for, by the forfeiture, the property was divested out of the owner. *Wilkins* v. *Despard*, 5 Term Rep. 112; 2 R. R. 559.

—— **Colonial Governors.**]—In a suit against her majesty's deputy commissary general for Natal, and as such representing her majesty's commissariat department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employés, and for general damage:—Held, on exceptions by the defendant to the jurisdiction of the court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; and that there was no cause of action against him. The government revenue cannot be reached by a suit against a public officer in his official capacity. Quære, whether the court would have had jurisdiction if a petition of right had been presented and the crown had ordered that right should be done. *Palmer* v. *Hutchinson*, 50 L. J., P. C. 62; 6 App. Cas. 619; 45 L. T. 180.

Trespass for seizing and detaining at Kingston in Jamaica a schooner of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs. Plea, in substance, of privilege and to the jurisdiction, that the defendant was captain-general and governor-in-chief of the island of Jamaica, that the acts complained of were done by him as governor of the island and in the exercise of his reasonable discretion as such, and as acts of state. The plea did not aver even generally that the seizure of the plaintiff's ship was an act which the defendant was empowered to do as governor, nor even that it was an act of state:—Held, that the judgment respondeat ouster was right and must be affirmed. *Musgrave* v. *Pulido*, 49 L. J., P. C. 20; 5 App. Cas. 102; 41 L. T. 629; 28 W. R. 373—P. C.

—— **Jurisdiction.**]—The governor of a colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of municipal courts to determine whether any act of power done by a governor is within the limits of his authority, and, therefore, an act of state. *Ib.*

Secretary of State—Removal of Officer.]—Action for removing an officer does not lie against the secretary of state for India, the crown having an absolute right to remove the officer at will and pleasure. *Grant* v. *Secretary of State for India*, 46 L. J., C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848. See *Dickson* v. *Combermere (Viscount)*, 3 F. & F. 527.

—— **Cannot Refuse to Appear.**]—A secretary of state, made a defendant in a suit in equity, cannot refuse to appear on the ground that the court has no jurisdiction over him, and that he could only be proceeded against on a petition of right. *Felkin* v. *Herbert*, 1 Dr. & Sm. 608; 8 Jur. (N.S.) 90; 9 W. R. 609.

Mandamus to Lords of Treasury.]—In the half-year ending the 31st December, 1870, certain prosecutions took place at the assizes and quarter sessions of a county, and the costs were taxed by the proper officers under the orders of the respective courts, and the treasurer of the county paid the bills, and returned the bills, with the usual vouchers, to the treasury. The lords of the treasury had appointed officers, called the examiners of criminal law accounts, and these officers disallowed or reduced in amount fifty-one of the items in the bills returned; and a rule nisi was then obtained for a mandamus to the lords of the treasury, commanding them to issue a treasury minute authorising the paymaster of civil contingencies to pay to the treasurer of the county the sums disallowed:—Held, that a mandamus would not lie, inasmuch as the lords of the treasury received the money, which was granted to her majesty, as servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable. *Reg.* v. *Treasury Commissioners*, 41 L. J., Q. B. 178; L. R. 7 Q. B. 387; 26 L. T. 64; 20 W. R. 336; 12 Cox, C. C. 277.

Held, also, that the course which the lords of the treasury had pursued was erroneous, as they had no authority whatever to have the bills retaxed, and ought to have paid over to the treasurer of the county the full sum which he had expended as costs of prosecutions. *Ib.*

The Exchequer and Audit Department Act, 1866 (29 & 30 Vict. c. 39), and the acts which it amends or alters, give no right to a receiver of public moneys to compel the commissioners of the treasury to direct the comptroller and auditor general to examine and audit the accounts. *Edmunds, Ex parte*, 25 L. T. 705; 20 W. R. 205.

A mandamus will not lie to the lords commissioners of the treasury to compel them to pay a debt incurred by a county court, even although parliament has, upon an estimate made by the commissioners of the treasury, voted a sum for the salaries and expenses of the county courts for the year. *Walmesley, Ex parte*, 1 B. & S. 81; 7 Jur. (N.S.) 1010; 4 L. T. 242; 9 W. R. 599.

Criminal Proceedings against.]—It is a high misprision in an officer to alter an inrolment without the sanction of the Court of Chancery. *Garrick* v. *Williams*, 3 Taunt. 540.

A public officer is indictable for misbehaviour in his office. *Rex* v. *Bembridge*, 3 Dougl. 327.

One who was appointed collector of certain duties by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties, by colour and pretence of being collector of such duties, though the money was fraudulently collected and misapplied by him, because he was in fact appointed collector, and in that character received the money. *Rex* v. *Dobson*, 7 East, 218; 3 Smith, 213.

—— **Jurisdiction.**]—The 42 Geo. 3, c. 85, giving jurisdiction for trying and punishing in this country, persons holding public offices or

employments, for offences committed abroad, does not extend to felonies. *Rex* v. *Shawe*, 5 M. & S. 403; 17 R. R. 340.

—— **Validity of Indictments.**]—In an indictment against a public officer for breach of duty, it is sufficient to state generally that he is such officer, without shewing his appointment. *Rex* v. *Hollond*, 5 Term Rep. 607; 2 R. R. 678.

In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. *Ib.*

Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them. *Ib.*

A charge in an indictment against an officer of a breach of orders in not prosecuting a war, "with all possible vigour and decision," is too uncertain, even though the charge is made in the very words of the order given to him. *Ib.*

By 33 Geo. 3. c. 52, s. 62, the demanding or receiving any sum of money or other valuable thing as a gift or present, or under colour thereof, whether for the use of the party receiving the same, or for, or pretended to be for, the use of the company, or of any other person whatsoever, by any British subject holding any office in the East Indies, shall be extortion and a misdemeanor, and shall be proceeded against and punishable as such. An information under this section charged the defendant with receiving from R., in the East Indies, a sum of money, to wit, 8,000 rupees, being of the value of 800*l.* of lawful money of Great Britain, as a gift or present. The jury found him guilty, and that the sum of money was 8,000 rupees; and that the sum of 8,000 rupees, at the time of the receipt, was of the value of 766*l.* 13*s.* 4*d.* money of Great Britain, being at the rate of 1*s.* 11*d.* for each rupee:—Held, first, that the meaning of the statute was to prevent a person holding office in the East Indies from receiving any gift absolutely, whatever the reason for the gift might be; and that if the meaning of the statute was to prohibit gifts being received only where they were received extorsively or under colour of office, the indictment would be good by virtue of 7 Geo. 4, c. 64, which applied as well to indictments preferred for offences abroad as for offences in England. *Douglas* v. *Reg.*, 13 Q. B. 74; 17 L. J., M. C. 176; 12 Jur. 974—Ex. Ch.

Held, secondly, that it was not necessary to state for whose use the money was received. *Ib.*

Held, thirdly, that it was not necessary to state whose the money was. *Ib.*

2. Purchase and Sale of Offices.

Indictment.]—The 49 Geo. 3, c. 126, s. 3, makes it a misdemeanor in any person who shall by any way or means contract or agree to receive or have any money, fee, or profit, for any office or employment specified in that act, or for any appointment thereto:—Held, that a count in an indictment alleging the offence to be that the defendants did unlawfully and corruptly contract and agree with D. N. to procure the appointment to a certain office and employment was bad for not stating the offence within that section. *Samo* or *Day* v. *Reg.*, 2 Cox, C. C. 178—Ex. Ch.

Relief against Bonds, &c.]—Bill for relief against four bonds for procuring plaintiff a pursership on board a man-of-war. The court could not set aside the bonds, but relieved against the interest and costs, on payment of the principal. *Symonds* v. *Gibson*, 2 Vern. 308.

Bond given by A. to B. for B.'s quitting his pretence, and procuring A. to be admitted purser to one of the king's ships. Court will relieve on payment of principal without costs. *Ib.*

A. agreed to surrender his commission in the army to B. for 100*l.*, for which B. gave his bond. B. was refused the commission. No relief in equity, save against the interest and costs. *Berrisford* v. *Done*, 1 Vern. 98.

Action at law on a bond given to a trustee, only reciting that the obligor was (on the resignation of obligee's cestui que trust) appointed to an office, not restrained by injunction, but may be pleaded at law in order to try whether the consideration was corrupt. *Thrale* v. *Ross*, 3 Bro. C. C. 57.

Bill of exchange given to secure procuration money stipulated to be paid to colonel of regiment for commission is void, and court will interfere even after money is in hands of sheriff on execution at law. *Whittingham* v. *Burgoyne*, 3 Anstr. 900.

Agreement and bond from A. to B. to pay 600*l.* for procuring a commission in the marines. The commission was procured, but A. refused to take the oaths. Equity will not relieve him against his bond, semble. *Ive* v. *Ash*, Colles's P. C. 267.

Perpetual injunction granted against a bond for the purchase of an office upon the public policy of the law, although the office was not within the statute 5 & 6 Edw. 6. *Hanington* v. *Du Chatel*, 1 Bro. C. C. 124.

A., by his interest with the commissioners of excise, gets an office in that branch of the revenue for B., who in consideration thereof gives a bond to A. to pay him 10*l.* per annum as long as B. enjoys the place. Equity will relieve against the bond. *Law* v. *Law*, 3 P. Wms. 391.

Money advanced.]—Money advanced by plaintiff to the defendant to procure him a commission in the marines, decreed to be refunded with interest, plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged, first, upon grounds of public policy; and, secondly, as plaintiff had been imposed upon, defendant knowing that he was incapable of holding the commission. *Morris* v. *MacCulloch*, 2 Eden, 190; Ambl. 432.

A sum of money was paid by A. to B. for the purpose of purchasing C. promotion in the army, and it remained unapplied in the hands of B. at the death of A. C., having been compelled, from the bad state of his health, to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche* v. *Kilmorey* (*Lord*), Turn. & R. 207; 24 R. R. 19.

Enforcing Contracts.]—Bill for specific performance of an agreement to grant a deputation of the office of registrar of a consistory court. *Wheeler* v. *Trotter*, 3 Swan. 174; 19 R. R. 195.

Contract for sale of command of East India ship is illegal, and therefore cannot be enforced by suit upon equity against the fund paid by

company, as a compensation under the regulations of 1796, to restrain the practice in future. *Thomson* v. *Thomson*, 7 Ves. 470; 6 R. R. 151.

Sale by the owner of the command of a ship in the service of the East India Company, without their knowledge, is illegal, and cannot be the subject of an action. Sale of a commission in the army is not bad of itself. Sale of a public office, or any obligation to be made good out of it, is so. *Hartwell* v. *Hartwell*, 4 Ves. 815.

The command of an East India ship is a public trust; and the sale of it, contrary to a public regulation of the company, is a breach of public duty. *East India Co.* v. *Neave*, 5 Ves. 181.

C. COMMISSIONERS.

1. Appointment and Qualification.

By Majority of Proprietors—Neglect of Conditions—Validity.]—By a local inclosure act it was provided that whenever the office of commissioner should be vacant the lord of the manor, with the major part in value of the proprietors of lands and common rights in the parish (such value to be ascertained according to their respective assessments in the last rates made for the relief of the poor of the parish in the said parish) present at a public meeting, should elect another. The office of commissioner having become vacant, a new one was elected by the lord of the manor and the major part in value of the proprietors of lands at a public meeting. No one there disputed that he had such majority, but no reference was made to the poor-rates:—Held, that, nevertheless, the appointment was valid. *Doe* d. *Harris* v. *Bodenham*, 9 B. & C. 495.

Of Agents—Right to Appoint.]—A local drainage act created the lords or ladies of three manors, or, in his, her, or their absence, their agents appointed in writing under their hands, commissioners for executing the act. It authorised the commissioners to take lands for the purpose of the drainage, and it contained clauses for that purpose to the same effect as those in the Lands Clauses Act, 8 & 9 Vict. c. 18, subsequently passed; and it provided that no person should be capable of acting as a commissioner or agent for a commissioner till he had made a declaration that he would duly execute the powers in the exercise of which he should act as commissioner or agent. The three lords of the manors, by writing under their hands, appointed the defendants their agents, but without having first made the declaration. These acted as commissioners (first making the declaration), and gave the plaintiff a written notice that they required to take, for the purposes of the act, his land, describing the specific acres, roods, and perches. The plaintiff refused to treat, and the commissioners thereupon issued a warrant to the sheriff of the county to summon a jury to assess the sum to be paid to the plaintiff for the purchase of the land required for the purpose of the act. Both the notice and warrant were in the defendants' names as commissioners. A jury was empannelled, and assessed the price of the land. The plaintiff, who had throughout protested against the proceedings, refused to receive the price so assessed. The defendants paid it into a bank, under the authority of the local act enabling them so to do, and entered on the land. The plaintiff having thereupon brought an action against them:—Held, that the lords and ladies of the manors were commissioners by virtue of the local act, and if they did not choose to associate, might appoint agents for such time as they thought proper, which agents thereupon became commissioners, and might issue notices and warrants in their own names, and were not bound to shew, on the face of their proceedings, for what lord or lady they respectively acted. *Ostler* v. *Cooke*, 18 Q. B. 831; 22 L. J., Q. B. 71; 17 Jur. 370—Ex. Ch.

Held, also, that such appointment of an agent was well executed, though the lord or lady had not previously made the declaration required by the local act. *Ib.*

Money Qualification—Incumbrance.]—By a local act a commissioner of a court of requests was liable to a penalty of 50*l.* if he acted without having a qualification of 50*l.* a year in real property, or 1,500*l.* in personal, or 25*l.* a year real, and 1,000*l.* personal property, "above all charges and incumbrances whatsoever," the proof of which qualification was by that statute to lie on him in any action against him for the penalty:—Held, that the words "above all charges and incumbrances whatsoever" did not mean beyond payment of all his debts, but only applied to specific charges on the property in respect of which he claimed to be qualified. *Dumelow* v. *Lees*, 1 Car. & K. 408.

Held, also, that in such an action it was sufficient if he shewed that he had property to the required amount; and that it was not incumbent on him to give any evidence with a view of shewing that the property was not incumbered. *Ib.*

Property Qualification—Occupier.]—By a lighting and watching act no person was qualified to be a commissioner unless he should be an occupier of premises in the township, and be rated for the same on the poor-rate at 35*l.*, or unless he should be rated on such rate, and be possessed of property in the township of the value of 1,500*l.*:—Held, that a person possessed of property to that amount at the time of election, but who was not an occupier until after making the rate preceding the election, and whose name was not on the rate when it was made, though inserted after, in pursuance of the 17 Geo. 2, c. 38, s. 12, was not qualified. *Reg.* v. *Eddowes*, 1 El. & El. 330; 28 L. J., Q. B. 84; 5 Jur. (N.S.) 469; 7 W. R. 63.

Ratable Value or Rates.]—By a local act it was enacted that twelve inhabitants, householders, resident in the town or parish of Rye, rated to the relief or maintenance of the poor of the parish, by one or more rate or rates, to the amount of 10*l.* per annum, should be appointed commissioners of the harbour of Rye:—Held, that the ratable annual value, and not the rates payable, conferred the qualification. *Easton* v. *Alce*, 7 H. & N. 452; 31 L. J., Ex. 115; 8 Jur. (N.S.) 156; 5 L. T. 323; 10 W. R. 110.

Penalty—Acting without Qualification.]—A local act of 3 Will. 4, c. 68, for improving a township, provided that no person should be capable of acting as a commissioner in the execution of that act, unless he should have the qualification thereby required; s. 10 imposed a penalty of 50*l.* on any person who should act as a commissioner without being qualified. The

1 Vict. c. 33 repealed the provisions of the first act as to the appointment, number, mode of election, and qualification of commissioners; s. 2, after defining the number of the new commissioners, and transferring to them the powers of the former commissioners, enacted, that "all provisions in the former act contained in reference to the commissioners thereby appointed shall be held to apply to the commissioners to be appointed under this act and the acts of such commissioners, in the same manner as if the same were re-enacted and repeated in that act (except as far as the same are repealed by or are inconsistent with its provisions), and that the two acts shall be construed together as one act"; s. 7 required a different qualification, but there was no clause in the act of Victoria which in terms imposed a penalty on persons acting as commissioners without such qualifications:—Held, that a person who acted as a commissioner under the 1 Vict. c. 33, without being qualified as required by that act, was liable to the penalty imposed by the 3 Will. 4, c. 68. *Gough* v. *Hardman*, 5 H. & N. 112; 1 L. T. 375.

Disqualification by Interest.]—A local act directed that no person should be capable of "acting as a commissioner in execution thereof in any case wherein he shall be personally interested in the matter in question," and that any person who should so act as a commissioner being so disqualified should forfeit 100*l*. The commissioners were in part elected by parishes within a certain precinct. An order had been made by them for constructing a footway along the frontage of the defendant's, among other premises, in a particular manner. The defendant, who was afterwards elected a commissioner, attended at a special meeting of the commissioners, and first moved to rescind the order as to all except his own premises, which was negatived. On a motion being made to alter the order by adopting a less expensive mode of paving, he supported the proposition in a speech, and took an active part in the discussion and in opposing the original order. He then proceeded to the ballot with the other commissioners. In an action for the penalty, there was a count charging the defendant with acting as commissioner where he was personally interested, and voting accordingly. Another count only charged him with acting as such commissioner in a case in which he was personally interested. The jury found that the defendant did not vote on the occasion in question, and gave him a verdict:—Held, that he did not act as a commissioner in proposing or rescinding the order, except as to his own premises, but there was evidence that he had acted as a commissioner by addressing the meeting on the motion for altering the order, and by taking an active part in the discussion; and that, as the only question left to them was whether he had voted, and not whether he had acted as a commissioner in any other manner, he was entitled to a new trial. *Charlesworth* v. *Budgard*, 1 C. M. & R. 498; 4 Tyr. 824; 4 L. J., Ex. 89.

The evidence of a person who proceeds to a ballot is admissible as to the share he personally took in it. *Ib.*

By an act for lighting a town, no person shall be capable of acting as a commissioner in the execution of the act who shall be interested in any contract for furnishing, supplying, or selling any article, matter, or thing to be employed or made use of for the purposes of the act:—Held, that a person who had contracted with former commissioners to sell a plot of land to be used for the purposes of the act was not disqualified from acting, though the conveyance had not been executed. *Woolley* v. *Kay*, 1 H. & N. 307; 25 L. J., Ex. 351. *See also* LOCAL GOVERNMENT.

A local act incorporated 10 & 11 Vict. c. 16. By s. 2 of the local act, every male person of full age, rated to the relief of the poor in a certain amount, shall be a commissioner. By 10 & 11 Vict. c. 16, s. 9, any person who after his appointment as a commissioner shall be concerned or participate in any manner in any contract shall thenceforth cease to be a commissioner. By s. 15, every person who shall act as a commissioner, after having become disqualified, shall be liable to a penalty of 50*l*. In an action against a person for the penalty for having acted as a commissioner after he was disqualified, an invoice was produced, in his handwriting, addressed "To the Commissioners of St. Ives," and charging them for lime supplied on several occasions during four months. He became a commissioner by reason of possessing the qualification required by s. 2 of the local act:—Held, first, that he was appointed a commissioner within the meaning of 10 & 11 Vict. c. 16, s. 9. *Nicholson* v. *Fields*, 7 H. & N. 810; 31 L. J., Ex. 233; 10 W. R. 304.

Held, secondly, that by being concerned in a contract he became disqualified to act as a commissioner within the meaning of s. 15. *Ib.*

Held, thirdly, that the invoice was evidence from which a jury might find that he was concerned or participated in a contract within s. 9. *Ib.*

2. POWERS.

Application of Funds.]—Commissioners under a local act, the object of which was to supply a town with water, were empowered to raise funds by assessment to be applied in certain ways having immediate reference to the purposes of the act, and in otherwise carrying it into execution:—Held, that although the commissioners might have properly applied the funds raised in resisting a proceeding in parliament prejudicial to the object of the act, yet they were not justified in applying them to defray the expense of obtaining another act of parliament, giving more extensive powers for carrying out the object of the existing act. *Att.-Gen.* v. *Andrews*, 2 Mac. & G. 225; 2 Hall & T. 431; 20 L. J., Ch. 467; 14 Jur. 905. See *Bower* v. *Griffith*, 16 W. R. 540.

Improvement commissioners empowered by a local act to levy rates, and do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants within their district, and for that purpose to exercise the powers vested in them by their act, will be restrained from applying the rates to the promotion of a bill in parliament to extend their district and enlarge their powers. *Att.-Gen.* v. *West Hartlepool Improvement Commissioners*, 39 L. J., Ch. 624; L. R. 10 Eq. 152; 22 L. T. 510; 18 W. R. 685.

Assessment of Damage—Trial of Facts.]—An act gave powers to a company to make a canal, and provided that certain commissioners should determine, by the verdict of a jury, the sum to be paid for damage caused by the works authorised by the act. Action on a judgment of the commissioners to recover the damage assessed by a

jury. Plea, that the damage for which compensation was awarded was not caused by reason of the execution of the company's powers, and that the commissioners had no jurisdiction to assess the damage:—Held, that the commissioners had no jurisdiction to try the question as to the fact of damage, but only to assess the damage, if any. *Barber* v. *Nottingham and Grantham Ry.*, 15 C. B. (N.S.) 726; 33 L. J., C. P. 193; 10 Jur. (N.S.) 260; 12 W. R. 376.

Death of Commissioners — Successors not appointed.]—By a navigation act the undertakers were authorised to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose, and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as commissioners under the act should direct. By a subsequent clause any person injured by the works was to receive compensation, to be assessed by the commissioners. The commissioners were named in the act, and power given them to appoint successors from time to time. The navigation was made; and, as part of it, a dam across a river was enlarged. Subsequently all the commissioners died without having appointed successors. The company afterwards raised the dam to the injury of a mill-owner below:—Held, that the power to alter the dam still existed, even though the mill-owner should no longer have any means of obtaining compensation, as to which the court gave no opinion. *Kennet and Avon Navigation Co.* v. *Witherington*, 18 Q. B. 531; 21 L. J., Q. B. 419.

Where three commissioners and their successors were appointed to transact the business under an inclosure act, and the act of any two of them was to be valid, an assessment executed by two, after the death of one of the three, and before the appointment of a successor, was invalid. *Doe* d. *Nicholson* v. *Middleton*, 3 Br. & B. 214.

Mortgage—Action by Puisne Incumbrancers—Costs.]—An action was brought by judgment creditors against harbour commissioners, in which the plaintiffs were found entitled to a charge on the undertaking, a receiver was appointed, and the priorities of other incumbrancers (some of whom were prior to the plaintiffs) were ascertained, and certain funds arising from the undertaking paid into court. The funds now available being insufficient for all the payments required:—Held, that, under the Commissioners Clauses Act, 1847, s. 60, the commissioners were entitled to be paid their costs as between solicitor and client out of the fund in priority to all parties, and that it made no difference that the fund had not actually come to the hands of the commissioners, but had been paid into court by the receiver. *Batten* v. *Dartmouth Harbour Commissioners*, 59 L. J., Ch. 700; 45 Ch. D. 612; 62 L. T. 861; 38 W. R. 603.

Extent of.]—When an act authorises commissioners to effect certain specified objects, with a clause providing for the payment of compensation to all persons whose interests may be affected, such authority extends not only against the persons to whom the commissioners are accountable, but also against the persons whose rights may be interfered with. *Holt* v. *Rochdale Corporation*, 39 L. J., Ch. 761; L. R. 10 Eq. 354; 23 L. T. 43; 18 W. R. 885.

3. Contracts.

By Clerk in accordance with a Resolution.]—By an act, commissioners were appointed for improving a navigation; their powers were to be executed by the majority present at a meeting of not fewer than three. They were not to be personally liable on contracts made, or for damages incurred, in relation to anything done in pursuance of the act, but might be sued in the name of their clerk. The commissioners, at a meeting held, resolved to accept a tender for executing works in pursuance of the act. Their clerk thereupon drew up a contract according to the tender, and it was afterwards signed by the contractor:—Held, that the contract made in consequence of the resolution was a contract entered into by the commissioners in execution of their office, and that they were liable and might be sued in the name of their clerk for damage negligently done by the contractor to third persons in execution of such contract. *Allen* v. *Hayward*, 7 Q. B. 960; 4 Railw. Cas. 104; 15 L. J., Q. B. 99; 10 Jur. 92.

Salary of Officer.]—Commissioners, appointed under a local act, were empowered to appoint officers at such salaries as they should think reasonable, and to remove such officers and appoint others. In some sections of the act the officers were spoken of as employed by the commissioners. The commissioners were empowered to make rates, which were vested in them, and they were directed to apply the moneys which should come to their hands under the act in paving, lighting, &c., the parish, and carrying the several purposes of the act into execution:—Held, that an action did not lie against them by one of their officers for arrears of salary. *Bogg* v. *Pearse*, 2 L. M. & P. 21; 10 C. B. 534; 20 L. J., C. P. 99.

—— **Clerk suing Successor.**]—Commissioners were appointed to be annually elected for executing a local act. They had power to levy rates. They had power to appoint clerks and other officers, and to pay them salaries out of the money to be raised by the rates. They had power to execute many works. They might sue and be sued by their clerk, and they were exempted from personal liability for any contracts entered into by them as commissioners:—Held, that a clerk, appointed by the commissioners for one year, might maintain an action for his salary against the clerk of the commissioners in a subsequent year. *Hall* v. *Taylor*, El. Bl. & Bl. 107; 27 L. J., Q. B. 311; 4 Jur. (N.S.) 877.

Held, also, that it was within the scope of their authority to employ an attorney; and that he might recover in an action against the clerk of the commissioners in a succeeding year. *Ib.*

—— **Charge on Rates—Mandamus.**]—Commissioners under a local improvement act were empowered to appoint a clerk and other officers, and to pay them reasonable salaries out of the moneys to be collected under the act; and power was given to levy rates for the purpose of paying the salaries of officers. Executors of B. sued the commissioners' clerk, the declaration alleging that the commissioners were indebted to B. in moneys for his agreed salary for his services as the clerk to the commissioners, and upon their

retainer, and for other work and labour, of B., as the attorney and solicitor of, and otherwise for, the commissioners, at their request, in and about the business of the commissioners, and for money paid by him for their use and on accounts stated; and that the debt and moneys were a charge upon any moneys and funds in the hands of the commissioners collected under the act; and if they should not have in their hands any such moneys and funds, then the same debts became and were a charge upon a rate and assessment leviable under the act; and the executors demanded of the commissioners to pay the moneys due out of the funds in their hands, or to levy a rate under the act; and alleging a neglect and refusal, and claiming a writ of mandamus commanding the commissioners to pay or assess a rate:—Held, that the declaration was bad, it being consistent with the allegations that to part at least of the claim the commissioners were personally liable, and the remedy by mandamus being therefore inapplicable. *Bush* v. *Beavan*, 1 H. & C. 500; 32 L. J., Ex. 54; 8 Jur. (N.S.) 1015; 7 L. T. 106; 10 W. R. 845.

—— **Whether Funds in Hand or not.**]—To an action for salary due from commissioners under a town improvement act to their clerk, they pleaded that they never had at or since the accruing of the debt funds applicable to the payment of it, and that they had applied all the moneys which had come to their hands as such commissioners, except a small sum set apart by them to satisfy certain other claims which had accrued since that of their clerk, and they never had nor were they likely to have any surplus out of which they could pay his claim:—Held, that the plea was bad, and that, a debt being due, the clerk was entitled to judgment, whether it could be enforced by execution or not. *Bush* v. *Martin*, 2 H. & C. 311; 33 L. J., Ex. 17; 10 Jur. (N.S.) 347; 9 L. T. 510; 12 W. R. 204.

—— **Judgment against Clerk—Distress upon Commissioners' Property.**]—By an act the commissioners thereby appointed for improving a town were empowered to sue and be sued in the name of their clerk, who was expressly exempted from personal liability in respect of any such action, and they were also empowered to appoint a clerk and other officers, and it was enacted that they should and might, out of the moneys to arise by virtue of the act, pay such officers such salaries as the commissioners should think reasonable. An action was brought by the executors of a former clerk to the commissioners against their present clerk, for arrears of salary due to the deceased, in which judgment was entered up against the defendant and a fi. fa. issued, under which the sheriff seized the fire-engines and other goods of the commissioners vested in them by the act for public purposes, and a rule nisi having been obtained to set aside the judgment and fi. fa., on the ground that execution could not be had against different persons from the party sued, and that a mandamus to compel the commissioners to pay the debt out of the rates was the proper remedy:—The court discharged the rule, on the ground that if the commissioners were right they had other means of redress, as by action of trespass, but that, if the rule was made absolute, there were no means of reviewing the decision of the court. *Saunders* v. *Slack*, 11 L. T. 484.

Grant of Annuity.]—A grant of an annuity by five commissioners named in a local act in these words: "We five, &c., do grant unto A. an annuity of ——*l.* out of the rates granted and to arise by virtue of this act," according to the form prescribed in the act, does not raise any personal liability in the grantors, as, on a contract, the act empowers any five to be a quorum. *Cane* v. *Chapman*, 1 N. & P. 104; 5 A. & E. 647; 2 H. & W. 355; 6 L. J., K. B. 49.

4. Breach of Duty.

Duty thrown on Body.]—Where a duty is thrown on a body consisting of several persons each is individually liable for a breach of duty, as well for acts of commission as of omission. *Rex* v. *Holland*, 5 Term Rep. 607; 2 R. R. 678.

The Middle Level drainage commissioners were empowered and directed by statute to make a cut, and make and maintain at or near its opening a sluice to exclude the tidal waters. They were trustees for a public purpose, and acting without reward. The sluice was properly made, but owing to the absence of due care and skill in the persons employed by them to maintain it, the sluice burst, whereby the tidal waters came in and flooded the neighbouring lands. There was no proof that the commissioners had negligently or improperly employed unskilful or incompetent agents:—Held, that the commissioners were liable to an action at the suit of the owners of the neighbouring lands. *Coe* v. *Wise*, 7 B. & S. 831; 37 L. J., Q. B. 262; L. R. 1 Q. B. 711; 14 L. T. 891; 14 W. R. 865—Ex. Ch.

See Local Government—Negligence, &c.

5. Action by and against Clerks of.

Personal Charges.]—The clerk to commissioners of paving drew up a contract for paving, of which contract the contractor was, by agreement, to pay the expense; he offered to execute the contract, but refused to pay the clerk's charges, as unreasonable; the clerk refused to allow the contract to be executed until his charges were paid. Under an act authorising the commissioners to sue by their clerk:—Held, that he could not sue as such clerk for these charges. *Curling* v. *Johnson*, 10 Bing. 89; 3 M. & Scott, 496; 2 L. J., C. P. 264.

Liability for Negligence of Workmen.]—Clerks to commissioners, under a lighting and paving act, intrusted with the conduct of public works, are not liable for an injury occasioned by the negligence of artificers and labourers employed under their authority. *Hall* v. *Smith*, 9 Moore, 226; 2 Bing. 156; 2 L. J. (O.S.) C. P. 113.

Clerk at a Fixed Salary.]—A clerk to commissioners under a local act, who is paid by a fixed salary, is not within 6 & 7 Vict. c. 73, so as to require the delivery of a signed bill of costs, although he is an attorney, and his services consisted of work which, before his appointment at a fixed salary, he did as an attorney. *Bush* v. *Martin*, 2 H. & C. 311; 33 L. J., Ex. 17; 10 Jur. (N.S.) 347; 8 L. T. 509; 11 W. R. 1078.

6. Charity Commissioners—*See* Charity.

7. Ecclesiastical Commissioners — *See* Ecclesiastical Law.

8. Inclosure Commissioners—*See* Common.

9. Inland Revenue Commissioners—*See* Revenue.

D. FOR LOCAL GOVERNMENT—*See* Local Government—Metropolis.

E. IN OTHER CASES.

1. Appointment.

Power of Appointor.]—An appointment to an office for the life of the appointee is not invalid, upon the sole ground that the person making the appointment only holds his own office for life. *Rosslyn (Earl)* v. *Aytoun*, 11 Cl. & F. 742.

A right of nomination to an office being in two surviving grantees who could not agree upon the appointment was determined by lot on the order of the court. *Seymour* v. *Bennet*, 2 Atk. 483.

Nature of Tenure.]—The office of chamberlain of England is hereditary. Where two sisters inherit, they may act by deputy to be approved by the king, and who must not be of inferior degree to a knight. *Burrell, Ex parte*, 2 Bro. P. C. 146.

The office of paymaster of exchequer bills was an office during pleasure only, and not during good behaviour or for life, under 48 Geo. 3, c. 1. *Smyth* v. *Latham*, 9 Bing. 692; 3 M. & Scott, 251; 2 L. J., Ex. 241; 1 C. & M. 547; 3 Tyr. 509.

The office of weighmaster in a market town in Ireland is a freehold office. The appointment to it ought to be for life. *M'Mahon* v. *Lennard*, 6 H. L. Cas. 970.

A corporation having power by statute to appoint a weighmaster, and also at their discretion to remove him, the office is not a freehold office, and an appointment duly made by the corporation of a weighmaster during their pleasure is valid. *Delea* v. *Cork Corporation*, Ir. R. 5 C. L. 37; 19 W. R. 471.

The office of surgeon of the district prison of St. Catherine in the island of Jamaica (created by the acts of the local legislature) is an office held during pleasure only, and not during good behaviour. *Hill* v. *Reg.*, 8 Moore, P. C. 138.

R. was in 1878 elected to the office of remembrancer of the city of London by the court of common council, and was subsequently sworn in before the court of aldermen. Before the plaintiff took the oath, the lord mayor made a declaration that his election was subject to the standing order relative to officers being annually elected, and the election was entered upon the city records as having been made upon those terms. In 1881 the court of common council passed a resolution that R. be not re-elected remembrancer, and the office be declared vacant. R. brought this action for a declaration that he was still remembrancer, and an injunction against the corporation appointing any one in his place, on the ground that the office had by usage acquired the nature of freehold, and that the court of common council had no power by resolution or by the form of election to alter the tenure of the office. It appeared that a remembrancer was first appointed eo nomine in 1570 by act of common council. Remembrancers were from that time regularly appointed to hold their office, sometimes during good behaviour, sometimes during the pleasure of the court of aldermen. In 1816 a resolution was passed by the court of common council that every person who might be elected to any office in the gift of that court should be elected for a year only. The subsequent appointments were expressed upon the records to have been made subject to this standing order. Some form of annual re-election was gone through at the beginning of every year in the case of the remembrancership and some of the other offices included in the standing order: —Held, that, if the office were for life, the election for a less period would be void altogether, and not merely as to the limitation, but that the form of appointment having varied, there was no continual usage sufficient to establish that the office was of any particular tenure, that if there was, it was as strong in favour of the tenure being during the will of the corporation as during good behaviour, and the resolution of the common council that the office was vacant was a sufficient determination of their will. *Robarts* v. *London Corporation*, 49 L. T. 455; 31 W. R. 529—C. A.

The office of commissioner of crown lands in New South Wales, created by the act of the legislature of that colony, is not a patent office, though made under the great seal of the colony within the meaning of the 22 Geo. 3, c. 75, but is an office held durante bene placito; and there is no right of appeal to the Queen in council, under that statute, from an order of a motion from such office by the governor-general and executive council. *Robertson, Ex parte*, 11 Moore, P. C. 288.

The 22 Geo. 3, c. 75, applies only to offices held by patent, for life, or for a certain term. *Ib.*

Upon the true construction of the Bedford Level Act, by which it is enacted that "none shall be capable to be or continue governor or bailiff that hath not 400 acres or more of 95,000 acres" (being the tract over which the corporation of the Bedford Level has jurisdiction), a mere legal estate in the lands of the level is a sufficient qualification for the office of governor or bailiff. *Childers* v. *Childers*, 1 De G. & J. 482; 26 L. J., Ch. 743; 3 Jur. (N.S.) 1277; 5 W. R. 859.

"Substantial Inhabitants."]—The 11 Geo. 3, c. 29, which renders "substantial inhabitants" of the wards of London eligible to the office of collector of the ward rates, applies to resident inhabitants only. *Donne* v. *Martyr*, 2 M. & Ry. 98; 8 B. & C. 62; 6 L. J. (O.S.) K. B. 246.

Disqualification—Acts Done—Validity.]—By a private statute, tithes and dues were commuted for a specific corn rent, to be raised by assessment upon the landowners, and the court of quarter sessions, once in every ten years, upon application to be made to them by the landowners to appoint a person to make a new valuation of the land within the township, and again to apportion the annual sums which the owner or owners shall or ought to be charged with, was required by order of the court to nominate and appoint one or more fit and proper person or persons, not interested in the tithes or dues, and not being the steward or agent of any person so interested, to make a new valuation and assessment. In an action upon a distress for a sum for which the plaintiff had been assessed in pursuance of such a valuation, it was contended that the land was not liable,

because the appointed tithe valuer, who was a shareholder in a railway passing through the township, was interested in the tithes and dues, that the sessions had consequently no jurisdiction to appoint him, and that therefore his acts were null and void:—Held, assuming him to be interested within the meaning of the statute, and that the order appointing him might have been brought up by certiorari and quashed, that as the sessions had jurisdiction to inquire and determine whether he was interested, and the appointment had not been set aside, he was de facto in the office of tithe valuer, and that consequently his acts done whilst so in office were not null and void, and could not be challenged. *Lancaster and Carlisle Ry.* v. *Heaton*, 8 El. & Bl. 952; 27 L. J., Q. B. 195; 4 Jur. (N.S.) 707; 6 W. R. 293.

The 38 Geo. 3, c. 5, s. 8, requires the assessors of land tax to be inhabitants of the parish, township or place, residing within the parish for which they are to act:—Held, that the acts of a person duly appointed as assessor were valid, although he was not qualified by being an inhabitant. *Waterloo Bridge Co.* v. *Cull*, 1 El. & El. 213; 28 L. J., Q. B. 70; 5 Jur. (N.S.) 464; 7 W. R. 87.

—— **Interested Person.**]—An office, of which the salary is to be fixed, and the accounts audited by certain justices, cannot be held by one of such justices. *Rex* v. *Patteson*, 1 N. & M. 612; 4 B. & Ad. 9; 2 L. J., K. B. 33.

Survivorship.]—Where one of two, appointed under 9 & 10 Vict. c. 95, s. 25, to execute jointly the office of clerk to a county court, dies, the survivor continues to hold the office, though he cannot act till a successor to the deceased person is appointed. *Reg.* v. *Wake*, 8 El. & Bl. 384; 27 L. J., Q. B. 11; 4 Jur. (N.S.) 68; 6 W. R. 36.

Deputy—Power to Appoint.]—Ordinarily if it is an office requiring skill or discretion a person cannot appoint a deputy—he cannot transfer, but is bound to do it himself. But where the office is merely ministerial, such as that of digging a grave or of pulling a bell, it is clear that a deputy may be appointed therein; in the case of the sexton falling ill the public might be inconvenienced if dead bodies could not be buried. *St. Margaret's, Rochester, Burial Board* v. *Thompson*, 40 L. J., C. P. 213; L. R. 6 C. P. 445; 24 L. T. 673; 19 W. R. 892. And see *Campbell* v. *Hewlitt*, infra.

An under-sheriff could not appoint a deputy under 3 & 4 Will. 4, c. 42. *Jones* v. *Williams*, 2 D. (N.S.) 938; 12 L. J., Q. B. 295; 7 Jur. 581.

—— **Rights of Deputy.**]—An action will not lie by a deputy against his principal for an increase of salary, without an express agreement, where the latter has been appointed to a new office. *Bell* v. *Drummond*, Peake, 45.

By a royal charter, establishing the palace court, it was granted that there should for ever be an office of the prothonotary of the court, and officer called the prothonotary, to make out and inrol processes, pleadings and judgments, and to keep the rolls and records; and the king granted the office to B., to have and execute the same by himself, or by his sufficient deputy, during his natural life. On a vacancy, the marshal of the household was to appoint the new prothonotary, who should be admitted, and might have and exercise the office during his natural life by himself or by his sufficient deputy or deputies. The prothonotary revoked by deed the appointment of his deputy, and appointed another by deed. The judge of the court, deeming this person insufficiently qualified, rejected him, and himself appointed the party previously dismissed, who had not ceased to act and to receive the fees payable to the prothonotary. He had received these fees while in office under the prothonotary's appointment, and the practice had been that he retained part and paid over the rest, in stated portions, to the knight marshal, the steward and the prothonotary:—Held, that the offices of prothonotary and deputy prothonotary were not distinct, and that, in the absence of special contract, the deputy acted and received fees on behalf of the prothonotary. *Campbell* v. *Hewlitt*, 16 Q. B. 258.

Held, secondly, that the retention of fees by the deputy on his account must be ascribed, not to any independent right, but to agreement between him and the prothonotary. *Ib.*

Held, thirdly, that the prothonotary's revocation of the appointment determined the agreement and the deputy's right to retain any part of the fees; though if he unavoidably continued to perform duties on behalf of the prothonotary, he might have a cross claim for remuneration. *Ib.*

Held, fourthly, that the judge of the court might refuse an insufficient deputy nominated by the prothonotary, but could not, of his own authority, appoint another deputy. *Ib.*

Proof of.]—The fact, that a party did a particular act (as signing a land-tax assessment) in an official capacity, may be proved, not only by shewing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) of his having exercised it afterwards. *Doe* d. *Hopley* v. *Young*, 8 Q. B. 63; 15 L. J., Q. B. 9; 9 Jur. 941. S. P., *Doe* d. *Bowley* v. *Baines*, 8 Q. B. 1037; 15 L. J., Q. B. 293.

Proof that a person has acted as a public officer on one occasion, before the occasion in question, is evidence that he is such officer. *Reg.* v. *Murphy*, 8 Car. & P. 297.

In proceedings against a party in a voluntary office, not cast on him by law, it is necessary to aver not only an appointment, but an acceptance by the person appointed. *Serra* v. *Wright*, 6 Taunt. 45; 1 Marsh. 441.

It is not necessary, in an action by the weighmaster for disturbance in his office, to shew a formal appointment to it by deed. His having acted in the office for several years is sufficient. *M'Mahon* v. *Lennard*, 6 H. L. Cas. 970.

Stamp Duty upon.]—*See* REVENUE.

2. DETERMINATION OF APPOINTMENT.

By whom Removable.]—It is the prerogative of the crown, by letters patent, to suspend a public officer, though the office is granted for life. *Slingsby's Case*, 3 Swans. 178.

The supreme court of Calcutta has power by the charter of justice to remove or suspend officers of that court, on account of misconduct, and this power of removal is not limited to acts done by such officer in his judicial character, but includes transactions distinct from those of his office. *Grant, In re*, 7 Moore, P. C. 141.

Semble, whilst an officer receiving a salary given by act of parliament conducts himself properly in his office, the court has no jurisdiction to dismiss him. *Kane* v. *Stewart*, Sau. & Sc. 84, n.; 1 Jones, 630.

Mode of.]—Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner the court will refuse to interfere on the mere ground that the power has not been wisely or discreetly put in force in the particular case. *Osgood* v. *Nelson*, 41 L. J., Q. B. 329; L. R. 5 H. L. 636. Affirming 10 B. & S. 119; 20 L. T. 958; 17 W. R. 895—Ex. Ch.

In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the court will not interefere with the decision arrived at by the corporation. *Ib.*

A corporate body having the power to dismiss one of its officers holding a freehold office on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:—Held, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself. *Ib.*

Notice of.]—A person validly elected to an office and admitted to it, cannot be removed from it without notice. *Reg.* v. *Saddlers' Co.*, 10 H. L. Cas. 404; 32 L. J., Q. B. 337; 9 Jur. (N.S.) 1081; 9 L. T. 60; 11 W. R. 1004.

The poor law commissioners have a discretionary power of removing a relieving officer of a union whom they deem unfit for his office, without giving him notice of their intention to remove him, or hearing what he has to say in his defence. *Teather and Poor Law Commissioners, In re*, 19 L. J., M. C. 70.

Effect of Suspension.]—Suspension does not create a vacancy in an office, it is only an impediment to the officer enjoying any benefit from it; but all acts required to be done by such officer must still be done by him to give them validity. *Phillips* v. *Bury*, 2 Term Rep. 351.

When an officer is suspended by the crown, he is entitled to receive his salary, but not to exercise the functions of the office. *Slingsby's Case*, 3 Swans. 178.

By Appointment of Another.]—Where justices of the peace having power to appoint a surgeon, appointed another in the place of one holding the office:—Held, that the office of surgeon of the district prison being a public office, held at pleasure, and not an ancient office, the choice of another to fill such office, by the justices, in exercise of the powers vested in them by the local acts, was a determination of the first appointment. *Hill* v. *Reg.*, 8 Moore, P. C. 138.

The subsequent appointment of a new paymaster in the place of a former one is a virtual revocation of the appointment of such former paymaster, even though the instrument under which the new appointment is made contains no express cause of revocation of the old one, and though it allege, contrary to the fact, that the former paymaster had resigned. *Smyth* v. *Latham*, 9 Bing. 692; 3 M. & Scott, 251; 2 L. J., Ex. 241; 1 C. & M. 547; 3 Tyr. 509.

By Acceptance of Incompatible Office.]—A public officer cannot vacate his office by accepting an incompatible office, unless the first office is one which he might have determined by his own act, or which he might have surrendered to the party appointing to the second office, or from which he might have been amoved by, or with the concurrence of, such party. *Rex* v. *Patteson*, 1 N. & M. 612; 4 B. & Ad. 9; 2 L. J., K. B. 33.

The acceptance by the holder of one office of another incompatible office does not vacate the former, unless it is such as he could determine by his own act simply, or unless that authority concurred in the appointment which could accept the surrender of or amove from the old one. *Worth* v. *Newton*, 10 Ex. 247; 2 C. L. R. 1471; 23 L. J., Ex. 338; 2 W. R. 628.

3. Assignment of.

Validity of.]—The office of warden of a forest was granted by James the First to Lord Oxford, his heirs and assigns, and was subsequently assigned by the holder upon various occasions; and, lastly, to A., without any objection on the part of the crown:—Held, that the office passed under the assignment to A., and that he was entitled to claim compensation upon the forest being disafforested. *Wellesley* v. *Mornington*, 23 L. J., Ch. 49; 2 W. R. 31.

The office of wood-ward, or forester of the crown, is an office of trust, incapable of assignment without a licence from the crown, founded on the return to a writ of ad quod damnum. *Att.-Gen.* v. *Mathias*, 4 Kay & J. 579; 27 L. J., Ch. 761; 4 Jur. (N.S.) 628; 6 W. R. 780.

4. Rights of Officers.

a. Salary and Pensions.

Agreements for Fixed Amount.]—The marshal of the city of Dublin is by virtue of his office registrar of the pawnbrokers of Ireland, and as marshal and registrar is entitled to receive considerable fees; and the defendant, in consideration of his being appointed to the office of marshal by the corporation of Dublin, entered into an agreement with them to accept, by way of fixed salary, a sum less than the fees, and to pay over the fees to the city treasurer:—Held, that the agreement was illegal, as being against public policy. *Dublin Corporation* v. *Hayes*, Ir. R. 10 C. L. 226.

An agreement between a municipal corporation and the clerk of the peace of the borough, on his appointment, that he shall accept a fixed salary in lieu of his fees, and that any surplus of fees above the salary shall be paid into the borough fund, is void, on two grounds of public policy: first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office.

Liverpool Corporation v. *Wright*, 1 Johns. 359; 28 L. J., Ch. 868; 5 Jur. (N.S.) 1156; 7 W. R. 728.

Right to Fees.]—Persons serving under the crown under a general commission have no legal right to demand specific compensation, semble. *Crawford* v. *Att.-Gen.*, 7 Price, 67.

The principal registrars in the prerogative office disagreeing about the appointment of a clerk, the deputy-registrar nominated A., who for twelve months officiated, and received fees:—Held, that he was an officer de facto, and had a right to the stated fees, and to retain them without account. *Seymour* v. *Bennet*, 2 Atk. 483.

Exclusion from Office—Return of Salary.]—The defendant, who had been illegally elected for the office of surgeon of a county infirmary in Ireland, entered into office, and though cautioned, kept out the plaintiff, who had been legally elected:—Held, first, that the plaintiff was entitled to recover damages from the defendant for so excluding him from the office. *Lawlor* v. *Alton*, Ir. R. 8 C. L. 160.

Held, secondly, that the plaintiff, as he had not actually discharged the duties of the office, though he had offered and was ready to do so, was not entitled to recover, as money had and received, the salary which the defendant had received under the grand jury presentment. *Ib.*

Claim to Fees—Evidence.]—The immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there is some evidence given to the contrary. *Shepherd* v. *Payne*, 16 C. B. (N.S.) 132; 33 L. J., C. P. 158; 10 Jur. (N.S.) 540; 10 L. T. 193; 12 W. R. 581—Ex. Ch.

The modern usurpation of an excess does not affect the title to the original fees. *Ib.*

The clerk of the papers of the queen's prison, appointed under 5 & 6 Vict. c. 22, by the secretary of state, at a fixed salary, holds in effect the same office as the clerk of the papers of the queen's bench prison, appointed under the 27 Geo. 2, c. 17, by the marshal of the Marshalsea, and that office was one belonging to the queen's bench, and consequently within the 11 Geo. 4 & 1 Will. 4, c. 58, and 1 & 2 Will. 4, c. 35:—Held, therefore, that the clerk of the papers of the queen's prison was entitled to insist on payment to him of the fees sanctioned by the commissioners under the 1 & 2 Will. 4, c. 35, in order that he might account for them to the treasury. *Markwell* v. *Dyson*, 14 Q. B. 820; 19 L. J., Q. B. 193; 14 Jur. 809.

Revocation of Resolution granting Pensions.]—Trustees were created by statute a body corporate for the management of the navigation of a river, with a common seal and a perpetual succession. The statute empowered them to levy tolls, and enacted that it should be lawful for them to allow to any officer or servant an annuity or allowance. Their clerk, removable at their will and pleasure, having in 1865 resigned, owing to ill-health, after service for forty years, the trustees duly passed a resolution (not sealed) that his resignation "be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly for some years, until the defendants, who had meanwhile been substituted by statute for the trustees, with all their powers, and subject to all their liabilities, duly passed a resolution to reduce the pension to 150*l.* per annum, to be paid during their pleasure, and made the first quarterly payment on the reduced scale. The clerk having brought an action to recover the difference:—Held, that the resolution of 1865 was revocable, and that he could not recover. *Marchant* v. *Lee Conservancy Board*, 43 L. J., Ex. 44; L. R. 9 Ex. 60; 30 L. T. 367—Ex. Ch.

Pensions under the Superannuation Act, 1859.]—Under the provisions of the Superannuation Act, 1859, the question whether or not a pension shall be granted to a public servant is to be decided by the commissioners of the treasury; and until they have decided to grant a pension no public servant can maintain an action in respect thereof. *Edmunds* v. *Att.-Gen.*, 47 L. J., Ch. 345; 38 L. T. 213; 26 W. R. 550.

The Superannuation Act, 1859, s. 2, after prescribing a scale of superannuation allowances for civil servants according to length of service, provides that, if any question shall arise as to the claim of any civil servant for superannuation under this clause, "it shall be referred to the commissioners of the treasury, whose decision shall be final." Where, therefore, a civil servant makes a claim for superannuation allowance to the commissioners of the treasury, and their lordships decide upon the amount of the allowance to be made, such decision is final, and cannot afterwards be made the subject of litigation in any civil tribunal. *Cooper* v. *Reg.*, 49 L. J., Ch. 490; 14 Ch. D. 311; 42 L. T. 617; 28 W. R. 611.

Pensions—Liability to Debts.]—A superannuation allowance, granted by a resolution of the board of directors of the East India Company to a retired clerk under the authority of 53 Geo. 3, c. 155, s. 93, is only a gratuity; and the grant, to be binding on the company, must be by deed. For both these reasons, the allowance is not a debt which can be attached on behalf of a judgment creditor of the grantee under 17 & 18 Vict. c. 125. *Innes* v. *East India Co.*, 17 C. B. 351; 25 L. J., C. P. 154; 2 Jur. (N.S.) 189; 4 W. R. 245.

The effect of ss. 15 and 17 of the Bankruptcy Act, 1869, is to vest in the trustee in a bankruptcy all the "property" of the bankrupt of whatever nature, including the matters dealt with by s. 23 and ss. 87 to 95, but subject to the exceptions and qualifications introduced by those sections. The pension of a retired judge of a crown colony, granted by the secretary of state for the colonies, and voted annually by the legislature of the colony, is, in case of the bankruptcy of the judge, "property" which vests in the trustee in the bankruptcy, but it is "income" of the bankrupt within s. 90 of the Bankruptcy Act, 1869, and is subject to the power thereby given to the court to determine how much of it shall be set aside for the benefit of the bankrupt's creditors. *Huggins, Ex parte, Huggins, In re*, 51 L. J., Ch. 935; 21 Ch. D. 85; 47 L. T. 559; 30 W. R. 878—C. A. *See also* BANKRUPTCY.

The court of probate in enforcing payment of alimony and costs will authorise sequestration to receive portions of a civil service pension. *Sansom* v. *Sansom*, 48 L. J., P. 25; 4 P. D. 69; 39 L. T. 642; 27 W. R. 692.

The pension of a retired officer in the Indian navy, received solely in respect of past services, is liable to sequestration for nonpayment of costs.

Dent v. *Dent*, 36 L. J., Mat. 61 ; L. R. 1 P. 366 ; 15 L. T. 635 ; 15 W. R. 591.

The pension of an officer of her majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve :—Held, that an order appointing a receiver of such pension was bad. *Birch* v. *Birch* (8 P. D. 163) approved ; *Dent* v. *Dent* (L. R. 1 P. 366) distinguished. *Lucas* v. *Harris*, 56 L. J., Q. B. 15 ; 18 Q. B. D. 127 ; 55 L. T. 658 ; 35 W. R. 112 ; 51 J. P. 261—C. A.

A creditor, before 1876, recovered a judgment against a county court judge in receipt of a salary. In February, 1876, the creditor, under s. 5 of the Debtors Act, 1869, obtained an order that the judge should pay the debt by instalments at stated times. In December, 1877, he resigned his judgeship, and a pension was granted him under 15 & 16 Vict. c. 52, s. 15. Having made default in payment of the sum he was directed to pay by the order of February, 1876, the creditor issued a writ of sequestration, and afterwards, in April, 1878, obtained an order restraining the debtor from receiving 200*l.*, part of his pension, and ordering that the sequestrator should receive that amount out of the pension :—Held, that the writ of sequestration was properly issued, and that the pension could be made available for payment of his debts. *Willcock* v. *Terrell*, 3 Ex. D. 323 ; 39 L. T. 84—C. A. See *Snow* v. *Bolton*, 50 L. J., Ch. 743 ; 17 Ch. D. 433 ; 44 L. T. 571 ; 29 W. R. 583.

E., a retired storekeeper of one of her majesty's dockyards, entitled to payment from the treasury of a pension or superannuation allowance of 155*l.* a year, assigned such pension to the plaintiff to secure a loan of money. E. afterwards became insolvent, and included the debt due upon the plaintiff's security in his schedule. The commissioner of the insolvent debtors' court, by his order, made in presence of counsel for the plaintiff, recommended that 50*l.* a year, part of the insolvent's pension, should be paid by the paymaster-general to the provisional assignee of the insolvent debtors' court, for the benefit of the creditors of the insolvent. The plaintiff declined to prove as creditor under the insolvency ; but, having filed a bill, moved for an injunction to restrain E. from applying for, or receiving, or enabling any other person to receive, the balance of his pension left after the appropriation of the annual sum recommended by the commissioner : —Ordered accordingly. *Lloyd* v. *Eagle*, 28 L. J., Ch. 389 ; 5 Jur. (N.S.) 187.

Salary—Rights of Creditors.]—The grant of a menial office in the house of lords for a term of years, liable to creditors, and a daily fee or allowance held to be also subject to their demands. *Schellinger* v. *Blackerby*, 1 Ves. 347.

Receiver granted at the suit of a judgment creditor of the office of master forester of the royal forest. *Blanchard* v. *Cawthorne*, 4 Sim. 566.

The court will not appoint a receiver of the annual allowance paid to the assistant parliamentary counsel to the lords of the treasury, before the hearing. *Cooper* v. *Reilly*, 1 Russ. & M. 560. Affirming 2 Sim. 560.

A salary to an equerry to one of the royal family is not a subject of sequestration. *Fenton* v. *Lowther*, 1 Cox, 315.

It is against public policy that the salary of a public servant should be reduced by the application of any part for the payment of debts. *Harnden, Ex parte*, 28 L. J., Bk. 18 ; 5 Jur. (N.S.) 852 ; 7 W. R. 280—L.JJ.

Salary—Assignment of.]—The office of clerk to the deputy registrar in the prerogative court of Canterbury is not an office connected with the administration of justice within the meaning of the statute 5 & 6 Edw. 6, c. 16, so as to prevent its being aliened or charged. Nor is the alienation of a charge on the profits of the office contrary to the policy of the law restricting the alienation of the income of a public officer. *Aston* v. *Gwinnell*, 3 Y. & J. 136.

The salary of the assistant parliamentary counsel to the treasury is not assignable, and the court will not appoint a receiver of it. *Cooper* v. *Reilly*, 2 Sim. 560 ; 1 Russ. & M. 560.

An assignment of the emoluments of a fellow of a college in the university is valid in equity, and effect will be given to a security thereon, out of the dividends apportioned to such fellow from time to time in respect of his fellowship. *Feistel* v. *King's College* (*Cambridge*), 10 Beav. 491 ; 16 L. J., Ch. 339 ; 11 Jur. 506.

The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment. *Palmer* v. *Vaughan*, 3 Swan. 173.

Semble, that the profits of a public office, such as the patent office of keeper of the register of sasines, cannot be assigned for the benefit of creditors. *Hill* v. *Paul*, 8 Cl. & F. 295.

Agreement to assign fees of gaoler, and profits of tap-house, not carried into execution. *Methwold* v. *Walbank*, 2 Ves. 238.

Pension—Assignment.]—Principles of public policy on which pay, pensions, &c., are held inalienable. *Grenfell* v. *Windsor* (*Dean*), 2 Beav. 544.

An assignment by a retired military officer of his pension for valuable consideration is void under 47 Geo. 3, sess. 2, c. 25. *Lloyd* v. *Cheetham*, 3 Giff. 171 ; 30 L. J., Ch. 640 ; 4 L. T. 576 ; 9 W. R. 924.

But the statute does not apply to the assignment of a pension granted by the East India Company. *Heald* v. *Hay*, 3 Giff. 467 ; 31 L. J., Ch. 311 ; 8 Jur. (N.S.) 379 ; 5 L. T. 740 ; 10 W. R. 264. S. P., *Carew* v. *Cooper*, 4 Giff. 619 ; 3 N. R. 188 ; 33 L. J., Ch. 289 ; 10 Jur. (N.S.) 11 ; 9 L. T. 641 ; 12 W. R. 198. *S. C.*, 10 Jur. 429 ; 12 W. R. 767—L.C.

A compensation granted to a public civil officer on the reduction of offices in his department under 4 & 5 Will. 4, c. 24, is not assignable by him. *Wells* v. *Forster*, 8 M. & W. 149 ; 10 L. J., Ex. 216 ; 5 Jur. 464.

A pension from the East India Company cannot be assigned. *Hawker, Ex parte, Keely, In re*, 41 L. J., Bk. 34 ; L. R. 7 Ch. 214 ; 26 L. T. 54 ; 20 W. R. 322.

A pension for past services may be alienated ; but a pension for supporting the grantee in the performance of future duties is inalienable. *Davis* v. *Marlborough* (*Duke*), 1 Swan. 74 ; 2 Wils. 130.

Property, including a pension payable by the

secretary of state for India, was mortgaged to the plaintiff, and subsequently to one of the defendants. Upon a bill for foreclosure the common decree was made, and it was also ordered that, in the event of the foreclosure becoming absolute, the mortgagor should execute a power of attorney enabling the mortgagee to receive the pension. *James* v. *Ellis*, 24 L. T. 12; 19 W. R. 319.

Where a canon was entitled to a share of the revenues of lands, &c., vested in the corporation, in consideration of future duties to be performed during the year, for his own and not for the public benefit, and he had assigned his canonry by way of mortgage:—Held, that such security was valid, and a case for the appointment of a receiver. Principles of public policy on which pay, pensions, &c., are held to be inalienable. *Grenfell* v. *Windsor* (*Dean*), 2 Beav. 544.

—— Claim for Arrears—Set-off.]—In an action brought by a retired clergyman against his successor in the incumbency for arrears of the pension allowed under the Incumbents' Resignation Act, 1871, the defendant claimed to set off against such arrears, and also to recover, by way of counter-claim, a judgment debt due to him from the retired clergyman:—Held, that the pension was inalienable, and therefore the defendant's claim could not be set off, and the plaintiff was entitled to a separate and independent judgment for the arrears due. *Gathercole* v. *Smith*, 50 L. J., Q. B. 681; 7 Q. B. D. 626; 45 L. T. 106; 29 W. R. 577; 45 J. P. 812—C. A.

By s. 10 of the Incumbents' Resignation Act, 1871, the pension allowed to a retiring clerk is made a charge upon the revenues of the benefice, "and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators and assigns . . . but shall not be transferable at law or in equity." In an action by a retired clerk against the incumbent of the benefice for payment of the arrears of the pension that had been allowed him under the act:—Held, that the incumbent could not set off against such arrears a judgment debt previously due to him from the retired clerk. *Gathercole* v. *Smith*, 50 L. J., Ch. 671; 17 Ch. D. 1; 44 L. T. 439; 29 W. R. 434—C. A.

b. Compensation for Loss of Office.

i. *Persons Entitled.*

Officer de facto.]—The council of a borough removed a town clerk, who had been elected to hold during good behaviour, but had not made the declaration prescribed by 9 Geo. 4, c. 17, s. 2:—Held, that, as having been an officer de facto, he was entitled to compensation. *Reg.* v. *Cambridge Corporation*, 12 A. & E. 702; 4 P. & D. 294; 10 L. J., Q. B. 25.

By s. 11 of the Metropolis Management (Plumstead and Hackney) Act, 1893, every officer in the service of the district boards therein mentioned who comes within the scope of the Superannuation (Metropolis) Act, 1866, and who has suffered pecuniary loss by abolition of office or by diminution or loss of salary, fees, or emoluments in consequence of the act of 1893, shall be entitled to pecuniary compensation:—Held, that the section must be construed to mean that compensation shall be paid to any of the servants of the district boards who have suffered loss in consequence of the act. *Legg* v. *Stoke Newington Vestry*, 59 J. P. 696.

Solicitors.]—An attorney cannot, under 5 & 6 Will. 4, c. 76, s. 66, or 5 & 6 Vict. c. 111, s. 2, claim compensation for fees and emoluments which he derived from being employed by the justices of a division to prosecute offenders committed by them for trial, where the prosecutor did not employ another attorney. *Reg.* v. *Manchester Corporation*, 5 Q. B. 402; 8 Jur. 421.

Certain trustees having the management of the relief of the poor of a metropolitan parish, appointed a solicitor for the arrangement of legal matters, with an annual salary. After the passing of the Metropolitan Poor Act, 1867 (30 Vict. c. 6), the poor law board refused to allow the board of guardians elected under that act to continue him in the appointment which he had received from the trustees:—Held, that he was entitled to an award of compensation from the poor law board, under s. 76. *Reg.* v. *Local Government Board*, 43 L. J., Q. B. 49; L. R. 9 Q. B. 148; 29 L. T. 769; 22 W. R. 315.

The four attorneys of the sheriff's court of York having a monopoly of the office of attorney in that court, were not, on other attorneys being admitted to practise in the court, by the operation of 5 & 6 Will. 4, c. 76, entitled to compensation; because, although their office was an office of profit within 5 & 6 Will. 4, c. 76, s. 66, there had been no abolition of it, or removal from it. *Reg.* v. *York Corporation*, 2 G. & D. 580; 3 Q. B. 550; 11 L. J., Q. B. 326; 6 Jur. 1082.

Clerk to Stipendiary.]—Before and at the time of granting a charter of incorporation and a separate court of quarter sessions to the borough of Manchester, there was a division of the county of Lancaster, called "the division of Manchester," consisting of forty-three townships, and the business of the division was done at the New Bailey, in Salford; and M. acted as clerk to the justices who attended there. Some of the justices of the division met at Worsley, and others at Heaton Norris, both being townships within the division, and did petty sessions business there; and such justices employed different clerks on such occasions. By virtue of 53 Geo. 3, c. 78, a stipendiary magistrate was appointed for a district, including Salford and other townships in the division of Manchester, who appointed M. as his clerk:—Held, first, that M. was not clerk to the justices for the Manchester division of the county of Lancaster, but only to such of them as attended at Salford; and, secondly, that the clerk to the stipendiary magistrate was not an officer of the borough, county or division of the county within 5 & 6 Vict. c. 111, s. 2; and, therefore, that M. was not, on either ground, entitled to compensation. *Reg.* v. *Manchester* (*Borough Council*), 9 Q. B. 458; 16 L. J., Q. B. 27; 11 Jur. 222.

Coroners.]—The 7 & 8 Vict. c. 92, s. 4, empowers the queen, with the advice of her privy council, to order that any county shall be divided into so many districts as shall seem expedient, for the purposes of the act; and by s. 6, whenever any county has been customarily divided into districts, for the purpose of holding inquests, during seven years before the passing of the act, and it shall seem expedient that the same division

of the county be made under this act, each of such districts shall be assigned to the coroner usually acting in and for the same district before the passing of this act; but if it shall appear expedient that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, the lords of the treasury are to assess the amount of compensation to be paid out of the county rate: —Held, that the coroner was entitled to compensation only where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division was ordered under the act. *Reg.* v. *Lechmere*, 16 Q. B. 284; 20 L. J., Q. B. 169; 15 Jur. 558.

Chamberlains.]—In 1794 a corporation appointed A. assistant-chamberlain of the city, for a year, at a yearly salary. In 1804 the salary of A. was raised. In 1810 B. was appointed assistant-chamberlain by the chamberlain, and he continued to hold this office till the passing of the 5 & 6 Will. 4, c. 76. In 1827 the corporation had again raised the salary. On the passing of the 5 & 6 Will. 4, c. 76, the office of B. was abolished, and a claim having been made by him for compensation, the lords of the treasury awarded that his office was not the subject of compensation, and the court confirmed the decision. *Harvey, Ex parte*, 3 N. & P. 159; 7 A. & E. 739; 7 L. J., Q. B. 129.

Clerk of the Peace.]—After the 5 & 6 Vict. c. 111, a corporate borough was created by charter, not containing a non-intromittant clause. Its area was a part of a county. A grant of a court of quarter sessions was made, and the council appointed a clerk of the peace for the borough: —Held, that the clerk of the peace of the county was not entitled to compensation under the 5 & 6 Will. 4, c. 76, s. 66, he not having been removed nor his office abolished, although the profits were diminished. *Reg.* v. *Brighton Council*, 7 El. & Bl. 249; 26 L. J., Q. B. 153; 3 Jur. (N.S.) 585; 5 W. R. 257.

Evidence of Resignation.]—It is no evidence of voluntary resignation, by a corporate officer, of the offices held by him, so as to exclude him from compensation, that he omitted to declare his wish to be re-elected, and allowed another person, without opposition, to be elected in his place. *Att-Gen.* v. *Poole Corporation*, 8 Beav. 75; 14 L. J., Ch. 101; 9 Jur. 318.

Where no formal resignation or surrender of the offices held by a corporate officer was made by him, and another person was, without opposition by him, appointed in his place:—Held, that such corporate officer was removed from his offices within the meaning of the act. *Ib.*

Agreement for Increase not under Seal.]—An agreement by a corporation with one of their officers, for an increase of the salary of an office retained by him, as a compensation for the loss of an office of which he was deprived, though upon an executed consideration, is not binding, if the contract is not under the common seal of the corporation. *Reg.* v. *Stamford Corporation*, 6 Q. B. 433; 8 Jur. 909.

Service under Crown.]—Persons serving under crown under a general commission have no legal right to demand specific compensation, semble. *Crawford* v. *Att.-Gen.*, 7 Price, 67.

Assignment.] — Semble, that compensation allowance for the loss of an office in the custom-house, though revocable at the pleasure of the government, is assignable. *Tunstall* v. *Boothby*, 10 Sim. 542; 9 L. J., Ch. 294.

Injunction granted to restrain the lords of the treasury from paying the compensation awarded under 11 Geo. 4 & 1 Will. 4, c. 68, for the office of side-clerk in the exchequer, which had been abolished. *Ellis* v. *Grey* (*Earl*), 6 Sim. 214.

ii. *Assessment of.*

By Town Council.]—The town council has jurisdiction to determine the whole claim to compensation of a borough officer who has been removed from office: and may pronounce not only on the amount to which he is entitled, but whether his office, or the tenure of it, was such as to entitle him to anything. *Reg.* v. *Sandwich Corporation*, 2 G. & D. 28; 2 Q. B. 895; 11 L. J., Q. B. 132; 6 Jur. 684.

—— **Effect of.**]—Where a town council, in obedience to a mandamus, assessed compensation for the loss of certain offices of profit, and the lords of the treasury, on appeal, assessed a larger amount of compensation:—Held, that the assessment under the mandamus estopped the town council from denying the right to compensation. *Sandwich Corporation* v. *Reg.*, 10 Q. B. 563; 16 L. J., Q. B. 432.

Emoluments of Office.] — The Metropolitan Bridges Act, 1877, provided that compensation should be paid to certain officers, including clerks, but not including solicitors, of the private companies or corporations whose bridges were taken over by the Metropolitan Board of Works under the act, upon a scale to be calculated on the basis of the emoluments actually received by them in the two years previous to the passing of the act. The Deptford Creek Bridge was taken over by the board, and thereby the plaintiff, who had been clerk to the Deptford Creek Bridge Company, lost his office. He had received a salary as clerk, and also payments for legal business done by him as solicitor for the company, and commission on the rents of the company's property which he received. The Deptford Creek Bridge Company had by their act power to appoint a solicitor and receiver as well as a clerk; they had never appointed such officers, and the legal business of the company had always been done and the rents received by the clerk, who had always been a solicitor:—Held, that, by the practice of the company, these duties had been attached to the office of clerk, and that the plaintiff was entitled to compensation in respect of the payments received for discharging them as part of the emoluments of his office; but as to the payments for legal business done by him, only in respect of his proportion as partner in the firm of solicitors of the net profits after deducting all office expenses necessarily incurred in earning the money. *Drew* v. *Metropolitan Board of Works*, 30 L. T. 138—C. A.

Jurisdiction of Lords of the Treasury.]—A town clerk had transacted the legal business of the corporation as charity trustees. He and his predecessors in office had usually transacted such business as incidental to their office. On the passing of 5 & 6 Will. 4, c. 76, he was removed from the office of town clerk, and subsequently

the new charity trustees also removed him from their employment. The town council having awarded him compensation for the loss of his office of town clerk, but having refused compensation for the loss of his employment by the trustees, he appealed to the lords of the treasury, who awarded him compensation for such employment also:—Held, that they had jurisdiction to award such compensation, because the transaction of the charity business formed part of the incidental profits of the office of town clerk, and they therefore had entertained a question of amount only, and not a question whether the loss of any distinct office was a proper subject of compensation. *Reg.* v. *Norwich Corporation*, 2 G. & D. 605; 3 Q. B. 285; 11 L. J., Q. B. 246.

A treasury order for compensation to an officer of a corporation dismissed after the passing of 5 & 6 Will. 4, c. 76, is not necessarily bad because it directs the compensation to be calculated from a bygone time. But such order is bad and a nullity, if on the face of it, or by comparison with the treasury minute directing the order to issue, it appears that the compensation is partly given for a period during which the party still held the office. *Reg.* v. *Lichfield Corporation*, 16 Q. B. 781; 20 L. J., Q. B. 383; 15 Jur. 812—Ex. Ch.

The steward of a borough demanded compensation as for an office held for life. The town council allowed compensation as for an annual office only. The lords of the treasury, after hearing the parties, awarded compensation on the former principle. On motion for a mandamus to the corporation to execute a compensation-bond, there appeared evidence, on the one hand, that the office was not legally holden for life; and, on the other, that it had usually been so holden, and that the appointment was accepted on that understanding:—Held, that the lords of the treasury were not bound to consider only the legal tenure, but might, referring to the circumstances of the case, award compensation as for an office held for life. *Reg.* v. *Norwich Corporation*, 8 A. & E. 633.

The lords of the treasury have no jurisdiction to determine the right of a borough officer to compensation, whether he has been removed for alleged misconduct or otherwise. They have jurisdiction as to nothing but the amount of compensation. *Reg.* v. *Sandwich Corporation*, 2 G. & D. 28; 2 Q. B. 895; 11 L. J., Q. B. 132; 6 Jur. 684. S. P., *Reg.* v. *Harwich Corporation*, 2 Q. B. 909; 2 G. & D. 109; 6 Jur. 821.

By the usage of a borough, the office of clerk to the justices was appurtenant to the office of common clerk. After the 5 & 6 Will. 4, c. 76, a separate commission of the peace was granted to the borough; and the person who had been common clerk, which office was then abolished, was in lieu thereof appointed town-clerk and clerk of the peace, but not, as formerly, clerk to the justices also; such office being by s. 102 incompatible with that of clerk of the peace:—Held, that the lords of the treasury had jurisdiction to make an order on the town council to compensate him for the loss of such office. *Rex* v. *Bridgewater Corporation*, 1 N. & P. 466; 6 A. & E. 339; 6 L. J., M. C. 78.

Where the lords of the treasury awarded compensation to an officer in a borough, on his being removed from office by the town council, if the office was not a borough office, or the removal was not made under 5 & 6 Will. 4, c. 76, the lords of the treasury had no jurisdiction. *Reg.* v. *Poole Corporation*, 3 N. & P. 119; 7 A. & E. 730; 7 L. J., Q. B. 126.

The lords of the treasury had no jurisdiction to decide whether an officer of a borough had been properly removed from office on the ground of misconduct. *Reg.* v. *Warwick Corporation*, 3 P. & D. 429; 10 A. & E. 386; 9 L. J., Q. B. 265.

If a corporation refuses compensation to a removed officer, on the ground that they had removed him for cause sufficient, the lords of the treasury have no jurisdiction to try the question of the sufficiency; and though, after entertaining that question, and determining it in favour of the claimant, they also adjudicate upon the proper amount of compensation, the court will not enforce by mandamus the payment of such compensation, nor try, upon the return to a mandamus, the sufficiency of the cause, the claimant being bound in the first instance to proceed against the corporation by mandamus, to compel them to restore him, or give him compensation for removal. *Reg.* v. *Newbury Corporation*, 1 Q. B. 751; 1 G. & D. 388; 6 Jur. 365.

Length of Service Nominal.]—On the 21st August, 1835, the town clerk of Lyme Regis, died, and, on the 31st of the same month, Lee was appointed his successor. On the 8th September, 1835, the 5 & 6 Will. 4, c. 76, passed:—Held, that he was entitled to nominal compensation only for the loss of his office as town clerk, since he must have known, when he was appointed, that his appointment would soon cease. *Lee, Ex parte*, 2 N. & P. 63; 7 A. & E. 139.

J. M.

PUBLIC POLICY.

See CONTRACT—WILL.

PUBLIC WORSHIP.

See ECCLESIASTICAL LAW.

PUFFER.

See AUCTION AND AUCTIONEER.

PURCHASE.

See ESTATE—SHELLEY'S CASE.

PURCHASER.

See SALE OF GOODS—VENDOR AND PURCHASER—NOTICE.

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See also LANDS CLAUSES ACT—SETTLED LAND—VENDOR AND PURCHASER.

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QUARTER SESSIONS.

See JUSTICE OF THE PEACE.

QUEEN ANNE'S BOUNTY.

See ECCLESIASTICAL LAW.

QUEENSLAND.

See COLONY.

QUIA TIMET ACTION.

Generally.]—To sustain a quia timet bill there must be not only title, but danger to the property: where both concur the court will require the defendant to give security. *Fisher* v. *Hughes*, 1 Coop. C. C. 329.

In order to maintain a quia timet action to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable. *Fletcher* v. *Bealey*, 54 L. J., Ch. 424; 28 Ch. D. 688; 52 L. T. 541; 33 W. R. 745.

Threat to break Contract.]—Where a company agreed to "erect and maintain in working order" certain telephone wires and apparatus, and threatened to cut off the communication, an injunction was granted to restrain the company from so doing. *Keith, Prowse & Co.* v. *National Telephone Co.* 63 L. J., Ch. 373; [1894] 2 Ch. 147; 8 R. 776; 70 L. T. 276; 42 W. R. 380; 58 J. P. 573.

A. covenants that a specific sum should be paid to B., if B. survived; A. having aliened part of it, on a bill by B., A. decreed to give security that it should be forthcoming. *Flight* v. *Cook*, 2 Ves. 619.

Accountant to Crown.]—The statutes providing for the relief of subject, accountants who have equities against the crown, held not to be confined to cases where the subject be actually sued or impleaded, but he may proceed by bill in equity in the first instance, and as it were quia timet, and that during the passing his accounts before the commissioners of audit. *Colebrooke* v. *Att.-Gen.*, 7 Price, 146.

Indemnity.]—A. is bound for B., and has a counter-bond; equity will compel B. to pay the debt, though A. is not sued. *Ranelaugh* v. *Hayes*, 1 Vern. 190.

A trustee held shares in a company on trust for an adult cestui que trust. He had applied for them at the request of the cestui que trust, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the cestui que trust, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. The trustee brought an action against the cestui que trust, claiming an indemnity against liability on the shares. There was no evidence to show whether calls were likely to be made in the winding-up:—Held, that the action was a mere quia timet one, and that it was premature and could not be maintained. *Ranelaugh* (*Lord*) v. *Hayes* (1 Vern. 189) not followed. *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 52 L. J., Ch. 418; 22 Ch. D. 561; 48 L. T. 107; 31 W. R. 285.

Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, &c., to which he may become liable by their default, the agents having afterwards become bankrupt, and government having given notice to the representatives of the colonel (deceased) of a demand upon the colonel's estate, by virtue of an unliquidated account, a bill by the representatives of the colonel, against the representatives of the surety, to pay the balance due to government, and also to set aside a sufficient sum out of the testator's estate to answer future contingent demands, though attempted to be supported upon the principle of a bill quia timet, dismissed with costs. *Antrobus* v. *Davidson*, 3 Mer. 569; 17 R. R. 130.

Preventing Action.]—Where the object of a bill quia timet is to prevent the assignees of a bankrupt, purchaser of estate, from bringing an action to recover back part of consideration money remaining due to vendor, which had been paid to him subsequent to act of bankruptcy, on the ground of his having waived his equitable lien, by taking a bond for the purchase-money, if the bill charge, as a fact, that the bond was given as a further additional or collateral security, the question of law cannot be raised on a general demurrer. *Braband* v. *Hoskins*, 3 Price, 31.

Parties.]—A party who had granted an annuity to a trustee for his wife, filed a bill

against the trustee, his wife, and an assignee of the annuity from her, stating that such assignee had filed a bill against him and his wife, and that the trustee threatened to distrain, and praying to be at liberty to pay the arrears of the annuity into court, and to be indemnified against the costs of the assignee's suit:—Held, that the suit was not sustainable as an interpleader or quia timet, because, on account of the trustee not being a party to the assignee's suit, no decree could be made in it against the plaintiff. *Palmer* v. *Fraser*, 3 Y. & Coll. 491; 3 Jur. 890.

Nuisance.]—The court will not interfere, quia timet, in a case of alleged nuisance, but the actual existence of the nuisance must be proved. *Att.-Gen.* v. *Kingston-upon-Thames Corporation*, 11 Jur. (N.S.) 596; 12 L. T. 665; 13 W. R. 888.

Therefore, where an information was filed to restrain the pollution of a navigable river by an increased discharge of sewage into it, but the evidence failed to show that a nuisance had actually arisen, the court dismissed the information, without prejudice to any further proceedings being taken, if a nuisance should ultimately be occasioned. *Ib.*

An interim injunction will not be granted in a quia timet action, unless the plaintiff makes out a strong case of probability that the apprehended mischief will in fact arise. Quære, whether, in the case of a hospital, the health of the public at large may not be considered to some extent as against the merely local inconvenience. *Att.-Gen.* v. *Manchester Corporation*, 62 L. J., Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.

The plaintiff was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture, for which it was essential that the water should be very pure. The defendants, who were alkali manufacturers, were depositing on a piece of land close to the river, and about one mile and a half higher up than the plaintiff's mill, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very noxious character would flow from the heap, and would continue flowing for forty years or more, and that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for the plaintiff's manufacture, and his trade would be ruined. The plaintiff did not allege that he had as yet sustained any actual injury. The defendants said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river:—Held, that it being quite possible by the use of due care to prevent the liquid from flowing into the river, it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of the plaintiff to bring another action hereafter, in case of actual injury or imminent danger. *Fletcher* v. *Bealey*, supra.

An action was brought by inhabitants of houses abutting on an open and unbuilt-on area of land situate in the centre of a town, adjoining the market-place, and known as Market-square, for an injunction to restrain the owner thereof from using, or causing or permitting the same to be used for the purpose of any sports, exhibitions, entertainments, or otherwise whereby a nuisance might be occasioned to the annoyance and injury of the plaintiffs. It appeared that in June, 1889, the defendant's agent licensed S. to use Market-square for holding a public show for several days, S. paying 6*l*. The show consisted of a large circular roundabout worked by a steam-engine, which engine also worked an organ; a large circular mechanical switchback worked by another steam-engine, which worked a second organ; a shooting gallery; and a boxing booth. Whilst the show was going on, the plaintiffs complained to the defendant's agent, and a correspondence ensued, which resulted in the defendant's agent declining to give an undertaking, and expressing his intention of allowing persons to use Market-square for public shows:—Held, that, as the defendant contended that he had the right to do the thing complained of, and had refused to give an undertaking, the inference was that there would be a repetition of the nuisance; and that therefore the plaintiffs were justified in bringing the action, and were entitled to an injunction. *Phillips* v. *Thomas*, 62 L. T. 793.

Delivery up of Documents.]—Principles on which courts of equity proceed, in ordering the delivery up of instruments on which actions may be brought. *Cooper* v. *Joel*, 27 Beav. 313; 1 De G. F. & J. 240; 1 L. T. 351.

A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first instalment the plaintiff was nonprossed:—Held, that, although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated, and that the future defence might fail from the loss of evidence. *Ib.* *And see* specific titles.

QUIET ENJOYMENT.

See LANDLORD AND TENANT—VENDOR AND PURCHASER.

QUIETING POSSESSION.

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H. MINES AND MINERALS — *See* MINES AND MINERALS.

I. PARLIAMENTARY DEPOSIT — *See* PARLIAMENT.

J. ABANDONMENT, ARRANGEMENT, WINDING-UP, AND EXECUTION.

1. *Abandonment*, 1530.
2. *Scheme of Arrangement*, 1533.
3. *Judgment against.*
   a. Registration of, 1537.
   b. Sale of Surplus Lands, 1537.
   c. Receiver.
      i. Under 30 and 31 Vict. c. 127, s. 4, 1539.
      ii. In other Cases, 1543.
   d. Leave to issue Execution, 1544.
   e. Exemption of Rolling Stock from Execution—*See* supra, C. 3.

K. BY-LAWS—*See* CARRIERS.

L. TAKING LANDS COMPULSORILY—*See* LANDS CLAUSES ACT.

M. CARRIAGE OF PASSENGERS AND GOODS, &C.—*See* CARRIERS.

N. LIABILITY FOR LAND TAX—*See* REVENUE.

O. LIABILITY FOR NEGLIGENCE—*See* NEGLIGENCE.

P. RATING—*See* RATES—LOCAL GOVERNMENT —CORPORATION.

Q. DUTY TO CARRY MAILS—*See* POST OFFICE.

A. PLACE OF BUSINESS.

Principal Office.]—A railway company, by an act incorporating the company, was to have two termini, one at Bristol, the other at Paddington: two general half-yearly meetings were to be held, one at Bristol, the other at Paddington: an equal number of directors was to be chosen from the residents near each place. All the general business was transacted at Paddington, where the secretary resided, and where orders were issued: —Held, that Paddington was the only principal office of the company, within the Railways Clauses Act, 8 & 9 Vict. c. 20, s. 138. *Garton* v. *G. W. Ry.*, El. Bl. & El. 837; 27 L. J., Q. B. 375; 4 Jur. (N.S.) 1036; 6 W. R. 677.

Where Business carried on.]—A railway company carries on its business, within the meaning of s. 60 of the County Courts Act, 1846, only at the principal station where the general superintendence of the whole concern is centred, and not at any station, however large, where the local management of any portions of the line is conducted, subject to the supervision of the general manager at the principal station. *Brown* v. *L. & N. W. Ry.*, 32 L. J., Q. B. 318; 10 Jur. (N.S.) 234; 8 L. T. 695; 11 W. R. 884. S. P., *Shiels* v. *G. N. Ry.*, 4 B. & S. 326; 30 L. J., Q. B. 331; 7 Jur. (N.S.) 631; 4 L. T. 479; 9 W. R. 739.

See *Minor* v. *L. & N. W. Ry.*, 1 C. B. (N.S.) 325; 26 L. J., C. P. 39; 2 Jur. (N.S.) 1168; 5 W. R. 122.

The South Eastern Railway Company has a station in Cannon street, City, where a considerable portion of its business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without the city:—Held, that the company does not carry on business within the jurisdiction of the mayor's court, within the meaning of s. 12 of the mayor's court Extension Act, 1857 (20 & 21 Vict. c. clvii). *Le Tailleur* v. *S. E. Ry.*, 3 C. P. D. 18.

The place where a railway company carries on its business within s. 12 of the Mayor's Court Procedure Act, is where the general superintendence and management of the business take place. *Rogers* v. *L., C. & D. Ry.*, 26 W. R. 192.

When, therefore, it appeared that a railway company had a chief office, which was also a terminal station, in London, but that its business

was managed at Victoria station, which was not within the city :—Held, that the company carried on its business at Victoria station and not within the city. *Ib.*

B. POWERS AND DUTIES IN CONSTRUCTING AND WORKING.

1. GENERALLY.

Construction of Acts.]—Railway acts are to be construed strictly against the parties obtaining them, but liberally in favour of the public. *Parker* v. *G. W. Ry.*, 7 Scott (N.R.) 835 ; 7 Man. & G. 253 ; 3 Railw. Cas. 563 ; 13 L. J., C. P. 105.

Enabling or Compulsory Powers.] — Acts authorising companies to make railways are regarded as but enabling statutes which give powers, but do not render compulsory or obligatory the exercise of those powers. *Scottish North Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382 ; 5 Jur. (N.S.) 607.

A railway extension act enacted, that it shall be lawful for the company to make a branch railway, "and, if they think fit," the diverging lines shewn on the plans, from the branch railway to various collieries, and also to widen and enlarge the railway. The company was empowered to let on lease the diverging lines, either before or after the construction, to the owners of the collieries :—Held, that the statute did not cast upon the company the duty to make the branch railway, and therefore a mandamus would not lie. *G. W. Ry.* v. *Reg.*, 1 El. & Bl. 874 ; 16 Jur. 675 ; 1 W. R. 358, n.—Ex. Ch.

Where a railway company were directed by a private act passed in 1845 that they "should, and they were thereby required," to go to parliament in the next session for an act to make a line, and during next session an act was passed in consequence of that provision, which contained the words : "and it shall and may be lawful for the company," &c., with reference to the making of this line :—Held, that these latter words did not repeal the compulsory provisions of the act of 1845, and must therefore be construed as obligatory. *G. W. Ry.* v. *Reg.*, 2 W. R. 54—Ex. Ch.

—— **Duty to maintain Railway — Line destroyed by Mining.**]—Where an act of parliament authorises but does not compel a railway company to take lands compulsorily and to construct and maintain a railway, and the company has taken the lands and made the railway, there is no obligation thereby imposed upon the company to continue working the railway. Hence, where a railway was let down by the owner of the subjacent minerals excavating the same, and the railway company refused to reinstate the railway, the court refused to grant a mandamus to compel them to reinstate it. *Reg.* v. *G. W. Ry.*, 62 L. J., Q. B. 572 ; 9 R. 1 ; 69 L. T. 572—C. A.

Part of Undertaking only.]—Where a railway company has undertaken to complete a line, or any series of lines, it is bound to complete the whole line or series of lines, and is not, without parliamentary authority, at liberty to abandon any portion of its undertaking. *Graham* v. *Birkenhead, Lancashire and Cheshire Junction Ry.*, 12 Beav. 460.

Existing contracts for making part of the line are no answer to an application to prevent a railway company from making a portion of the line with an intention of completing less than the whole. *Ib.*

A railway company authorised to make a line of fifty-six miles, resolved on making only four miles of it, and to abandon the rest :—Held, that such a resolution was illegal, both as against the landowners on the line and the shareholders in the company. *Cohen* v. *Wilkinson*, 12 Beav. 125 ; 18 L. J., Ch. 378 ; 13 Jur. 641 ; 5 Railw. Cas. 741. See *S. C.* on appeal, infra.

A railway company in 1846 obtained an act, which recited that it would be of local and public advantage if a line of railway was formed according to the plans and sections deposited as required by the practice of parliament, and referred to in the statutes, and that the company was willing to make it, and enacted that "it shall be lawful for them" to make it, and gave the company compulsory powers for purchasing lands ; and if it abandoned the line, or any part of it, the land was to vest in the owners of the land adjoining. By a subsequent act in 1849, the company was authorised to make a deviation line, and the time for making the railway and for the exercise of the compulsory powers was extended. The company had, in the exercise of the compulsory powers, taken the land, and opened part of the line :—Held, first, that the substituted portion of the line was to be considered as if it had been included in the act of 1846. *York and North Midland Ry.* v. *Reg.*, 7 Railw. Cas. 459 ; 1 El. & Bl. 858 ; 1 C. L. R. 119 ; 22 L. J., Q. B. 225 ; 17 Jur. 630 ; 1 W. R. 358—Ex. Ch.

Held, secondly, that the statutes did not cast upon the company, either by express words, or by implication, the duty to make the railway. *Ib.*

Held, thirdly, that there was no contract between the landowners and the company which could be enforced by mandamus (overruling *Reg.* v. *Lancashire and Yorkshire Ry.*, infra). *Ib.*

Held, fourthly, that the company, having exercised some of their powers, and made part of their line, was not bound to make the whole. *Ib.*

A company having obtained an act of parliament for making a railway on representation that it will be for the public benefit, with power to take lands along the proposed line, is bound from the time when such act receives the royal assent to execute the work. *Reg.* v. *Lancashire and Yorkshire Ry.*, 7 Railw. Cas. 266 ; 1 El. & Bl. 228 ; 22 L. J., Q. B. 57 ; 17 Jur. 62 ; 1 W. R. 35.

The court will enforce performance by mandamus at the instance of one of the adjoining landowners. *Ib.*

The powers contained in railway acts are given only in contemplation of the supposed public good by completion of the whole work, and the court will interfere when it sees that the whole undertaking cannot be completed. *Cohen* v. *Wilkinson*, 1 Macn. & G. 481 ; 1 H. & Tw. 554 ; 5 Railw. Cas. 758 ; 18 L. J., Ch. 378 ; 14 Jur. 535.

A railway is not like a partnership for general trading purposes, in which one portion of the business may be abandoned, but it is a partnership for a public purpose for effecting a work which it is a duty to complete. The obligation to complete the work is co-extensive with the authority to make it. *Ib.*

It appeared very probable that at the time of

filing the bill, a company, which were authorised to make 150 miles of railway, intended to complete twenty-three miles only, and then abandon the rest. Upon a motion to restrain them, it appeared that the company had since abandoned the whole. The court was of opinion that if the case had remained as it was at the time of the filing of the bill, the plaintiff would have been entitled to the injunction; but refused it, on the ground of the alteration in the existing circumstances, and gave no costs. *Logan* v. *Courtown (Earl)*, 3 Beav. 22; 20 L. J., Ch. 347.

Where a railway company has formed a portion of the line, but is unable to complete the whole, the court exercises a discretion in granting an injunction, the effect of which will be to prevent that portion being made effective and beneficial to the public and profitable to the shareholders. *Hodgson* v. *Powis (Earl)*, 12 Beav. 529; 19 L. J., Ch. 356; 14 Jur. 906. See *S. C.* on appeal, infra.

A series of acts had in the same year been obtained by the same parties for the construction of three different railways, all forming part of one system, but not joining each other at any point, and with different amounts of capital stock specifically allotted to each undertaking. Two years afterwards the whole of the undertakings were leased to another company, under an act of parliament, the management being entrusted to a joint committee. Only one of the three lines was completed, the others being abandoned:—Held, that no injunction ought to be granted on an interlocutory application to restrain the amalgamated companies from making calls, or extending the works which they had already completed, and an injunction which had been granted was dissolved. *Hodgson* v. *Powis (Earl)*, 1 De G. M. & G. 6; 21 L. J., Ch. 17; 15 Jur. 1022.

—— **Parties.**]—On an application by an individual shareholder, on behalf of himself and the other shareholders, for an injunction to restrain the construction of part only of the line, the court refused to interfere, on the ground of the acquiescence of the plaintiff, and also that the other shareholders had for eighteen months previously to filing the bill known, or had the means of knowing, the acts complained of. *Graham* v. *Birkenhead, Lancashire and Cheshire Junction Ry.*, 2 Macn. & G. 147; 2 H. & Tw. 450; 20 L. J., Ch. 445; 14 Jur. 494.

A bill was filed by a shareholder on behalf, &c., to prevent the directors making a part only of the railway, abandoning the rest, and for an indemnity. There were several classes of shareholders:—Held, that it was not necessary that the several classes should be severally and separately represented on the record. *Dumvile* v. *Birkenhead, Lancashire and Cheshire Junction Ry.*, 12 Beav. 444.

A shareholder in a line of railway projected by A., filed a bill on behalf of himself, &c., against the members of the provisional committee, alleging that they had abandoned the line in favour of one projected by B., and alleging misconduct, &c., and praying an account, a receiver, and an injunction. Demurrer for want of equity and for want of parties, overruled without prejudice, and costs, with consent of all, reserved. *Wilson* v. *Stanhope*, 4 Railw. Cas. 251.

User for what Purposes.]—Action by a reversioner against a company for entering and making a railway on his land. Plea, that, before the reversion of the plaintiff, the dean and chapter of Durham were seised in fee, and by deed between them and the plaintiff, demised to the plaintiff the land for a term, "excepting and reserving the mines under the same, with power to dig, win and carry away the mines, with free ingress, egress and regress, way-leave and passage to and from the same, or to or from any other mines, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggonways in and over the premises, or any part thereof." The defendant justified making the railway as the servant of the dean and chapter, and by their authority. On the trial, it appeared that the company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, and authorising the company to make such a railway for the conveyance of passengers, goods, coals, wares and merchandise. The railway was constructed for the purpose of conveying general goods and passengers, as well as coals, but had not been actually so used, and the railway was not more than was necessary for the carriage of coals likely to be sent along it from the country with which it communicated:—Held, if the railway was such a railway as the company, at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the company also to use the railway for other purposes for which they had no right to use it. *Durham and Sunderland Ry.* v. *Walker*, 2 G. & D. 326; 3 Railw. Cas. 36; 2 Q. B. 940; 11 L. J., Ex. 440.

What Persons Empowered.]—By an act for making a canal, the "owners or proprietors of any mines of coals" within certain parishes were empowered to make any railways or roads to convey their coals to the canal over the lands or grounds of any person or persons, paying or tendering satisfaction for the damage thereby occasioned:—Held, that this power was not limited to persons who were proprietors at the time of the passing of the act or of the making of the canal, but extended to other persons who had become so since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines. *Bishop* v. *North*, 11 M. & W. 418; 3 Railw. Cas. 459; 12 L. J., Ex. 362.

Restraining User of Railroad.]—There is no equity to restrain by injunction the owners of a railroad made over the plaintiff's land from using the railroad after it had been completed, or from interrupting the plaintiff's workmen in removing it, and restoring the land to its original state, although the possession of the land for the purpose of constructing the railroad may have been obtained from a tenant of the plaintiff by means of circumvention and fraud. *Deere* v. *Guest*, 1 Myl. & Cr. 516; 6 L. J., Ch. 69.

The court will restrain one tenant in common from the wilful destruction of the common property; but where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a rail-

road on the property, which, at law, had been held to be an ouster, the court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, &c., though the rent agreed to be paid by the company was three times the former rent. *Durham and Sunderland Ry.* v. *Wawn*, 3 Beav. 119 ; 2 Railw. Cas. 395 ; 4 Jur. 764.

Mandatory injunction in effect compelling a railway company to pull down walls which it had built in order to prevent another railway company from crossing its line. *Great North of England Ry.* v. *Clarence Ry.*, 1 Colly. 507 ; 3 Railw. Cas. 605.

Liability for Constables' Wages.]—A railway act contained a provision for the appointment of constables during the construction of the railway and works, to be paid by the company :—Held, that the liability of the company for the wages did not cease with the opening of the line, but continued so long as workmen were employed in completing any of the works. *North British Ry.* v. *Horne*, 5 Railw. Cas. 231.

Statutory Powers—Expiration of Period for Completion of Works.]—Sect. 16 of the Railways Clauses Consolidation Act, 1845, empowers a railway company, subject to the provisions and restrictions of the special act, to execute various works, and from time to time to alter, repair, or discontinue the before-mentioned works and substitute others in their stead :—Held, that the powers of this last clause were not subject to a restriction in the special act as to the time for completing the railway. *Emsley* v. *North-Eastern Ry.*, 65 L. J., Ch. 385 ; [1896] 1 Ch. 418 ; 74 L. T. 113 ; 60 J. P. 182—C. A.

To Stop up Streets.]—In 1864, a railway company was empowered by an act to extend its line into London, and to make a station there. The act referred to plans and sections as being already deposited. The plans and sections shewed Sun street as crossed by an arch. The Railways Clauses Act, 1845, 8 & 9 Vict. c. 20 (incorporated with the special act), provides, s. 13, that where it is intended to carry a railway on an arch as marked on the plan or section the same shall be made accordingly. The special act of 1864 gave the company power to stop up streets within an area (embracing Sun street) described as the site of the intended station. In 1870, the company obtained an act empowering it to change the level and pass under Sun street by a tunnel :—Held, that there was nothing in the Railways Clauses Act, 1845, s. 13, to bind the company to cross the street by an arch as described in the deposited plans and sections (in the event of its not doing so by a tunnel, under the special act of 1870), so as to interfere with its power of stopping up the street altogether under the clause of its act of 1864, which enabled the company so to deal with streets within the prescribed area. *Att.-Gen.* v. *G. E. Ry.*, L. R. 6 H. L. 367 ; 22 W. R. 281.

A railway company was by its special act empowered to stop up certain streets and passages in the metropolis, including L. C., and to appropriate and use such streets and passages, or parts so stopped up for the purpose of the railway and works, and they were authorised to grant leases of superfluous lands. The company erected a station at the north end of L. C., and thereby completely stopped it up as a thoroughfare, and they purchased all the houses along each side of the street, but did not expressly purchase or pay for, or take any conveyance of the soil of the street itself ; nevertheless, they treated the whole of the space formerly occupied by the street as well as by the houses on each side of it (which they had pulled down) as vested in them, and they surrounded it with a hoarding, stopping up the south end of the street, and leased a plot of land, comprising the ground at the south end of the street, to the defendants for building purposes. Builders, occupying premises in the street running at right angles to L. C., claimed a special right of access to them over the end of L. C. for the purpose of conveying long ladders and poles to their premises, beyond the right of the public in the street as a highway. They filed a bill to restrain the railway company from building so as to interfere with this alleged right, and moved for an injunction :—Held, that the railway company, having stopped up the one end of the street which they required for the purposes of their station, and having purchased all the houses in the street, had a right to stop up and appropriate the rest of the street, and accordingly the motion was refused. *Temple* v. *Flower*, 41 L. J., Ch. 604 ; 26 L. T. 657 ; 20 W. R. 587.

The railway company and the attorney-general ought to be parties to such suit. *Ib.*

Two Modes of Construction.]—Where the legislature has authorised a railway to be made, by means of a tunnel or otherwise, through a town or close to houses or buildings, the railway company is bound, not only to make compensation for any damage which the making of the railway may occasion to adjacent erections, but also, where there may be two modes of constructing their works, to adopt that course which would do the least amount of injury to the neighbouring property. *Freehold General Land Investment Co.* v. *Metropolitan District Ry.*, 14 L. T. 96.

Must not Act Negligently.]—When a railway company, in executing works authorised by its statutory powers, took insufficient precautions to secure the safety of an adjoining house, the court granted an injunction to restrain the negligent exercise of its powers, and appointed a surveyor to report what was necessary to secure the premises ; and the company having complied with the requisitions of the surveyor, the court granted an inquiry as to damages. *Biscoe* v. *G. E. Ry.*, L. R. 16 Eq. 636 ; 21 W. R. 902.

A railway company is bound to exercise the power given to it in derogation of individual rights with moderation and discretion and not negligently. *Ib.*

A railway company, in making a cutting through rock, at a short distance from a private dwelling house, conducted its operations by blasting, and pieces of stone were hurled on to the buildings and into the garden. Injunction granted. *Arnold* v. *Furness Ry.*, 22 W. R. 613.

A railway company, in the course of its works, caused excavations to be made on its own land, within three feet of the walls of the houses belonging to the plaintiffs, and to a depth of fifteen feet lower than the foundations of such houses. On affidavits that the houses had been undermined, and in danger of falling in, and that the lives of the occupants would not be in safety if the excavations were allowed to proceed, the plaintiffs obtained an injunction ex

parte, restraining the company from making further excavations. On affidavits on the part of the company, stating that the excavations had not endangered, and, if proceeded with in the ordinary manner, would not endanger, the houses; and that the giving way of one of the houses was owing to the wall thereof being very old and badly built, and to the taking down of an adjoining building; the court dissolved the injunction, with costs. *Warburton* v. *London and Blackwall Ry.*, 1 Railw. Cas. 558.

Power to Underpin Buildings on Adjoining Lands—Retaining Wall of Railway.]—A railway company had power to underpin or strengthen buildings on lands adjoining their line. They carried their line in a deep cutting close beside a building belonging to the plaintiffs, and having given the required notice that they intended to underpin this building, they made a wall of concrete to support the plaintiff's building, part of the thickness of which was under the plaintiff's building, and part on the company's land, the whole wall forming the retaining wall of the railway cutting:—Held, that the fact that the concrete wall was also the retaining wall of the railway did not make it the less an "underpinning" within the meaning of the act; and therefore that the company had not acted beyond their powers in making the wall on the plaintiff's land. *Stevens* v. *Metropolitan District Ry.*, 54 L. J., Ch. 737; 29 Ch. D. 60; 52 L. T. 832; 33 W. R. 531—C. A.

Liability for sending Water on adjoining Lands for Protection of Defendants' Premises.]—By reason of an unprecedented rainfall, a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it, by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently:—Held, that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable. *Whalley* v. *Lancashire and Yorkshire Ry.*, 53 L. J., Q. B. 285; 13 Q. B. D. 131; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500—C. A.

A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage:—Held, upon demurrer, that the statement of claim disclosed a good cause of action. *Hurdman* v. *N. E. Ry.*, 47 L. J., C. P. 368; 3 C. P. D. 168; 38 L. T. 339; 26 W. R. 489—C. A.

When, in consequence of the construction of the works of a railway, a constantly-recurring injury arose by floods or heavy rains washing earth on to the plaintiff's property, an injunction was granted as the proper remedy, instead of sending the case to have the damage assessed under the Lands Clauses Act, s. 68. *Keates* v. *Holywell Ry.*, 28 L. T. 183.

In such a case the court will not grant a mandatory injunction, but will direct the injury to be stopped simpliciter, leaving it to the company to find the means of so doing. *Ib.*

Fall of Embankment.]—When an injury is alleged to have arisen from the improper construction or maintenance of a railway, the fact of one of its embankments giving way will amount to primâ facie evidence of such insufficiency; and this evidence may become conclusive, in the absence of any proof on the part of the company to rebut it. *Great Western Ry. of Canada* v. *Braid*, 1 Moore, P. C. (N.S.) 101; 1 N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 444.

Nuisances — During Construction.]—In the Railways Clauses Act, 1845, the "powers aforesaid" in s. 32, in exercise of which a railway company may do certain specified acts upon lands of which they have taken temporary possession, are exercisable for the purposes named in that section only, and the words "action for nuisance or other injury," in the same section, include "suit." *Fenwick* v. *East London Ry.*, 44 L. J., Ch. 602; L. R. 20 Eq. 544; 23 W. R. 901.

Therefore, when a railway was in course of construction at the rear of a shop, and the company took temporary possession of an adjoining piece of land not owned by the owner of the shop, and erected a mortar mill thereon, for the purpose of making mortar to be used in the construction of the railway, that not being one of the purposes named in s. 32:—Held, that an injunction would be granted to restrain the railway company from working the mortar mill so as to be a nuisance to the owner of the shop. *Ib.*

Held, that the making of mortar was not an act necessary for making the railway within s. 16, for the company might get mortar elsewhere, and it was not an act without which the railway could not be made. *Ib.*

A railway company has not, by reason of the powers in its special act enabling it to work the line in the way most convenient to itself, any power to commit an act which, if committed by a private person, would constitute a nuisance, and be restrainable by injunction accordingly. *Smith* v. *Midland Ry.*, 37 L. T. 224; 25 W. R. 861.

The provisions of the Railways Clauses Act, 1845, which authorise a railway company to construct and work its line, do not authorise the commission of acts which would, in the case of a private individual, constitute a nuisance. *Smith* v. *Midland Ry.*, 26 W. R. 10.

—— **When Construction completed.**]—A railway company purchasing land for the railway acquires an absolute fee-simple, but such fee-simple is acquired solely for the purposes of constructing and using the railway. *Norton* v. *L. & N. W. Ry.*, 47 L. J., Ch. 859; 9 Ch. D. 623; 39 L. T. 25; 27 W. R. 852. Affirmed, 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173—C. A.

A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of

railway. A railway company is liable to an action for nuisance for using its rights so as to injure the neighbouring landowner where they might use them without such injury. *Ib.*

The court will not interfere to prevent a nuisance caused by carrying on a trade which is temporary and occasional only. *Swaine* v. *G. N. Ry.*, 33 L. J., Ch. 399; 10 Jur. (N.S.) 191; 9 L. T. 745; 12 W. R. 391.

Motion for an injunction to restrain the user of a temporary ballast line of railway, laid down for the purposes of the construction of a permanent line, in such a manner as to cause injury to the plaintiff's houses, very considerable damage having already been done to the houses. At the hearing of the motion, it appeared that the ballast line had been wholly removed; the motion was therefore refused, the court reserving the consideration of costs. *Shersby* v. *S. E. Ry.*, 13 Jur. 689.

In cases of this nature the court will not grant an injunction ex parte. *Ib.*

A railway company, having, besides the ordinary compulsory powers of taking land, power to purchase by agreement additional lands, not exceeding fifty acres in all, in such places as should be deemed eligible for any of certain specified purposes connected with the undertaking which it should deem requisite, bonâ fide selected and acquired additional lands and used them without negligence for one of the purposes authorised, to wit, as a dock or yard for the reception of cattle travelling upon the line. A nuisance was thereby caused to adjoining occupiers:—Held, that the nuisance, being a necessary consequence of the use of the lands for a purpose expressly authorised by parliament, could not be restrained by injunction. *Rex* v. *Pease* (4 B. & Ad. 30), *Vaughan* v. *Taff Vale Ry.* (5 H. & N. 679), and *Hammersmith Ry.* v. *Brand* (L. R. 4 H. L. 171) followed. *Metropolitan Asylum District* v. *Hill* (6 App. Cas. 193) distinguished. *L. B. & S. C. Ry.* v. *Truman*, 55 L. J. Ch. 354; 11 App. Cas. 45; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388—H. L. (E.)

Engines—User of.]—By a private act reciting that a proposed railway, between certain termini, and its branches, would be of great public utility, a company was incorporated for the making of such railway, in a line parallel to and in some places within five yards of a highway, from which line no deviation was to be made exceeding 100 yards. A subsequent act authorised the use of locomotive engines on the railway. Upon an indictment for using the engines, whereby horses were frightened, and accidents occasioned on the highway, the alleged nuisance was found by verdict, but it was also found that the engines were of the best construction, and used with due care, and that by reason of these engines the public obtained better and cheaper coal:—Held, that such a restriction of the rights of the public was not unreasonable, and must be presumed to have been contemplated by the legislature, when authorising the use of locomotive engines, without words of qualification. *Rex* v. *Pease*, 1 N. & M. 690; 4 B. & Ad. 30; 2 L. J., M. C. 26.

—— **Construction of—Smoke.**]—A penalty is not incurred under s. 114 of the Railways Clauses Act, 1845, unless the engine using smoke-emitting fuel is so defectively constructed as to be incapable of consuming it own smoke, though used with proper care; and, consequently, no penalty attaches where the engine, though properly constructed on the principle of consuming its own smoke, is so carelessly used on a railway as to emit instead of consuming its smoke. *Manchester, Sheffield and Lincolnshire Ry.* v. *Wood*, 2 El. & El. 344; 29 L. J., M. C. 29; 6 Jur. (N.S.) 70; 1 L. T. 31; 8 W. R. 24.

—— **Inspection of.**]—A court of equity will enforce, by injunction, the provision of s. 115, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines and not to enforce the provision of the act; and notwithstanding also, that, to enforce such right of inspection would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over their line of a competing company. *Midland Ry.* v. *Ambergate Nottingham and Boston Ry.*, 10 Hare, 359; 1 W. R. 162.

Locomotive Engine at Station—Noise of Steam—Duty to Screen.]—In an action against the defendants, a railway company, it appeared that the plaintiffs were leaving a station belonging to the defendants in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station which was blowing off steam, and the carriage was upset and the plaintiffs injured. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient, but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident:—Held, that the defendants were not liable, as there was no evidence of any obligation on their part to screen the railway from the road. *Simkin* v. *L. & N. W. Ry.*, 21 Q. B. D. 453; 59 L. T. 797; 53 J. P. 85—C. A.

Liability of Railway Company for Damage by Sparks.]—A private statute, reciting that a railway for the passage of waggons, engines, and other carriages would facilitate the conveyance of coals and other heavy articles to certain slate quarries, and of slates, copper, and other ores to the seaside, and would otherwise be of great public utility, empowered a company to make and maintain a railway passable for waggons and other carriages, and to erect and set up fire engines or other machines, and to do all other matters and things fit or necessary for the making and using the railway. While one of the company's trains, carrying passengers in accordance with a certificate of the board of trade, and drawn by a steam locomotive engine, was passing along the line, sparks from the engine were emitted and blown towards a haystack, which took fire and was burnt:—Held, that the company had no statutory authority to use locomotive engines, and therefore was liable for the damage, notwithstanding all reasonable precautions had been taken by them to prevent the emission of sparks. *Jones* v. *Festiniog Ry.*, 9 B. & S. 835; 37 L. J., Q. B. 214; L. R. 3 Q. B. 733; 18 L. T. 902; 17 W. R. 28.

A railway company, authorised by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks

emitted from an engine travelling on the railway, provided the company has taken every precaution in its power, and adopted every means which science can suggest to prevent injury from fire, and is not guilty of negligence in the management of the engine. *Vaughan* v. *Taff Vale Ry.*, 5 H. & N. 679; 29 L. J., Ex. 247; 6 Jur. (N.S.) 899; 2 L. T. 394; 8 W. R. 549—Ex. Ch.

—— **Evidence.**]—Workmen employed by a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and was thence carried by a high wind across a stubble-field and over a road, and burnt a cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the railway company had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them:—Held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence that the fire originated in sparks from the engine that had just passed. *Smith* v. *L. & S. W. Ry.*, 40 L. J., C. P. 21; L. R. 6 C. P. 14; 23 L. T. 678; 19 W. R. 230—Ex. Ch.

Held, secondly, that there was evidence that the company was negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field. *Ib.*

In an action against a railway company for so negligently managing and conducting an engine that the premises of the plaintiff adjoining the line were destroyed by fire emitted from the engine, evidence is admissible for the purpose of shewing that other engines belonging to the company, upon other occasions, in passing along the line, threw sparks or ignited matter to a sufficient distance to reach the premises, without shewing the precise circumstances under which this occurred. *Piggot* v. *Eastern Counties Ry.*, 3 C. B. 229; 15 L. J., C. P. 235; 10 Jur. 571.

The fact of premises being fired by sparks emitted from a passing engine is primâ facie evidence of negligence on the part of the company, rendering it incumbent on it to shew that some precautions had been adopted by the company reasonably calculated to prevent such accident. *Ib.*

In an action for injury by fire, alleged to have been caused by a locomotive belonging to a railway company, it was proved that the fire broke out shortly after the passing of the engine, and that the engine had none of the appliances which had been long in use to prevent sparks or hot cinders issuing from the chimney or the fire-box, and that there was no other way of accounting for the fire than assuming it to have been caused by a spark or a cinder from the engine. For the company, the evidence of several scientific witnesses was to the effect that the engine was so constructed that it was unnecessary to provide any of the safeguards suggested by the plaintiff's witnesses, and that it was impossible that sparks or cinders could have been thrown out by it so as to cause the damage complained of. In his summing up, the judge, after a recapitulation of the evidence on both sides, left it to the jury to say whether or not there had been negligence on the part of the company, either in using an improperly-constructed engine or in improperly using an engine of the description mentioned by the witnesses of the company:—Held, no misdirection. *Fremantle* v. *L. & N. W. Ry.*, 10 C. B. (N.S.) 89; 31 L. J., C. P. 12; 9 W. R. 611. *S. C.*, at nisi prius, 2 F. & F. 337.

In an action against a railway company for damage negligently caused by a fire to the plaintiff's premises, alleged to have arisen from sparks emitted from their engines, the negligence alleged being such as practical men stated would impede the engines, and would not be effectual for the object, it was left to the jury to say whether there were any means which the company ought to have adopted; and the jury having found that there had been no negligence on the part of the company, as to using such means, or in managing their engines, a verdict was directed in their favour. *Dimmock* v. *North Staffordshire Ry.*, 4 F. & F. 1058.

In an action against a canal company for damage caused by the emission of sparks from the engines of a steamboat used by them, evidence being given that there were some mechanical appliances which were used to prevent the emission of sparks, and that there were species of fuel and modes of dealing with the furnaces for that object, which had not been adopted, the question was left to the jury whether there had been a neglect by the company of any practicable precautions which they reasonably ought to have used. *Longman* v. *Grand Junction Canal*, 3 F. & F. 736.

In an action against a railway company for carelessly letting sparks fly from their engines so as to set the herbage and pasturage on fire, it is not necessary to prove any specific negligence. *Gibson* v. *S. E. Ry.*, 1 F. & F. 23.

—— **Damages.**]—The compensation, in such a case, should be measured, as in the case of an unwilling vendor. *Ib.*

If the company is negligent it is responsible for the injury that results from their conduct to the owner of the injured property, although they could not have reasonably anticipated that such injury would be caused by it. *Smith* v. *L. & S. W. Ry.*, supra.

Injunction to Restrain Injuries.]—Where a public company is exceeding its powers, a court of equity cannot refuse to interfere by injunction, notwithstanding that irreparable mischief is not shewn to result from the proceedings of the company. *Dun River Navigation Co.* v. *North Midland Ry.*, 1 Railw. Cas. 135.

Parties injured by the conduct of a railway company, in exceeding the powers conferred upon it by act of parliament, are entitled to the most effectual remedy within the power of a court of equity; and where it appeared that the injury complained of would be remedied by suspending an injunction, an injunction which had been granted was suspended for three weeks. *Spencer* v. *London and Birmingham Ry.*, 1 Railw. Cas. 159.

The plaintiff, a lessee of a wharf and premises, of which the Regent's Canal Company was the

proprietor, had covenanted to bear, in common with other lessees, the expense of keeping in repair a private road, called the Commercial road, leading from his premises to a public road. The London and Birmingham Railway acts provide that the company shall not take, use, damage, pass along or interfere with the said Commercial road, without the previous consent of the Regent's Canal Company under its common seal. A contractor for the railway works having deposited clay on the road to a quantity injurious to the plaintiff's premises, he filed a bill to restrain the nuisance:—Held, that the canal company was not a necessary party to the suit. *Semple* v. *London and Birmingham Ry.*, 1 Railw. Cas. 480. And see *S. C.*, 2 Jur. 560; 9 Sim. 209.

2. Deviation and Plans.

Construction of Act.]—In putting a construction upon a railway company's act, no regard will be paid to the plans and sections deposited, in pursuance of the standing orders of the houses of parliament, previous to the application for that act, unless they are incorporated therewith. *North British Ry.* v. *Tod*, 12 Cl. & F. 722; 4 Railw. Cas. 449; 10 Jur. 975.

Plans and sections of an intended railway deposited in pursuance of the standing orders of the houses of parliament, cannot be referred to for the purpose of construing the special act, except so far as they may have been incorporated within its provisions. *Beardmer* v. *L. & N. W. Ry.*, 1 Macn. & G. 112; 1 H. & Tw. 161; 5 Railw. Cas. 728; 18 L. J., Ch. 432; 13 Jur. 327.

Objection by Landowner.]—No proprietor, through whose lands a railway is to pass, is entitled to object that the line prescribed by the act of parliament has been deviated from, before it has reached his land, unless he can shew that the deviation is prejudicial to himself, or is likely to defeat the objects of the act. *Lee* v. *Milner*, 2 Y. & Coll. 611.

Agreement to apply for Deviation.]—During the progress of a railroad bill through parliament, the promoters of the bill agree, with an owner of land on the intended line, that if the bill shall pass they will endeavour in the next session to obtain the sanction of parliament to a deviation of the line. Quære, whether such an agreement is legal. *Simpson* v. *Howden (Lord)*, 3 Myl. & Cr. 97; 1 Railw. Cas. 326. *And see* 3 Railw. Cas. 294.

Deposit of Plans.]—Where a company has a project extending into two adjacent counties, a landowner in one county is not bound to examine the plans or works of the company to be executed out of the county, or any plans or sections except those deposited with the clerk of the peace of his own county. *Bentinck* v. *Norfolk Estuary Co.*, 3 Jur. (N.S.) 204.

The depositing with the clerks of the peace the plans and sections of a proposed railway, indicating the works proposed to be effected in constructing the line, gives no authority to the company to carry those works into effect, except so far as they are authorised by the Railways Clauses Act, 1845, or the special act regulating the company. *Reg.* v. *Wycombe Ry.*, 8 B. & S. 259; 36 L. J., Q. B. 121; L. R. 2 Q. B. 310; 15 L. T. 610; 15 W. R. 489.

The lines and works of a railway are sufficiently shewn on the plans deposited by a black line, with dotted lines on each side, to mark the limits of deviation. *Weld* v. *L. & S. W. Ry.*, 32 Beav. 340; 33 L. J., Ch. 142; 9 Jur. (N.S.) 510; 8 L. T. 13; 11 W. R. 448.

Where the plans deposited by a railway company delineated a field, shewing the line, the limits of deviation, and the boundaries on one side of those limits, but leaving the boundaries on the other side undefined, the court restrained the company from taking the land beyond the limits of deviation on the undefined side, though the name of the owner of the whole field was described in the book of reference. *Wrigley* v. *Lancashire and Yorkshire Ry.*, 4 Giff. 352; 9 Jur. (N.S.) 710; 8 L. T. 267.

—— **Necessity of Works.**]—To a count alleging that the plaintiff was entitled to support for his house from an adjoining house, and that a railway company wrongfully deprived the plaintiff of the support of the adjoining house, by negligently and improperly pulling down the same, without taking any care to secure the house against the consequence of such pulling down, the company pleaded (except as to so much of the count as charged them with having negligently and improperly pulled down the adjoining house) that the same was delineated in the plans, and described in the books of reference deposited, as in their act mentioned; and that because it was necessary in order to make the railway authorised by that act they pulled down the house:—Held, that the plea was good. *Knapp* v. *L. C. & D. Ry.*, 2 H. & C. 212; 32 L. J., Ex. 236; 9 Jur. (N.S.) 671; 8 L. T. 541; 10 W. R. 890.

Land within the limits of deviation in the deposited plans and sections, but not actually taken in the first instance by the company, may be taken for the purposes of making a siding, so as to give local traffic an ingress on to the main line. *Dylar's Estate, In re*, 1 Jur. (N.S.) 975.

Under s. 16, a railway company, empowered by a special act, incorporating the provisions of the general act, to construct "a railway and works" within certain limits as to space and time, may within such limits, without the consent of the owner, take the land for the purpose of constructing the various works mentioned in s. 16, although such works are not necessary, but only convenient for the purposes of the line. *Sadd* v. *Maldon, Witham, and Braintree Ry.*, 6 Railw. Cas. 779; 6 Ex. 143; 20 L. J., Ex. 102.

Sect. 14 of the Railways Clauses Act, 1845, is to be construed as referable to the line of railway alone, whereas s. 16 comprehends all collateral works, therein called accommodation works, which may become necessary in consequence of the formation of the railway itself. *Beardmer* v. *L. & N. W. Ry.*, supra.

A railway company, authorised by its special act to take such of the lands shewn and described in the deposited plans and books of reference as might be required for the purposes mentioned in the special act, has power to take lands outside the limits of deviation, if such lands are reasonably required for the construction of the line of railway within the limits of deviation, provided such lands have been properly shewn and described in the deposited plans and books of reference. *Wrigley* v. *Lancashire and Yorkshire Ry.* (4 Giff. 352) explained. *Dowling* v. *Pontypool, &c. Ry.* (L. R. 18 Eq. 714) approved.

Finch v. *L. & S. W. Ry.*, 59 L. J., Ch. 458 ; 44 Ch. D. 330 ; 62 L. T. 881 ; 38 W. R. 513—C. A.

Deviation—What is.]—Deviation, in its ordinary and natural sense and as used in acts of parliament, means shifting the work in its integrity from one site to another which may be deemed more suitable. It does not imply a right not only to alter the situation of the work but in doing so to dispense with a half or two-thirds of it. *Herron* v. *Rathmines Commissioners*, [1892] A. C. 498 ; 67 L. T. 658—H. L. (Ir.)

Lateral and Vertical Deviation.] — Lateral deviation means horizontal movement in any direction in the plane of the map ; vertical deviation means movement up or down in the plane of the sections—per Fitzgibbon, L.J. *Herron* v. *Rathmines Commissioners*, 27 L. R., Ir. 179.

Nature and Amount of Deviation.]—A vertical deviation of the level of a railway not exceeding five feet, calculated with reference to the datum line shewn on the plans and sections deposited in pursuance of the standing orders of the houses of parliament, is within the powers of deviation conferred by s. 11, although the deviation may exceed five feet, calculated with reference to the surface line shewn on the plans and sections. *North British Ry.* v. *Tod*, 12 Cl. & F. 722 ; 4 Railw. Cas. 449 ; 10 Jur. 975.

The expression "deviation" in s. 15, is used with reference to the medium filum of the railway as laid down in the parliamentary plans. Doe d. *Armistead* v. *North Staffordshire Ry.*, 16 Q. B. 526 ; 20 L. J., Q. B. 249 ; 15 Jur. 944.

A railway act enacted, that the lands to be taken for the line of the railway should not exceed twenty-two yards in breadth, except where a greater breadth should be necessary for waiting-places, embankments, cuttings, &c. ; and a section provided, that the company, in making the railway and other works, should not deviate from the line delineated on the plan deposited with the clerk of the peace in pursuance of the act, with or without consent of the owners or occupiers of the lands, more than 100 yards, and that no deviation should extend into the lands or property of any person not mentioned in the book of reference of the plan, unless omitted by mistake ; and the company was empowered to make such deviations in the section as might be necessary in consequence thereof :—Held, that this section only prohibited the company from making the substituted line of the railway itself, at a greater distance than 100 yards from the line delineated in the plan ; but that it did not prevent them from taking lands at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c. ; the intention of the act being to give the company the same incidental powers with respect to the deviated line, as they had with respect to the original line :—Held, also, that a party, whose lands were so taken, could not object that the company had taken, for the same purpose, lands of another person not mentioned in the book of reference. Doe d. *Payne* v. *Bristol and Exeter Ry.*, 6 M. & W. 329 ; 2 Railw. Cas. 75 ; 9 L. J., Ex. 232.

In the case of a tunnel marked on the deposited plans, there can be no deviation therefrom without the consent required by s. 13 of the Railways Clauses Act, 1845, or under the special powers of the special act. *Little* v. *Newport, Abergavenny and Hereford Ry.*, 12 C. B. 753 ; 7 Railw. Cas. 280 ; 22 L. J., C. P. 39 ; 17 Jur. 209 ; 1 W. R. 81.

A railway company having entered on land which they had purchased, and having proceeded to make their line in a manner exceeding their powers of vertical deviation, on a motion for an injunction, an action was directed to be brought immediately, and the motion to stand over. *Holyoake* v. *Shrewsbury and Birmingham Ry.*, 5 Railw. Cas. 421.

The plaintiff must satisfy the court that he has sustained substantial damage from the violation of a legal right to entitle him to an injunction. *Ib.*

A railway company was building an embankment more than five feet above the level, according to ss. 11 and 12 of the Railway Clauses Act. It had not given the notice required by s. 12, but had obtained the consent required by s. 11. The court put it on terms to take the opinion of the board of trade, submitting to such order as this court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment. *Pearce* v. *Wycombe Ry.*, 1 Drew. 244 ; 17 Jur. 660.

Where the deposited plans and sections specify the span and height of a bridge by which a railway is to be carried over a turnpike road, the company will not, in the construction of the bridge, be allowed to deviate from the plans and sections. *Att.-Gen.* v. *Tewkesbury and Great Malvern Ry.*, 1 De G. J. & S. 423 ; 32 L. J., Ch. 482 ; 9 Jur. (N.S.) 951 ; 8 L. T. 682.

There is a presumption of intention that the plans and sections referred to in an act conferring powers over the property of individuals should be adhered to. *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212 ; 28 L. J., Ch. 153 ; 5 Jur. (N.S.) 25 ; 7 W. R. 67.

A canal company being desirous to enlarge one of their reservoirs, in order to obtain an act of parliament for that purpose, gave the usual parliamentary notices, and deposited with the clerk of the peace certain plans and sections. The plans shewed the lines, and where the enlargement was to take place, and also the proposed limits of lateral deviation, and the sections referring to the plans shewed the levels. The company completed the reservoir, but deviated from the deposited plans and sections. On a bill filed by W., alleging that his lands were flooded in consequence of such deviation, to restrain the company from using the reservoir as constructed : —Held, that the sections and plans deposited with the clerk of the peace were incorporated in and formed part of the act of parliament of the company, and, therefore, if any actual damage had resulted to W., he would have been entitled to an injunction. *Ib.*

Where a special railway act provided that the line should be made according to the levels shewn on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street :—Held, that the latter provision was not obligatory, and did not prevent the company from carrying its line across the street according to the provisions of the general act. *Dover Harbour (Wardens)* v. *L. C. & D. Ry.*, 3 De G. F. & J. 559 ; 30 L. J., Ch. 474 ; 7 Jur. (N.S.) 453 ; 4 L. T. 387 ; 9 W. R. 523.

Where a railway company, keeping within its powers of deviation, deviates from the deposited plans in such a way as to arouse an apprehension, which was not aroused by the deposited plans, that great inconvenience and risk will be

caused to the public, yet it will not be restrained by injunction if the information or bill against them does not charge them with capriciously using its powers of deviation, and if no evidence is given to shew that, granting the deviation, the line could be constructed in such a way as to allow the aroused apprehension. *Att.-Gen.* v. *G. W. Ry.*, 14 W. R. 726.

Time for.]—Time for making deviations from the adopted line being extended for another two years from the 4th July, 1838, an injunction was refused. *Dublin Navigation Co.* v. *North Midland Ry.*, 2 Jur. 1076.

"Town."]—At a trial of an issue the question was whether a railway at a particular place passed through a town within the meaning of s. 11 of the Railways Clauses Act, 1845, or not. The judge merely told the jury that the word "town" in the act was to be understood in its ordinary sense:—Held, that this was a misdirection, and that the judge should have given the jury such a definition as would have been a guide to enable them to decide the particular question before them. "Town" in s. 11 means the space on which the dwelling-houses are collected so near to each other that they may be said to be continuous. An open space occupied as a mere accessory to the convenience of dwelling-houses would also be in the town. *Elliott* v. *South Devon Ry.*, 5 Railw. Cas. 500; 2 Ex. 725; 17 L. J., Ex. 262. See *Falkner* v. *Somerset Ry.*, 42 L. J., Ch. 851; L. R. 16 Eq. 458. *Carington* v. *Wycombe Ry.*, 37 L. J., Ch. 213; L. R. 3 Ch. 377; 18 L. T. 96; 16 W. R. 494. *L. & S. W. Ry.* v. *Blackmore*, 39 L. J., Ch. 713; L. R. 4 H. L. 610; 23 L. T. 504; 19 W. R. 305.

As to taking Lands within Limits of Deviation.]—See Lands Clauses Act.

3. In Respect of Particular Works.

a. Stations.

Power to take Land for Building.]—Under the words "railway and works," in s. 3 of the Railways Clauses Act, a railway company has a right, by the compulsory powers of their act, to take a piece of land for the purpose of building a station. *Cother* v. *Midland Ry.*, 2 Ph. 469; 5 Railw. Cas. 187; 17 L. J., Ch. 235.

By a clause in a railway act, after reciting that plans and sections of the widenings, enlargements and other works proposed to be made, describing the lands intended to be taken or used for the purposes of such widenings and enlargements, and for the stations, works and conveniences to be connected therewith, and also books of reference, had been deposited with the clerks of the peace, the company was empowered to "widen, alter, enlarge and complete their railway and other works, in, upon or over the lands delineated on the plans and described in the books of reference, and to enter upon, take and use such of the lands described upon the plans and in the books of reference, as might be necessary for such purposes, and to purchase and acquire any easement, right or limited interest upon, over, through or in any of the lands":—Held, that this authorised the building of a station upon part of the lands described, and not only such works as were necessary for the mere widening of the railway, the station being necessary for the public convenience. *London and Blackwall Ry.* v. *Limehouse Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164; 5 W. R. 64.

"First-Class Station."]—On the purchase of land by a railway company in 1838, the company covenanted with the landowners that a piece of the land purchased should for ever thereafter be used as a first-class station. The station was built, and the railway was completed in 1842; the railway company was afterwards made part of a company with a much greater length of railway. In 1869 the landowner filed a bill to compel the company to build a larger station and to stop all trains at that station:—Held, that as the existing station had not been objected to, and had remained for many years, and as the passengers were not numerous, the court would not compel a larger station to be built; but that as many trains as stopped at any other station between the termini of the original railway, excepting mail, express and special trains, must stop at this station. *Hood* v. *North-Eastern Ry.*, L. R. 5 Ch. 525; 23 L. T. 206; 18 W. R. 473.

"Public" Station.]—Where by a clause in a railway act it was provided that "it should not be lawful for the railway company to make or establish any public station, yards, wharves, waiting, loading or unloading places, warehouses or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or cattle, or any goods, articles, matters or things, upon the estate of R. G. without his consent":—Held, upon demurrer, that the word public did not necessarily apply to every building, and that if it did, every convenience connected with the railway must, upon the question of demurrer, be considered as public, and therefore within the restriction of the clause. *Gordon* v. *Cheltenham Ry.*, 5 Beav. 229; 2 Railw. Cas. 800.

At Particular Place.]—A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson* v. *Northampton and Banbury Ry.*, 43 L. J., Ch. 503; L. R. 9 Ch. 279; 30 L. T. 147; 22 W. R. 380.

The intention of Eton College to exclude the Great Western Railway Company from having a station within three miles of Eton being admitted or apparent, and they having procured to be introduced into the act clauses prohibiting the company from forming, making or laying down a railway or tram or other road to the south of the line, approaching within three miles of the college, and for making or constructing a depôt, station, or yard, &c., within three miles of the college, without the consent of the college, and the company having set down and taken up passengers without such consent within the prohibited space:—Held, that the words did not restrain it from so doing, the company being entitled to do all the act does not upon a strict construction restrain it from. Injunction refused.

Eton College v. *G. W. Ry.*, 1 Railw. Cas. 200; 3 Jur. 163.

"No Goods or Cattle Station at."]—In an action the plaintiff asked for an injunction to compel the defendants to pull down a goods station and cattle sheds which they had erected 140 yards from Bala Station, although it was provided by their private act "that at that station there should be no goods or cattle station." The plaintiff had not objected to the buildings till they were nearly completed, owing to his being abroad at the time, and ignorant of their erection till his return. The defendants contended that the buildings in question had not been erected "at" the station, as they were 140 yards off; that if they had been, it was for the public convenience they should be there, and that the plaintiff was precluded by acquiescence from insisting on his claim:—Held, that the erections were a breach of the provisions of the act, and that the plaintiff was entitled to his injunction. *Price* v. *Bala and Festiniog Ry.*, 50 L. T. 787.

By Lessees of Covenantors.]—A railway company purchased lands from C., and agreed to erect a station at A., and that the trains should stop there for passengers and luggage. They entered into possession of the lands before the conveyance was executed, but did not erect a station, and C. served a writ of ejectment upon them. The company then filed their bill against C. praying for the specific performance of the contract. A decree was made ordering specific performance, and that C. should execute a proper conveyance of the lands, and that such conveyance should contain a covenant by the company to erect the station, and that trains should stop there for passengers and luggage. This conveyance was duly executed. Under acts of parliament of 1867 and 1873, confirming agreements between the company and the S. W. company, the latter company were empowered to take a lease for 1,000 years of the S. railway, and to work it, and were, during such lease, to be liable to all duties and obligations to which the S. company, if the acts had not been passed, would be subject and liable. No station was erected. On bill filed by C. against both companies:—Held, that though the S. W. company were necessary parties to the suit, no case whatever had been made out against them, inasmuch as they were not bound either in law or in equity by the covenant entered into by the S. company with C. to erect a station, but that they would be bound, when the station was made, to stop their trains there. *Churchill* v. *Salisbury and Dorset Ry.*, 23 W. R. 894. Varying 32 L. T. 216.

Condition of.]—*See* CARRIERS.

b. Sidings.

Taking Land for.]—Land within the limits of deviation in the deposited plans and sections, but not actually taken in the first instance by the company, may be taken for the purposes of making a siding, so as to give local traffic an ingress on to the main line. *Dylar's Estate, In re*, 1 Jur. (N.S.) 975.

Construction of Act—Public Use.]—A railway act provided "that it should not be lawful for the company to make or establish any public station, yards, wharves, waiting, loading or unloading places, warehouses or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or cattle, or any goods, articles, matters or things upon the estate of G., without his consent":—Held, that the word "public" did not necessarily override the whole sentence, and that, if it did, then that, from the subsequent clauses, every convenience connected with the railway must be considered as for the public use. *Gordon* v. *Cheltenham and Great Western Union Ry.*, 5 Beav. 229; 2 Railw. Cas. 800.

Agreement with Landowner—Specific Performance.]—A railway company agreed with a landowner, through whose estate the railway would pass, to construct and maintain a siding connected with their railway at B., together with all necessary approaches thereto for public use, for the reception and delivery of goods:—Held, that specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made. *Lytton* v. *G. N. Ry.*, 2 Kay & J. 394; 2 Jur. (N.S.) 436; 4 W. R. 441.

Held, also, that the agreement did not bind the company to erect sheds, or to keep one of their servants in attendance at the siding; but that it obliged the company to construct a proper siding, with approaches and a wharf or raised platform for the loading or unloading of goods. *Ib.*

—— Though Offer of Money Payment.]—A railway company having contracted to make a siding for the plaintiff on his land, offered a money payment instead, but specific performance of the agreement was decreed. *Greene* v. *West Cheshire Ry.*, 41 L. J., Ch. 17; L. R. 13 Eq. 44; 25 L. T. 409; 20 W. R. 54.

Undertaking to Replace—Further Expenditure—Indemnity.]—A railway company, as compensation for injury to the plaintiff's mill by the construction of their railway, agreed to lay down a siding from their line to the mill. The siding was made, but the plaintiff not having used it, the railway company removed the points, undertaking by a letter of the 2nd March, 1871, to replace them on receiving sufficient notice of an intention to use the siding. In November, 1879, the siding not having been used, the railway company removed the rails, and the plaintiff having required them to be replaced, its secretary, on the 27th November, 1879, wrote to the plaintiff that the rails had been removed under misapprehension, and would be replaced at once, or that the directors would undertake to do so at any time when called on. By regulations of the board of trade, issued in July, 1879, railway companies were required to provide signals, &c., on the opening of any siding or branch line which had not been in use before that time. On the 17th September, 1880, the plaintiff required the railway company to replace the siding. On the 19th of October the secretary replied, requiring the plaintiff to indemnify the directors against the expenses occasioned by the regulations of the board, in consequence of the non-user of the siding, if he required it to be replaced. The plaintiff's solicitors refused, and having again required the siding to be replaced, on the 5th of January, 1881, wrote to the secretary that unless in that month the plaintiff should be fully compensated

for the injury and expense sustained by him from the construction of the railway, proceedings would be taken to recover full compensation. The secretary replied on the 19th of January, denying the liability of the company in respect of a right never used, and on which the plaintiff apparently placed no value. In an action for specific performance of the agreement to replace the siding:—Held, first, that the non-user of the siding, and the expenses caused thereby, under the regulations of the board of trade, were not a defence to the action, and that the company was not entitled to any indemnity against those expenses. *Todd* v. *Midland Great Western Ry.*, 9 L. R., Ir. 85.

Held, secondly, that the plaintiffs were entitled to a decree to replace the siding and keep it in working order, the court considering damages an insufficient remedy. *Ib.*

Customers' Siding—Cutting off Connection—Order to Restore.]—Where a railway company had wrongfully taken up and removed the rails forming a connection between their line and a siding belonging to the applicant, the company was ordered at their own expense forthwith to restore the communication. *Portway* v. *Colne Valley Ry.*, 7 Ry. and Can. Traff. Cas. 102.

What is Sufficient Performance.]—When a railway company was bound by its act to make a good and sufficient siding on a specified field of an owner who had opposed the bill:—Held, that the obligation was not broken, though the company took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or out of the specified field. *Dowling* v. *Pontypool, Caerlon and Newport Ry.*, 43 L. J., Ch. 761; L. R. 18 Eq. 714.

c. Bridges.

Mandamus to Construct.]—A mandamus will not lie to compel a railway company to construct a bridge in lieu of a level crossing pursuant to an order of the board of trade, where it appears that the company is wholly without funds, and has not the means of providing the money required for that purpose. *Bristol and North Somerset Ry., In re*, 47 L. J., Q. B. 48; 3 Q. B. D. 10; 37 L. T. 527; 26 W. R. 236.

Under the Railways Clauses Act, 1845, s. 46, a railway has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special act), either to carry the road over the railway or the railway over the road. A mandamus to command a company to do one of these two things is therefore defective unless it shews on the face of it circumstances which establish the impossibility of the company exercising this option. *Reg.* v. *S. E. Ry.*, 4 H. L. Cas. 471; 17 Jur. 931. Affirming 17 Q. B. 485; 20 L. J., Q. B. 428.

Bridge is a "Building."]—A railway company bought land from the plaintiff, and in the purchase deed covenanted with him not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his. At the time of the conveyance the railway had been carried through the purchased land with two lines of rails on a viaduct thirty-three feet high, part of which was within eighty feet from the protected property. The company afterwards determined to widen its railway, so as to have four lines of rails, and commenced building on the purchased land, for the purpose of widening the viaduct, piers more than eighteen feet high, and standing within eighty feet of the protected property, and between it and the old viaduct:—Held, that the company ought to be restrained from so doing. *Lloyd* v. *L., C. & D. Ry.*, 2 De G. J. & S. 568; 34 L. J., Ch. 401; 11 Jur. (N.S.) 380; 12 L. T. 363; 13 W. R. 698.

Agreement to Erect binding on Amalgamation.]—A railway company obtained a conveyance, for the purposes of the railway, of land from C.; and in the conveyance the company bound itself to erect and maintain a bridge over the road leading to C.'s property, which was to be, according to the plans, thirty-five feet wide, and leaving a road under it of fifteen feet wide. Afterwards this bridge was made, but the company, some years later, amalgamated with the H. company, and the latter company's act authorised a junction with the former railway, at a point near this bridge. The two companies then agreed as to the mode of effecting the junction; and part of the plan was to widen the arch or bridge over C.'s road, so as to extend the bridge from thirty-five feet to fifty-five feet wide, thereby darkening the road beneath. C. applied for an injunction to restrain the companies from carrying out this plan:—Held, that the first company having, in the first instance, obtained the conveyance from C. on certain conditions as to the width of the bridge, was bound not to depart from those conditions; and the H. company was equally bound, as claiming under the first company; for it was part of the consideration to maintain the bridge of the height and width originally fixed. *Edinburgh and Glasgow Ry.* v. *Campbell*, 4 Macq. H. L. 570; 9 L. T. 157.

Construction—Piles or One Span.]—A railway company had power by its act to cross a river, the property of certain persons, by the erection of a viaduct. By a clause to protect the proprietors of the river, it was enacted that between certain points the works incident to the construction of the railway should be made under the direction of the proprietors and according to plans to be submitted and approved by their engineer before commencement of the work. The company required the viaduct to be built on piles driven into the river; the proprietors objected that it should be done by a viaduct of one span or arch:—Held, that the company was not restricted to that mode of construction, but might carry the viaduct according to the terms of its act, without doing any permanent damage to the proprietors of the river. *Birmingham Waterworks* v. *L. & N. W. Ry.*, 4 L. T. 398.

Contract—Reference to Act—Width.]—In a contract between a railway company and a proprietor of land to be crossed by the line of railway, the Railways Clauses Act should be expressly referred to, if the company intends to claim the benefit of its provision. *Clarke* v. *Manchester, Sheffield and Lincolnshire Ry.*, 1 John. & H. 631.

Therefore, where a company contracted "to provide and erect a suitable bridge over a street (marked in a plan referred to in the deed) as then planned and intended"; and the plan

shewed that the street was intended to be forty-two feet wide:—Held, in the absence of any reference in the deed to the act, that the company was not at liberty to narrow the street to the dimensions specified in s. 49 (twenty-five feet), but must make a bridge with an arch of the full width of the street (forty-two feet). *Ib.*

According to Plans and Sections.]—By the plans and sections deposited by a company, it appeared that they intended to carry the railway across a public road by means of a skew bridge. Instead of doing so, the company diverted the road for some distance, and afterwards restored it to its former course by a bridge which crossed the railway at right angles, thus causing two abrupt and dangerous curves. A dispute having arisen between the trustees of the road and the company, the court granted an injunction until further order, restraining the company from proceeding with the works, and directed that in the meanwhile a competent person should inquire and report whether any deviation was necessary, and if so, how it could most conveniently be effected. *Att.-Gen.* v. *Dorset Ry.*, 3 L. T. 608; 9 W. R. 189.

A railway company with whose act the Railways Clauses Act, 1845, was incorporated, by its deposited plans and sections proposed to build over a turnpike road an arch, of a span of forty-five feet. The company afterwards proposed to the trustees of the road to vary its plans, and to build a bridge of a span of thirty-five feet; but the proposal was rejected. Subsequently the company's agents commenced the erection of a bridge of the lesser span; and thereupon one of the trustees filed an information for an injunction:—Held, that the word "accordingly," in s. 13 of the Railways Clauses Act, 1845, meant, according to the deposited plans and sections; and that the company was bound to erect the bridge according to the plans which had been deposited. *Att.-Gen.* v. *Tewkesbury and Malvern Ry.*, 1 De G. J. & S. 423; 32 L. J., Ch. 482; 9 Jur. (N.S.) 682; 8 L. T. 682.

A bridge forming part of the line of railway itself, is an engineering work within s. 14, and the company is by that section debarred from making it otherwise than according to the description in the plan. *Ib.*

A railway company, before applying for a deviation act, deposited with the clerk of the peace for the county plans and sections of the proposed line, and cross sections, shewing the manner in which roads were to be carried over the line. On one of these sections, No. 3, were delineated the manner in which it was proposed to carry a road at I. over the line by a bridge, and the proposed inclination of the altered line of road. The deviation act, when obtained, incorporated the Railways Clauses Act, and enacted that it should be lawful for the company to construct the bridges for carrying the railway over any roads, or for carrying any roads over the railway, of the heights and spans and in the manner shewn on the sections deposited. The company made the line, and at I. deviated two feet vertically from the level marked on the plans. They carried the road over the line on a bridge of the proposed height and span, but with a different inclination of the altered road. A mandamus having issued, commanding the company to make the bridge and carry the road over it in conformity with cross section, No. 3, and at the rates of inclination delineated thereon as the rates of inclination of the road when altered:—Held, first, that the exhibition of the plans and sections imposed no obligation on the company, except in so far as the plans, &c., were incorporated in the act. *Reg.* v. *Caledonian Ry.*, 16 Q. B. 19; 20 L. J., Q. B. 147; 15 Jur. 396.

Held, secondly, that nothing in 8 & 9 Vict. c. 20, rendered the cross sections obligatory on the company. *Ib.*

Held, thirdly, that if the special act was obligatory (which, semble, it was so far as regarded the height and spans of the bridges), the obligation did not extend to the rates of inclination of the altered road, and that the mandatory part of the writ going in this respect beyond the obligation imposed by law, the writ was bad altogether. *Ib.*

Where, in consequence of a company raising the level of their railway within the limits of vertical deviation, it became necessary to raise the height of a bridge over which a road was to be carried:—Held, that there was no restriction as to the powers of the company to alter the levels of the approaches to the bridge, provided the land to be affected was included in the plans and sections deposited, or mentioned in the books of reference, and that full satisfaction was made to all parties interested for the damage sustained. *Beardmer* v. *L. & N. W. Ry.*, 5 Railw. Cas. 728; 1 Mac. & G. 112; 1 Hall & T. 161; 18 L. J., Ch. 432; 13 Jur. 327.

Widening—Obstruction.]—A railway company having formed its line, obtained an act for an extension for three years of their compulsory powers to take land, the preamble stating that it was for the convenience and safety of the public. The company was owner of the soil on both sides of a lane crossed by a bridge, and therefore, like any other owner, owner of the soil of the land, but by a subsequent act the soil of all roads was vested in the district board of works in whose district such roads were situate. After the expiration of the three years the company found it necessary to widen the bridge over the lane, and claimed power to do so notwithstanding that the board of works for the district denied such power, and proceeded to widen the bridge, but only in the same line of abutment, the road itself not being narrowed, but the soil necessarily disturbed to form such addition. The board moved for an injunction to restrain such widening:—Held, that the soil of the road was only vested in the board to promote the public convenience and prevent the incursion of strangers. That the public convenience required the widening of the bridge, and as the only obstruction would occur whilst the works were in progress, and the road would not be ultimately narrowed, it was not a case for the extraordinary interference of the court. *Wandsworth Board of Works* v. *L. & S. W. Ry.*, 8 Jur. (N.S.) 691; 10 W. R. 814.

Turnpike Road—Injunction—Undertaking.]—Sects. 70 and 71 of a railway act provided for the crossing by the railway of roads, not being turnpike roads. Sect. 72 provided that a turnpike road to be crossed by the railway should be raised or sunk so as to pass over or under the tramway. The railway being proposed to cross the Northam Bridge Road, a turnpike road, in the mode provided for by ss. 70 and 71, the plaintiffs, the proprietors of the road,

filed their bill to restrain the railway company from crossing over or using the same, until it should have compleid with s. 72:—Held, that, as the object of the plaintiffs must be to procure for the public using the road a compliance with s. 72 of the act, upon the railway company entering into an undertaking to proceed with and complete a bridge over the road with all possible dispatch, an injunction ought not to be granted during the time which must necessarily elapse in building the bridge. *Northam Bridge Proprietors* v. *London and Southampton Ry.*, 1 Railw. Cas. 653; 9 L. J., Ch. 277. And see *S. C.* at law, 6 M. & W. 428; 9 L. J., Ex. 165.

—— **Agreement.**]—By the Railway Clauses Act, if a railway crosses any turnpike-road, then, except where otherwise provided for by the special act, the road is to be carried over the railway or the railway over the road. By its special act a company was authorised to make the railway "in the line and upon the lands delineated in the plans deposited"; and it was authorised to pass a certain turnpike-road on a level, and the deposited plans so represented. The plaintiff agreed to sell to the company a portion of his land adjoining the road, and the agreement recited that it was purchased for the purpose of constructing a railway "according to a certain plan and section thereof deposited," &c.:—Held, that the company, under the acts, had power to make the turnpike-road pass under the railway instead of on a level, and that this right had not been destroyed by the agreement with the plaintiff. *Breynton* v. *L. & N. W. Ry.*, 10 Beav. 238; 4 Railw. Cas. 553; 2 Coop. C. C. 198; 11 Jur. 28.

Low Level causing Damage.]—By its special act, passed in 1872, a railway company whose line was made in 1857, was authorised to divert a road crossing its line on the level, and to carry it under the line by a bridge, and the soil of the diverted road was to belong to the company. The new road and bridge were to be in accordance with the deposited plans and sections, which shewed a total height from the road to the rails on the bridge of sixteen feet three inches, but did not mention the height of headway. The special act incorporated the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845 (s. 49 of which provides that all bridges shall have a headway of fifteen feet), and it provided that nothing in the special act should exempt the company from the provisions of the general acts. It also gave the company power to deviate from the deposited sections to the extent of five feet. The company, without altering the levels of the line (no such alteration being shewn on the deposited plans), made the bridge of the prescribed height of sixteen feet three inches, but with a headway of only fourteen feet, and that partly gained by carrying the road below the level of the adjoining land, so that at times it was flooded from an open ditch near the line, and became impassable. If the surface of the road was raised one or two feet, all serious inconvenience from flooding would be removed, and a headway of twelve or thirteen feet would be sufficient for the traffic of the district. On an information at the relation of the road surveyors:—Held, that the attorney-general was entitled to an injunction, restraining the company from making or maintaining the bridge with less headway than fifteen feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded. *Att.-Gen.* v. *Furness Ry.*, 47 L. J., Ch. 776; 38 L. T. 555; 26 W. R. 650.

A railway company, in exercise of the powers conferred on it by an act of parliament, which gave compensation to persons whose property might sustain damage from their operation, was proceeding to erect an arch over a mill race, for the purpose of sustaining an embankment, on which the railway was to be constructed; and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill race an arch of less than certain specified dimensions. *Coates* v. *Clarence Ry.*, 1 Russ. & M. 181; 8 L. J. (o.s.) Ch. 72.

A railway company, in the progress of its works, proposed to cross a mill-stream, by a bridge to be supported in the centre of the mill-stream by two piles, placed sixteen feet apart. The bridge was to be six feet in height above the level of the water. The plaintiff, the owner of the mill, asserted that that height was insufficient to allow barges to pass under; and also, that placing piles in the stream would impede the flow of the water, and thereby stop the working of the mill:—Held, that nothing but necessity could justify the company in carrying on their works in such a manner, or on such a level, as would cause serious damage to the owner of the land. In a case where the affidavits on engineering points are conflicting, the court will seek for the professional assistance of some impartial engineer, to form a decision upon them. *Manser* v. *Northern and Eastern Counties Ry.*, 2 Railw. Cas. 380; 5 Jur. 983.

The act of parliament authorised the railway company to carry its railway over any road by means of an arch sixteen feet above the surface of the road. This was done by the company, who, at the same time, lowered the road to meet the required height, and thereby the road became flooded. Before the act was passed, the consent of the trustees of the road was obtained, on condition that the road should not be prejudiced; but no special proviso was inserted in the act:—Held, that the trustees of the road were precluded from obtaining relief, there being no express clause restricting the usual powers given to railway companies. *Aldred* v. *North Midland Ry.*, 1 Railw. Cas. 404; 3 Jur. 244.

Ascent and Approaches of Bridge.]—The proviso in s. 16 of the Railways Clauses Act, 1845, that in the exercise of their powers the company shall do as little damage as may be, and shall make satisfaction to all parties interested for all damages sustained by them, applies only to cases of damage to individuals for which compensation may be made, and does not control the enactment in s. 50, as to the ascent of bridges over the line. *Reg.* v. *East and West India Docks*, 2 El. & Bl. 466; 1 C. L. R. 496; 22 L. J., Q. B. 380; 17 Jur. 1181; 1 W. R. 409.

Where, in consequence of a company raising the level of its railway within the limits of vertical deviation, it became necessary to raise the height of a bridge over which a road was to be carried:—Held, that there was no restriction as to the powers of the company to alter the levels of the approaches to the bridge, provided the land to be affected was included in the plans

and sections deposited, or mentioned in the books of reference, and that full satisfaction was made to all parties interested for the damage sustained. *Beardmer* v. *L. & N. W. Ry.*, 1 Macn. & G. 112; 1 H. & Tw. 161; 5 Railw. Cas. 728; 18 L. J., Ch. 432; 13 Jur. 327.

By s. 41 of a railway act, it was enacted, that where any part of any road should be rendered impassable by the operations for making the railway, the company should cause another road to be made as convenient, and in the case of a turnpike-road, the temporary road should be set out, and the principal road restored within six months from the commencement of the operation. By s. 42, where the railway should cross any turnpike-road, either the turnpike-road should be carried over the railway, or the railway should be carried over the turnpike-road, by means of a bridge, of such construction as is thereinafter mentioned. By s. 47, where any bridge shall be erected for carrying any turnpike-road over the railway, the road over such bridge shall be formed, and shall at all times be continued of such width, as to leave a clear space between the fences of such road of not less than fifteen feet. The company lifted the road over the railway by a bridge, thirty feet wide between the parapets, and with approaches twenty-four feet wide:—Held, that, though that part of the road which might strictly be called the bridge, need not be wider than fifteen feet, the doctrine that the approaches form part of the bridge did not apply in this case. *Reg.* v. *Birmingham and Gloucester Ry.*, 1 G. & D. 324; 2 Railw. Cas. 694; 2 Q. B. 47; 10 L. J., Q. B. 322; 4 Jur. 966.

—— **Impossibility of Performance.**]—A local board of health withdrew its opposition to a railway bill upon the insertion in the act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than one in thirty. The making a slope of one in thirty required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of one in twenty:—Held, that the company must not have a bridge with a slope of more than one in thirty, and that it was no answer to say that this requisition could not be complied with without stopping the railway. *Att.-Gen.* v. *Mid-Kent Ry.*, L. R. 3 Ch. 100; 16 W. R. 258.

Public Footpath—Level Crossing on Embankment—Obligation to build Bridge.]—Sect. 46 of the Railways Clauses Act, 1845, imposes no obligation on a railway company to carry a public footpath by means of a bridge over a railway on an embankment in a case where such footpath crosses the railway on a level. *Reg.* v. *Bexley Heath Ry.*, 65 L. J., Q. B. 469; [1896] 2 Q. B. 74; 74 L. T. 540; 44 W. R. 501; 60 J. P. 454—C. A.

Over other Railway—Consent of Owner.]—By an act a company was empowered to make a railway over lands to a certain point; and it was enacted that nothing in the act should authorise the company to enter the lands of any person, without the previous consent of the owner; and that, in every case in which the railway should cross any other railway, the communication between the two railways, in case of disagreement, should be made in such manner as should be directed by two engineers (one to be chosen by each party) and an umpire, whose decision should be binding on all parties; provided, that the engineer of the company, if the owner of the railway to be crossed should, for twenty-one days after notice, neglect to appoint an engineer on his behalf, should have power to make such communication as he should think proper; that the company should make satisfaction for damage occasioned by such crossing, and should have full power at all times to cross such railway by means of such communication:—Held, that the consent in writing of the owner of a railway intended to be crossed by another railway was necessary. *Clarence Ry.* v. *Great North of England Ry.*, 13 M. & W. 706; 3 Railw. Cas. 426; 7 Jur. 65. S. P. and *S. C.*, 3 G. & D. 389; 4 Q. B. 46; 12 L. J., Q. B. 145.

The defendants, not being possessed of compulsory powers for taking land for the purpose of a railway, and it being necessary for them, in order to complete their line, to cross the plaintiffs' railway, gave notice of their intention of crossing the same, but were restrained by injunction from so doing until the question of a right could be decided at law. They had entered into a contract with an owner of land on one side of the plaintiffs' railway, by which a way leave was to be granted if the line were completed within a certain time; but this injunction would render it impossible for them to complete their contract:—Held, that the injunction should be dissolved so far as to enable the defendants to complete their contract. *Clarence Ry.* v. *Great North of England Ry.*, 2 Railw. Cas. 763; 6 Jur. 269.

Over Canals.]—A company was empowered to do all works necessary and convenient for constructing a railway, and among others to cross canals and make embankments in the line; and in particular to cross a canal of which the defendants were the proprietors, and to make an embankment over a valley near the same place. Subsequent clauses in the act restricted the company from doing anything which should obstruct the navigation of the canal, or any part thereof, and specified the height and dimensions of any bridge to be made and maintained for carrying the railway over the canal. The company, for the purpose of transporting earth from the higher lands on the south to the lower land on the north side of the canal for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal:—Held, that the clause empowering the railway company to cross canals in the progress of their works was not restricted by the subsequent clauses which applied to permanent bridges. *London and Birmingham Ry.* v. *Grand Junction Canal Co.*, 1 Railw. Cas. 224.

Although a railway company is not to act capriciously in regard to carrying out the powers of an act of parliament, the act constitutes it the judge of the most convenient mode of conducting the works. *Ib.*

Over Rivers—Notices to Owners.]—In an action by an owner of a vessel navigating a public river, against a railway company, the declaration charged the company with filling up and obstructing a part of the bed of the river, penning back the water, and preventing it from flowing in its accustomed channel and course in so ample a manner as it otherwise would have done, and preventing the plaintiff from passing

along and navigating that part of the river. Plea, that the company had done the matters complained of under their special act, and under the Lands Clauses Act and the Railways Clauses Act; that plans and books of reference were deposited with the clerk of the peace; that the part of the bed of the river which was obstructed was among the lands delineated on the plans, and described in the books of reference; and that the company, for the purpose of constructing the railway, and under and by virtue of the powers and provisions mentioned in their special act and the acts of parliament therewith incorporated, and not otherwise, entered upon the same part of the bed of the river, and constructed part of the railway thereon, the same being necessary for the purpose of making the railway. Issue thereon:—Held, that the company was not bound under their plea to shew that all notices required by the acts for the purchase of such part of the river from the owners of the bed of it had been given, and all other things done which were requisite to vest that part of the bed of the river in the company. *Abraham* v. *G. N. Ry.*, 16 Q. B. 586; 20 L. J., Q. B. 322; 15 Jur. 855.

—— **What Rivers.**]—Held, secondly, that the first clause of s. 16 of 8 & 9 Vict. c. 16, includes navigable rivers as well as rivers not navigable, and therefore the company was authorised by it to construct their railway upon the bed of the navigable part of the river. *Ib.*

—— **Removal of Débris of Broken Bridge.**]—The North British Railway (New Tay Bridge) Act, 1881, gave the North British Railway authority to erect a new bridge over the Tay a little higher up the river than one blown down on 28th December, 1879. S. 21 of this act provided, "The company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2; and shall remove the ruins and débris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the board of trade." The magistrates of Perth, whose jurisdiction extends down the river to within about three miles of the old bridge, raised an action for declarator and implement:—Held (1) that the special act imposed an absolute obligation to remove the old ruins and débris of the old bridge; and s. 21 did not give the board of trade a discretionary power to dispense with the performance of any part of this obligation; and it followed that the respondents had an interest to obtain a declarator as to the extent of the obligation; but (2) dissenting from the judgment of the court below, the obligation did not become immediately prestable; and (3) the import of the expression "to the satisfaction of the board of trade" was, that though not bound to submit their plans of removal, including the time and manner, yet, as a matter of prudence, the company ought to do so; (4) that in the circumstances it would be inexpedient, though hardly incompetent, to do more now than simply ordain the company to remove the whole ruins and débris in terms of s. 21, for to order the removal "forthwith" might unduly hamper the discretion of the board of trade; and if the company were guilty of undue delay in applying to the board of trade; or if they should proceed at their own hand so as to cause obstruction to navigation; or if after obtaining the sanction of the board of trade to some scheme of removal, they failed to properly execute it, or any conditions attached, the respondents, on application to the court had an effective remedy. *North British Ry.* v. *Perth (Provost)*, 10 App. Cas. 579—H. L. (Sc.)

—— **Opening Span—Detention of Vessel.**]—A railway company carried its line over the river D., which was a navigable river, by a bridge with an opening span:—Held, that the railway company were not bound, by s. 15 of the Railway Clauses Act, 1863, to open the bridge for a barge with a mast so constructed that it could be lowered, and that refusing to open the bridge for such a vessel was not a detention within the meaning of the act. *West Lancashire Ry.* v. *Iddon*, 49 L. T. 600; 48 J. P. 199.

Refusal to Construct—Remedy.]—A company was required to construct a bridge over a public river, so as to leave the same width of waterway under the same as then existed at the point where the river was crossed, and so that there should be a clear height of five feet above the ordinary level of the river; provided, that, after notice given to the company by an owner or occupier of lands adjoining the railway, that the bridge was not made according to the true intent and meaning of the act, it should be lawful for such owner or occupier to apply for and obtain an order from a justice of the peace, enabling such person to make such bridge accordingly, the expenses to be defrayed by the company. The company was constructing a bridge which did not comply with either of these provisions, whereupon a landowner gave them notice, requiring them to construct a bridge, leaving the former width of waterway, and the clear height of five feet above the water, in the terms of the act. The company replied that they would do the first, and would accept process as to the second. They afterwards made the bridge of the required height, and, to preserve the same width of waterway, commenced cutting the banks of the river, which they afterwards discontinued. To subsequent applications to proceed with the work they returned no answer:—Held, that these facts amounted to a refusal to do what was demanded, and that the applicant was entitled to a mandamus, notwithstanding the powers given him of applying to a justice. *Reg.* v. *Norwich and Brandon Ry.*, 4 Railw. Cas. 112; 3 D. & L. 385; 15 L. J., Q. B. 24.

Over Roads—Span—Headway.]—On the plans deposited by the promoters of a railway with the clerk of the peace, a bridge of which it was proposed to carry the line across a turnpike road was described as having a span of forty-five feet:—Held, that under the Railways Clauses Act, s. 13, the company was bound to make an arch conformably to the description in the plan, and was not at liberty to build it with a span of only thirty-five feet. *Att.-Gen.* v. *Tewkesbury and Malvern Ry.*, 1 De G. J. & S. 423; 32 L. J., Ch. 482; 9 Jur. (N.S.) 682; 8 L. T. 682.

A bridge, forming part of the line of railway itself, is an engineering work, within s. 14. *Ib.*

The effect of s. 51 of the Railways Clauses Act, 1845, taken in conjunction with s. 49, is that if the average available width for the passage of carriages on any road is more than thirty-five

feet, the road may be narrowed to thirty-five feet under the arch; where it is less, the arch may be made the same width as the road, so that it be not less than twenty feet wide; if the road is afterwards widened, the arch must be widened in proportion up to, but not beyond, thirty-five feet. *Reg.* v. *Rigby*, 6 Railw. Cas. 479; 14 Q. B. 687; 19 L. J., Q. B. 153; 14 Jur. 329.

In this reckoning, footpaths are not to be taken into account. *Ib.*

By its special act, passed in 1872, a railway company whose line was made in 1857, was authorised to divert a road crossing its line on the level, and to carry it under the line by a bridge, and the soil of the diverted road was to belong to the company. The new road and bridge were to be in accordance with the deposited plans and sections, which shewed a total height from the road to the rails on the bridge of sixteen feet, three inches, but did not mention the height of headway. The special act incorporated the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845 (s. 49 of which provides that all bridges shall have a headway of fifteen feet), and it provided that nothing in the special act should exempt the company from the provisions of the general acts. It also gave the company power to deviate from the deposited sections to the extent of five feet. The company, without altering the levels of the line (no such alteration being shewn on the deposited plans), made the bridge of the prescribed height of sixteen feet, three inches, but with a headway of only fourteen feet, and that partly gained by carrying the road below the level of the adjoining land, so that at times it was flooded from an open ditch near the line, and became impassable. If the surface of the road was raised one or two feet, all serious inconvenience from flooding would be removed, and a headway of twelve or thirteen feet would be sufficient for the traffic of the district. On an information at the relation of the road surveyors:—Held, that the attorney-general was entitled to an injunction restraining the company from making or maintaining the bridge with less headway than fifteen feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded. *Att.-Gen.* v. *Furness Ry.*, 47 L. J., Ch. 776; 38 L. T. 555; 26 W. R. 650.

Sect. 9 of the London and Southampton Railway Act empowered the company to make in, upon, across, under, or over any land, streets, hills, valleys, and roads, such inclined planes, tunnels, embankments, bridges, arches, and piers as the company should think proper, according to the provisions, and subject to the restrictions of the act. Sect. 74 provided, that where any bridge should be erected by the company for the purpose of carrying the railway over or across any turnpike road, or other public highway, the span of the arch thereof should be of such width as to leave a clear and open space under every such arch of not less than fifteen feet. Sect. 77 provided, that where any part of any carriage or horse-road should be found necessary to be cut through, diverted, sunk, &c., the company should previously thereto cause a sufficient road to be made instead thereof, as convenient for passengers and carriages as the road to be cut through. The company erected a bridge over a turnpike road at a place where the width of the then existing road was forty feet, but the bridge crossing obliquely, and the piers being built on the road, the passage under the arch was only twenty-four feet for the length of one hundred and sixty feet:—Held, that the restrictions of s. 77 applied only to a case where a road might be either temporarily or permanently diverted, and that under s. 9, the company might build any piers or necessary buildings for a bridge, provided they left a width under such bridge of fifteen feet, as provided by s. 74. *Att.-Gen.* v. *London and Southampton Ry.*, 1 Railw. Cas. 302; 9 Sim. 78; 7 L. J., Ch. 15.

For Purposes of Station.]—By local acts, paving commissioners of a parish were empowered to remove obstructions from houses and buildings abutting near any streets which, in their judgment, should obstruct the circulation of light and air, or be inconvenient to passengers. An act establishing the Northern and Eastern Railway Company empowers them to construct arches over the railway, or other works, streets, &c., and upon the railway, or any lands adjoining or near thereto, to erect stations. By another act, amending the former, the company was empowered to provide a station and depôt near the London terminus of the Eastern Counties Railway; and it was enacted, that all the "clauses, powers, provisions, directions, regulations," &c., contained in the former act should apply to the purchase of land and buildings for the railway and also for the station. It was also enacted that nothing in that act should extend to prejudice, derogate from, &c., the privilege of any parish over which the railroad should pass, under the local acts:—Held, that the Northern and Eastern Counties Railway Company was empowered by the above acts to arch over public thoroughfares in the parish not only for the construction of the railway itself, but also for the erection of a station. *Att.-Gen.* v. *Eastern Counties Ry.*, 10 M. & W. 263; 12 L. J., Ex. 106.

An information was filed, at the relation of one of the commissioners appointed under 12 Geo. 3, and 57 Geo. 3, against the Eastern Counties Railway Company and the Northern and Eastern Railway Company, for the purpose of restraining it by injunction from constructing or making any covering or building over certain streets and courts within the jurisdiction of the said acts. The defendants were desirous of building a station, and for that purpose proceeded under the powers of its act to arch over certain streets within the jurisdiction of the said paving commissioners. The Court of Exchequer having certified that the defendants were entitled (if it was necessary or reasonably convenient for the construction of a station and proper warehouses) to construct such coverings or buildings, by arches or otherwise, over the streets within the jurisdiction of the paving commissioners:—Held, that the fact of the commencement of the works by the defendants was sufficient proof of the necessity for and the convenience of such buildings. *Att.-Gen.* v. *Eastern Counties Ry.*, 2 Railw. Cas. 823.

Lowering Road.]—A company was empowered to raise or lower any roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway; and where any bridge should be erected by the company over any public carriage-road, not being a turnpike-road, the centre of the arch must be of a height from the surface of the road of not less than sixteen feet. Nothing in the act was done to derogate from any of the rights or privileges

of any parish over which the railway should pass, acting under any local act. By a local paving act it was enacted, "that no person shall alter the form of any pavements which shall be now made by virtue of this act without the consent of the commissioners, or in any wise encroach thereon, or put up any posts, boards," &c.:—Held, that the company was entitled, in carrying the railway by a bridge over a street under the control of the commissioners, to lower the street so as to give the height to the centre of the arch required by the statute. *Reg.* v. *Eastern Counties Ry.*, 3 Railw. Cas. 22; 2 G. & D. 1; 2 Q. B. 569; 11 L. J., Q. B. 178; 6 Jur. 820.

A company was empowered to divert, raise, sink, or deepen any roads, in order to carry the same over, under, or by the side of the railway. By another act, enabling them to vary their line, they were authorised to carry the line of railway across a turnpike-road, by means of a bridge of the width of thirty feet at the least, and for that purpose to lower the bed of the road, provided, that, in case it should be expedient to lower the surface of the road, it should not be lawful for the company to lower or alter the bed of the road, unless the same should be lowered on both sides of such bridge, so as to leave a certain inclination, and that the company should make all new fences, and relay and re-form the road. The company made a bridge thirty feet wide over a turnpike-road forty-two feet wide, consisting of thirty feet carriage-way, and two footways of six feet each. They lowered the carriage-way of the road, but left the footways at their original level. On the trial of traverses to a return to a mandamus which had issued to the company to re-form the road, and to lower it the whole width of forty-two feet, the jury found—first, that the company had not so lowered the road; secondly, that they had re-formed the road in compliance with the act; and, thirdly, that the road made by the company was more commodious to the public than if the whole road had been lowered to the full width of forty-two feet. The queen's bench held, that the word "road" meant the whole road, including footpaths, and, therefore, that the company had not re-formed the road as required by the act, and that the finding of the jury upon the issue, as to its being more commodious, was not sufficient to dispense with a compliance with the language and meaning of the act. *Manchester and Leeds Ry.* v. *Reg.*, 3 Railw. Cas. 633; 3 G. & D. 269; 3 Q. B. 528; 10 L. J., Q. B. 266.

Held, by the exchequer chamber, that it was not a good return to the mandamus, that the carriage-road and footpath, as they now exist, are more commodious and convenient to the public, &c., than if lowered as required by the writ. *Ib.*

But held, that by the words "bed of the turnpike-road" the act intended that the carriage-road only should be lowered, and that the full breadth of the former carriage-road was not intended to be preserved under the bridge, but only as to the part of the road lowered as it descended to the bridge on one side and ascended from it on the other. *Ib.*

Expense of Repair—Recovery of.]—The defendants' predecessors in title obtained an act for the formation of a road which was to pass under a railway by means of a bridge. By the act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting the same, until they should have delivered to the company plans, drawings, and specifications of the works intended to be executed under or affecting the railway and works thereof, such plans, &c., to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, &c., should have been examined and approved by the engineer of the company; and that "the same works should be executed and thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company." And it was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages, and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers. The bridge was accordingly constructed of brick piers and iron pillars, of iron girders resting upon the piers and pillars, and of timber and woodwork. In the construction of the bridge, the brick and ironwork was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and woodwork, the superstructure, was done by the plaintiffs' engineer at the expense of the undertakers, and with materials provided by them. The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by the company, who claimed to be reimbursed their outlay in so doing by the defendants, although the defendants had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:—Held, that the plaintiffs were not entitled to recover the expenses so incurred. *L. & S.-W. Ry.* v. *Flower*, 45 L. J., C. P. 54; 1 C. P. D. 77; 33 L. T. 687.

Temporary Bridge.]—Sect. 94 of a railway act empowered a company, subject to the restrictions imposed by the act, to make and maintain the railway, and to construct in, under, upon, across, or over any hills, valleys, roads, rivers, canals, brooks, or streams, or other waters, such embankments, bridges, aqueducts, and conduits, either temporary or permanent, and to erect and construct such buildings, engines, machinery, apparatus, and other works and conveniences for the purposes of the act, as the company shall think proper. The railway company having commenced the building of the permanent bridge, erected a temporary bridge adjoining to the permanent bridge, which was used partly for building that bridge, and partly for conveying earth and materials across the river. On the application of a navigation company to restrain the erecting of a temporary bridge across the navigation, or of anything impeding the navigation in a manner not authorised by the act:—Held, that, subject to the restrictions of the act, s. 94 ought to be literally carried into effect. That the railway company had the power of erecting such a temporary bridge, the power being exercised reasonably and bonâ fide. That, in construing such power with a view to its reasonable and bonâ fide exercise, regard must be had to the peculiar purpose for which the permanent bridge was designed. That, the temporary bridge being of the dimensions specified in the act, and a navigable waterway being left as required

thereby, the same was lawfully erected under s. 94, for the bonâ fide purpose of building the permanent bridge. That the temporary bridge being erected and used for a lawful purpose might also be used for other purposes, for which alone it could not have been erected. That, subject to the restrictions of the act, the company acting bonâ fide, was constituted the judge of the mode of executing its works. Circumstances upon which the court was of opinion that the temporary bridge was reasonably and bonâ fide erected. *Priestly* v. *Manchester and Leeds Ry.*, 2 Railw. Cas. 134; 4 Y. & Coll. 62. *See also* 1 Railw. Cas. 576.

Acts of parliament, giving railway companies power to build bridges, must be expounded with reference to the peculiar mode of construction of bridges in railways. *Ib.*

Projected Road not Finished.]—In 1850 a meeting of landowners was held for the construction of a private road from A. to join a turnpike-road at point C. In 1854 the road was constructed as far as D., which was within 250 yards of the proposed point of junction when the works were suspended. The proprietors of the new road, however, entered upon the remaining land, cut down the trees, and marked out the proposed line of road. In 1853 a railway company was projected, and the plans deposited, shewing that at the proposed point of junction of the new road with the turnpike-road the turnpike-road would be raised several feet. The new road was not referred to in the deposited plans, and in 1854 the act passed without making any provision in respect of it. The new road was afterwards completed throughout, and opened for traffic in 1855. From point D. to the point of junction with the turnpike-road the gradient of the new road was very steep; and assuming the company to have constructed its line by raising the turnpike-road, according to the deposited plans, the junction at point D. would have been impracticable. The company subsequently constructed its line, but, instead of raising the turnpike-road according to its deposited plans, it turned it, and interposed the railway between the turnpike-road and the new road. Upon a bill filed by the proprietors of the new road:—Held, that the fact of the new road being projected and completed to within 250 yards of the proposed point of junction before the railway was authorised or planned did not establish in the proprietors of the new road the right to join the turnpike-road in the same way as they would have been entitled to if the company's act had not passed; and that the proprietors of the new road were not entitled to have an archway formed under the railway, or to have the road united on either side, at the expense of the company. *Gawthern* v. *Stockport, Disley, and Whaley Bridge Ry.*, 3 Jur. (N.S.) 573.

Temporary Occupation of Land—"Roads"—Tramway — Necessity.]—A railway company proposed to take temporary possession of a piece of land adjoining their railway, in course of construction, for the purpose of laying thereon a tramway for carrying materials for their new line. The materials could be brought by the high-road, but at greater expense:—Held, that the temporary occupation was not shewn to be "necessary for the construction" of the railway within s. 32 of the Railways Clauses Consolidation Act, 1845. The court, on motion, restrained the company from taking possession of the land, being strongly inclined to hold also that the proposed tramway was not a road within the same section. *Morris* v. *Tottenham and Forest Gate Ry.*, 61 L. J., Ch. 215; [1892] 2 Ch. 47; 66 L. T. 585; 40 W. R. 310.

d. Roads and Streets—Interference with.

Diverting Public Roads.]—Sect. 16 of the Railways Clauses Act, 1845, authorises the permanent diversion of public roads, and not only a temporary diversion for the purpose of constructing a railway. *Phillipps* v. *L., B. & S. C. Ry.*, 4 Giff. 46; 9 Jur. (N.S.) 348; 7 L. T. 663.

The powers conferred by 8 & 9 Vict. c. 20, s. 16, must be understood as restricted to such acts as are necessary to the construction of the railway, and do not extend to acts done for the saving of expense or inconvenience to the company. *Reg.* v. *Wycombe Ry.*, 8 B. & S. 259; 36 L. J., Q. B. 121; L. R. 2 Q. B. 310; 15 L. T. 610; 15 W. R. 489.

The power conferred on a railway by s. 16 of the Railways Clauses Act, 1845, to divert the course of a river or road, "in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering or repairing, and using the railway. *Pugh* v. *Golden Valley Ry.*, 49 L. J., Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863—C. A.

If a railway crosses a highway without diverting it, a bridge must be made for the highway over or under the railway, but the highway may be diverted to a place where there is a level crossing, if the road so diverted will be more convenient than a bridge. *Att.-Gen.* v. *Ely, Haddenham, and Sutton Ry.*, 38 L. J., Ch. 258; L. R. 4 Ch. 194; 20 L. T. 1; 17 W. R. 356.

—— **Danger—Injunction.**]—The B. Railway Company had, by their special act, power to divert roads and make the substitutions shewn on their deposited plans. The plans shewed, as a substitute for a road passing along the side of a mountain on which part of the line was to be constructed, a curved road above the old one to be cut out of the mountain side. The railway company had taken possession of the old road and made an embankment upon it, upon which they had laid a portion of their line, which was in use for ballast trains, used in the construction of the line, but not open to the public. They had made the new road, but it was made dangerous in winter weather by the constant falling upon it of stones from the steep slope of the mountain above it. This was an action by the attorney-general on the information of the local board for the district claiming an injunction to restrain the railway company from using the old road until they had caused a sufficient road to be made in its stead:—Held, that s. 53 of the Railways Clauses Act, 1845, applied notwithstanding the fact that the taking of the old road and substitution of the new were authorised by the company's special act, and that the injunction must be granted. On the company's undertaking forthwith to lower the inclination of the slope of the mountain above the road so as to make the road safe, the injunction was suspended. *Att.-Gen.* v. *Barry Dock and Ry.*, 56 L. J., Ch. 1018; 35

Ch. D. 573; 56 L. T. 559; 35 W. R. 830; 51 J. P. 644.

—— **Effect of Agreement.**]—An agreement was entered into between a landowner and a railway company, that the former should not oppose a projected railway, on condition that there should be a reference to arbitration, for, among other purposes, defining the line of approach to his premises from a turnpike road which it was proposed to divert. After the award indicating such approach had been made, it became expedient for the company further to divert the turnpike-road, but within the limits of deviation, and consequently necessary to alter the line of the approach to the landowner's premises:—Held, that the company were not precluded from making such alteration. *Wood* v. *North Staffordshire Ry.*, 1 Macn. & G. 278; 1 H. & Tw. 611. Reversing 13 Jur. 466.

In the month of February, 1847, P. entered into a contract with a railway company to sell certain land to the company; and the agreement contained certain stipulations as to the construction, by the company, of two bridges, and also the following words: "and a road upon the level as at present where the said P. now passes to and fro from his brick-kilns." In May, 1847, P. conveyed the land to the company, but in the conveyance no mention was made of the bridges or road. P. died, leaving the plaintiff his heir-at-law, who entered into possession of the land. The company having lately commenced their works on the lands in question, and making the road several feet lower than the original level, the plaintiff applied for an injunction to restrain the company from proceeding to construct the road at a lower level than the road referred to in the agreement, and from stopping up the present road, except for the purpose of carrying a new road across the land at what was the level at the date of the agreement:—Held, that although the conveyance was silent as to the bridges and road, the plaintiff was entitled to his injunction. *Foster* v. *Birmingham, Wolverhampton, and Dudley Ry.*, 2 W. R. 378.

Diminishing Width.]—By an act by which a railway company was incorporated, the usual power was given to it to construct, according to the provisions and restrictions of the act, the said railway upon, across, or over any roads, &c., doing as little damage as might be. By a subsequent section it was enacted, "that where the railway should cross any turnpike-road, or other public highway, by means of an arch," such arch should be "of such width as to leave a clear and open space under such arch of not less than fifteen feet":—Held, that, under these clauses, the company was empowered to diminish the width of any turnpike-road which was crossed by the railway, provided it left an open space of fifteen feet; and an application by the trustees of a turnpike-road for an injunction to restrain a railway company from constructing a bridge over the road of less than the usual width of that road, on the ground that an inconvenience to the public would be thereby occasioned, was refused. *Att.-Gen.* v. *London and Southampton Ry.*, 9 Sim. 78; 1 Railw. Cas. 283; 7 L. J., Ch. 15.

User of Road by Company.]—The preamble of the London and Brighton act, after reciting that a railway between London and Brighton would be of great public advantage, by s. 3 enacts that it shall be lawful for the company to make and maintain a main line of railway and branches, with all proper warehouses, wharves, and all other suitable and proper works, communications, &c. By s. 12 the usual powers are conferred on the company for making and maintaining the railway, and, among others, to make and construct upon, across, or over, any roads, &c., such roads, ways, cuttings, &c., as the company shall think proper. The company having purchased a private wharf, separated from one of their terminus stations by a turnpike-road, laid down on the road stone blocks, so as to form two runs or stoneways level with the road, for the purpose of facilitating the passage of goods from the wharf across the road to the station:—Held, that the company was not authorised by its act to interfere with the road in such a manner. An injunction, which had been granted to restrain the trustees of the road from removing the stone blocks, was dissolved, although, in the opinion of the court, no damage could result from the stone blocks either to the road or the passengers upon it. *L., B. & S. C. Ry.* v. *Cooper*, 2 Railw. Cas. 312.

A railway company while constructing a railway laid down sleepers and rails for some distance over one side of a high-road, and ran locomotives and trucks over it. No fence had been put up between these rails and the portion of the road left for the ordinary traffic, which was in places narrow:—Held, that although the evidence did not shew that the public had been greatly inconvenienced by this proceeding, the high-road had thereby been rendered "dangerous and extraordinarily inconvenient," and that the railway company must be restrained by a perpetual injunction from using the highway till it had made a substituted road. *Att.-Gen.* v. *Widnes Ry.*, 30 L. T. 449; 22 W. R. 607—L.JJ.

Substituting other Roads.]—Sects. 53, 55, 56, of 8 & 9 Vict. c. 20, with respect to the crossing of roads, or other interference therewith, are applicable to the interference with roads incidentally, and do not apply where the object of the special act is to change the nature of that road substantially. *Tanner* v. *South Wales Ry.*, 5 El. & Bl. 618; 25 L. J., Q. B. 7; 1 Jur. (N.S.) 1215.

Motion for an injunction to restrain a railway company from stopping up a road until it should have made another, as convenient as the old road, according to the act of parliament:—Held, that it did not appear to be the intention of the defendants to break up the old road until a new one (about to be formed) was completed. The injunction could not be granted, but the motion should stand over till it was ascertained whether the company would, after making the new road, proceed in an illegal course; and whether the new road was really as inconvenient, and contrary to the clauses of the act, as the plaintiff alleged. *Kemp* v. *L., B. & S. C. Ry.*, 1 Railw. Cas. 495; 3 Jur. 403.

A railway company having begun to divert a turnpike road by a crossing on a bridge over its railway, with a sharp curve, an information at the relation of two of the trustees of the road was filed, praying for an injunction to restrain the company from interfering with the road until it should have provided another as convenient as the former, or as near thereto as circumstances allowed, as required by the Railways Clauses Act, 1845, s. 56. The court, holding

that the company were not doing as little damage as could be, granted the injunction; but without prejudice to any application either party might make to the board of trade, under s. 66 of the above act. In granting such an injunction, the court cannot point out to the company what it ought to do, except by stating the reasons which induce the court to come to its conclusion, or the manner in which it appears to the court that that which seems an evil can be remedied. *Att.-Gen.* v. *L. & S. W. Ry.*, 3 De G. & Sm. 439; 13 Jur. 467.

The provisions of the Railways Clauses Act, 1845, requiring a substituted road to be made in certain cases:—Held, not to be satisfied by an existing road which was alleged to be as convenient as any new substituted road could be. *Att.-Gen.* v. *G. N. Ry.*, infra.

A bill stated that a railway company was interfering with a public road by digging a trench and lowering the level of it, and causing a permanent and complete obstruction. The bill prayed for an injunction restraining the company from obstructing the road or rendering the same less convenient for the passage of carriages, &c., than it had previously been, until it had made a proper substituted road. An injunction to that effect was granted. The company then changed its plan, and, instead of lowering the road, carried the railway across it on a level, with posts and gates which were closed only during a few short and ascertained periods in the day, when trains crossed:—Held, that the general terms of the injunction were not restricted by reference to the particular nature of the injury complained of, but that it had in spirit, as well as terms, been violated. A sequestration was ordered to issue for the contempt, and was only stayed upon appeal, upon the defendants paying all the costs, and undertaking to construct a road in conformity with the provisions of the Railways Clauses Act, and in the meantime to provide and maintain a free passage at all times. *Ib.*

Where an injunction was granted in May against a railway company, and a sequestration was directed to issue in November for a breach of it, the court refused to suspend the latter order pending an appeal from both orders, although the result of the sequestration would be to compel the defendants to construct a bridge (which would become unnecessary if the order should be reversed), and to stop the traffic on the line in the meantime. *Ib.*

By s. 59 of the London and Brighton Railway Act, after reciting that it is intended to carry the railway across certain public roads or highways in the parish of C., and to alter the levels or present surface of such roads, it is enacted, that all alterations, whether temporary, permanent, of, in, or to any of the said public roads or highways, and all works connected therewith of any kind or description whatsoever, and all bridges to be erected by the company, and all future repairs of such altered roads, or any temporary roads, and the quality of the materials to be used and applied in or to such altered or temporary roads, and all future damage to such altered or temporary roads, shall be made, formed, completed, and finished under the superintendence, from time to time, and to the entire satisfaction of the board of surveyors of roads from the parish of C. By s. 60 it is enacted, that if the company shall in the doing, making, forming, completing, and finishing of all, or any, or either of such alterations or works in, to, or belonging to the said public roads or highways in the parish of C., do or cause any injury or damage to any or either of the said road or roads, or to any part thereof, and shall not forthwith proceed to repair and make good such injury or damage to the satisfaction of the board of surveyors of the parish of C.; or if the roads so to be altered shall not be properly made and completed, and kept in repair, it shall be lawful for the said board of surveyors to cause such repairs to be done. The company made a diverted temporary road, leading from one of the said roads, which diverted temporary road was crossed by the railway. The railway did not cross the old road, neither did the company alter the level or surface of the old road. The company also made and tendered to the surveyors a permanent diverted road, which the surveyors refused to approve of or accept; the company having, in the execution of its works, crossed the temporary diverted road with locomotive engines, the surveyors put up fences on either side, so as to obstruct the passage across it:—Held, that, even if the surveyors had, under ss. 59 and 60, a jurisdiction to determine in what manner the diverted permanent road should be made, they were not justified in putting up the fences across the temporary road, but ought to have applied for an injunction, or for a mandamus; that the right of the surveyors was a private right; and that they were in no way interested in the question of public safety. *L., B. & S. C. Ry.* v. *Blake*, 2 Railw. Cas. 322.

—— **Notice—Plan Deposited.**]—Upon one of the sections of a railway deposited with the clerk of the peace, and referred to by an act (afterwards passed) authorising the formation of the line, there was a note to the effect that a particular road, therein delineated, was to be stopped up, and another, therein also delineated, was to be a substituted road for it:—Held, that the public and the landowners were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction upwards of four years afterwards on the company's proceeding to stop up the road. *Att.-Gen.* v. *G. N. Ry.*, 4 De G. & Sm. 75; 14 Jur. 684; 15 Jur. 387.

The works for stopping up the above-mentioned road were commenced in October, 1849, but it was not rendered entirely impassable till February, 1850:—Held, that an application for an injunction in February, 1850, was not too late. *Ib.*

Turnpike-road, what.]—Mandamus to a railway company reciting that the railway crossed a street and turnpike-road, which was carried over the railway by a bridge, and that the company had made the ascent to the bridge with a greater degree of ascent and inclination than one foot in thirty feet, contrary to s. 50; and that the company had deviated from the levels of their railway, as referred to the common datum line shewn in the deposited plans and sections, to an extent exceeding two feet, in the place where the railway passed through this street and turnpike-road. The writ commanded the company to make the ascent to the bridge in conformity with 8 & 9 Vict. c. 20, and to make the levels of the railway, as referred to the common datum line, and as directed in the deposited plans and sections. The road was a public carriage-road, but not a turnpike-road,

and the ascent was no greater than was allowed by s. 50, in the case of a public carriage-road :—Held, that as the first part of the writ failed, the prosecutor could not have a peremptory mandamus for the other part against the company. *Reg.* v. *East and West India Docks*, 2 El. & Bl. 466 : 1 C. L. R. 496 ; 22 L. J., Q. B. 380 ; 17 Jur. 1181 ; 1 W. R. 409.

A carriage-road is not a turnpike-road, unless it is repaired by trustees out of tolls payable by passengers along it. *Ib.*

Property in Old Road.]—Where a railway company, having made a substituted road, inclosed and took possession of the portion of the old road, which had ceased by the diversion to form part of the turnpike-road :—Held, that there was nothing in the Turnpike Act (3 Geo. 3, c. 126) or in 8 & 9 Vict. c. 20, s. 16, to place the company in the position of trustees of the substituted road, so as to transfer to them the soil of the old road. *Salisbury (Marquis)* v. *G. N. Ry.*, 5 C. B. (N.S.) 174 : 28 L. J., C. P. 40 ; 5 Jur. (N.S.) 70 ; 7 W. R. 75.

Stopping-up Street Permanently.]—A railway company was by its special act empowered to stop up certain streets and passages in the metropolis, including L. C., and to appropriate and use such streets and passages, or parts so stopped up, for the purpose of the railway and works, and it was authorised to grant leases of superfluous lands. The company erected a station at the north end of L. C., and thereby completely stopped it up as a thoroughfare, and it purchased all the houses along each side of the street, but did not expressly purchase or pay for, or take any conveyance of the soil of the street itself ; nevertheless it treated the whole of the space formerly occupied by the street as well as by the houses on each side of it (which they had pulled down) as vested in it, and it surrounded it with hoarding, stopping up the south end of the street, and leased a plot of land comprising the ground at the south end of the street to the defendants for building purposes. Builders occupying premises in the street running at right angles to L. C. claimed a special right of access to them over the end of L. C., for the purpose of conveying long ladders and poles to their premises, beyond the right of the public in the street as a highway. They filed a bill to restrain the railway company from building so as to interfere with this alleged right, and moved for an injunction :—Held, that the railway company having stopped up the one end of the street which it required for the purposes of its station, and having purchased all the houses in the street, had a right to stop up and appropriate the rest of the street, and accordingly the motion was refused. *Temple* v. *Flower*, 41 L. J., Ch. 604 ; 26 L. T. 657 ; 20 W. R. 587.

A railway act obtained by the Great Eastern Railway Company for extending its line into the city of London, and making a station, incorporated the Railway Clauses Act, 1845, and declared that plans and sections had been deposited, and then gave a general power to stop up streets within a given area. Sun street was within the area, but the plans and sections had described it as crossed by an arch, and in a subsequent act, where many of the levels were altered, it was spoken of as crossed underground by a tunnel. The railway company proposed to build a station on the soil of Sun street :—Held, that the company might do so ; for that the street being within the area described, there was nothing inconsistent in the provisions of the acts, the power to cross the street by an arch or a tunnel not affecting the right to use the surface of the soil for a station to be built within the area described in the act. *Att.-Gen.* v. *G. E. Ry.*, L. R. 6 H. L. 367 ; 22 W. R. 281.

Obstruction—Injunction.]—Where a railway company had obstructed an alleged public right of way, and the evidence shewed that the public right had been so dealt with that it had been lost, and did not establish a private right of way, the court refused an injunction against the company, and left the plaintiff to pursue his remedy by action on the case, under the provisions of the Railways Clauses Act. *Freeman* v. *Tottenham and Hampstead Junction Ry.*, 11 Jur. (N.S.) 107 ; 11 L. T. 702 ; 13 W. R. 335.

The court will, by mandatory injunction, restrain a trespass the continuance of which will inflict irreparable damage upon persons in possession. Damage which it is impossible to measure will be deemed irreparable. *L. & N. W. Ry.* v. *Lancashire and Yorkshire Ry.*, 36 L. J., Ch. 479 ; L. R. 4 Eq. 174 ; 17 L. T. 43 ; 15 W. R. 810.

A bill was filed to restrain a railway company from placing an obstruction, partly on a public footway and partly on land belonging to the plaintiffs and a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act was done without any colour of title by the defendants :—Held, that this was one of the exceptional cases in which the court would interfere to restrain a trespass by a stranger. *Ib.*

Substituted Railway—Remedy for Neglect.]—C. was possessed of a fireclay field, to which he had made a private railway, communicating with the M. & K. railway, belonging to the appellants. The appellants, in 1845, obtained an act for constructing a branch from their railway, in making which they interfered with the private railway. By the Railways Clauses Act the appellants were bound, within a certain period, under penalties, to cause a substituted railway to be made instead of the one interfered with. C. entered into an agreement for a lease with M. of the fireclay field, by which it was stipulated that the lessee should have the use of the private railway. The agreement also provided, that in case the appellants should fail to make the substituted railway, C. would do so at his own expense. The company not having made the substituted railway, M. brought an action against C., and recovered damages. C. then sued the appellants for the amount on an implied indemnity, and for special damage :—Held, that C. could have maintained an action ex delicto against the company for neglecting to restore the substituted railway, and that the provision contained in s. 47, as to penalties, did not extinguish such right of action, the remedy under such section being only cumulative. Nor was C. confined for a remedy to the statutory tribunal which the legislature has provided where losses are sustained in the formation of railways. That tribunal is only established to give compensation for losses sustained in consequence of what a railway company may do lawfully under the

powers of the act by which it is constituted. For anything done in excess of those powers, or contrary to the provisions of the act, the proper remedy is in the ordinary tribunals of the country. *Caledonian Ry.* v. *Colt*, 3 Macq. H. L. 833; 7 Jur. (N.S.) 475; 3 L. T. 252.

Held, also, that C. was not entitled to recover the money paid by him to M., as the action brought by the latter was ex contractu on an agreement to which the appellants were not privy; whereas the cause of action by C. against the appellants was ex delicto. C. should have himself made the substituted railway, and then sued the company for the cost and any other special damage. *Ib.*

Impossibility of Performance.]—A railway act provided, that, where any part of any road should be cut through, taken, &c., in exercise of the powers given to the company, they should first make another road instead thereof, as convenient for passengers and carriages as the former road; and that, where such road was turnpike, "the substituted road, if temporary, shall be set out and made, and the principal road shall be restored, within six calendar months after the commencement of the operation"; and that, where any bridge should be erected for carrying any turnpike-road over the railway, "the road over such bridge" should be not less than fifteen feet wide. The level of the ascent of every such bridge was also regulated. The company made a bridge fifteen feet wide, with approaches at each end (187 and 126 yards long respectively), for conveying a turnpike-road over the railway, and took part of the former turnpike-road for the purpose of making the approaches, which were carried along and within the space which that road had occupied. On a mandamus to the company to make and restore such part of the turnpike-road according to the statute, alleging that the trustees of the road had duly required them to do so within six calendar months after commencement of the operation:—Held, that it was no sufficient return, that the approaches, though of less width, were as convenient to the public as they could be made in execution of the powers of the act, and as convenient to the public as the original road had been. Or, that the company could not now widen the approaches without taking and purchasing more land; that their compulsory powers of purchasing under the act had expired before they were called upon to widen; and that they had not the power to take or purchase land for such purpose. *Reg.* v. *Birmingham and Gloucester Ry.*, 2 Q. B. 47; 2 Railw. Cas. 694; 1 G. & D. 324; 10 L. J., Q. B. 322; 4 Jur. 966.

Injunction—Temporary User.]—A railway company while constructing a railway laid down sleepers and rails for some distance over one side of a highroad, and ran locomotives and trucks over it. No fence had been put up between these rails and the portion of the road left for the ordinary traffic, which was in places narrow:—Held, that although the evidence did not shew that the public had been greatly inconvenienced by this proceeding, the highroad had thereby been rendered "dangerous and extraordinarily inconvenient," and that the railway company must be restrained by a perpetual injunction from using the highway till it had made a substituted road. *Att.-Gen.* v. *Widnes Ry.* 30 L. T. 449; 22 W.R. 607—L.JJ.

Inconvenient Alteration—Indictment.]—By a railway act a company was empowered to divert or alter any roads or ways, in order the more conveniently to carry the same over or under the railway. The company, in carrying a road under the railway, erected a skew bridge, which diverted the road to an angle of 45° instead of 34°, which was the angle made at that particular point by the old line of road. At the trial of an indictment against the company's engineer for so doing, the judge directed the jury, that, if the public sustained inconvenience by the alteration, they should find for the crown; but that, if the work was done in a mode in which an experienced engineer would do it, having reasonable regard to the interests both of the company and the public, the company had a right to make such diversion. The jury having found for the defendant on the ruling, the court refused to grant a new trial. *Reg.* v. *Sharpe*, 3 Railw. Cas. 33.

A railway company was empowered by statute to make obstructions in public or private roads, for the purpose of their undertaking, doing as little damage as might be; and a subsequent section enacted, that, wherever it was found necessary to use that power, they should, before any such road should be cut through, make a road instead thereof, as convenient for passengers as the road to be cut through, or as near thereto as may be. The company having obstructed a public road without making a new one equally convenient, or as nearly so as might be:—Held, indictable at common law for a nuisance to the old highway. *Reg.* v. *Scott*, 2 G. & D. 729; 3 Q. B. 543; 3 Railw. Cas. 187; 11 L. J., Q. B. 254; 6 Jur. 1084.

Action, whether maintainable.] — Action against a railway company for an obstruction of a right of way as appurtenant to the house of the plaintiff, by means whereof he could not have or enjoy his way as he of right ought to have done, and otherwise might and would have done, and had been and was deprived of the use, benefit and advantage of the same. Plea, justifying the obstruction complained of, for the purpose of making and constructing a railway under the powers and provisions of an act, by which the company was incorporated, and of the acts therewith incorporated. Replication, that the way was a road within the meaning of the Railways Clauses Act, 1845; that the company rendered it impassable and thereby interfered with the same, within the meaning of that act; and that the company had not caused a sufficient road to be made, instead of the road so interfered with:—Held, that by ss. 6 and 55 of the above act, the remedy by action for an interference with a private right of way was taken away, except where special damage had been suffered, and therefore that the count was bad. *Watkins* v. *G. N. Ry.*, 16 Q. B. 961; 20 L. J., Q. B. 391.

An action will lie against a railway company for not restoring a road within the prescribed period where damage has been occasioned. *Caledonian Ry.* v. *Colt*, 3 Macq. H. L. 833; 7 Jur. (N.S.) 475; 3 L. T. 252.

Compensation.] — But one who sustains a private or a particular injury from the diversion or obstruction of a public road by the works of a railway company, which diversion or obstruction, if done without sanction of an act of parliament, would give a right of action, is entitled to compensation. *Wood* v. *Stourbridge*, 16 C. B. (N.S.) 222. *See also* LANDS CLAUSES ACT.

Penalty.]—To entitle a person to proceed against a railway company for penalties for interfering with an existing public road, under s. 57 of 8 & 9 Vict. c. 20, as "a person having the management of the road," he must be clothed with some duty in respect of the public ejusdem generis with that of "trustees, commissioners, or surveyor." *Reg.* v. *Wilson*, 18 Q. B. 348; 21 L. J., Q. B. 281; 16 Jur. 973.

A railway act imposed a penalty on a company for the interruption of any road, and in case of a private road, made the penalty "payable to the owner thereof":—Held, that the tenant of the farm over which the road passed could not sue for the penalty. *Collinson* v. *Newcastle and Darlington Ry.*, 1 Car. & K. 546.

But the owner of a private road, entitled under 8 & 9 Vict. c. 20, s. 54, to recover penalties for its interruption, is the person who, for the time being, owns such road in possession. *Mann* v. *Great Southern and Western Ry.*, 9 Ir. C. L. R. 105.

—— **Temporary Interference with Occupation Road—Owner usque ad medium filum.**]—The owner of an occupation road usque ad medium filum can recover a penalty under s. 54 of the Railways Clauses Act, 1845, in respect of his half of the road where a railway company have contravened the provisions of s. 53 by failing, before commencing to interfere with an existing road, to cause a sufficient road to be made instead of the road to be interfered with. *Llewellyn* v. *Glamorgan Vale Ry.*, 66 L. J., Q. B. 670; [1897] 2 Q. B. 239; 76 L. T. 778.

Semble, a railway company may be liable for the whole penalty to any person who owns any part of the road interfered with; and should they stop up a road, various portions of which are owned by different persons, they may incur as many penalties as there are owners. *Ib.*

Obligation to Repair.]—Under s. 46 of the Railways Clauses Act, 1845, a railway company having carried a highway over the railway by a bridge, is bound to keep both bridge and road, and all the approaches thereto, in repair; and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. *North Staffordshire Ry.* v. *Dale*, 8 El. & Bl. 836; 27 L. J., M. C. 147; 4 Jur. (N.S.) 631.

Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of s. 46 of the Railways Clauses Act, 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain. *Lancashire and Yorkshire Ry.* v. *Bury Corporation*, 59 L. J., Q. B. 85; 14 App. Cas. 417; 61 L. T. 417; 54 J. P. 197—H. L. (E.). Affirming 36 W. R. 491—C. A.

A railway company having carried a road over the railway by a bridge, is bound to keep both bridge and road, and all the approaches in repair, and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. *North of England Ry.* v. *Langbaurgh*, 24 L. T. 544.

But a railway company which, in carrying a railway over a highway by a bridge, lowered the level of the highway, is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge. *L. & N. W. Ry.* v. *Skerton*, 5 B. & S. 559; 33 L. J., M. C. 158; 10 L. T. 648; 12 W. R. 1102.

By a special act, with which was incorporated the Railways Clauses Act, where the railway was proposed to cross the turnpike road leading from Newcastle-under-Lyne to Leek, the company "shall erect a proper and sufficient bridge constructed of bricks, stone, iron, or other materials, so as to carry the turnpike-road over and across the railway, such bridge also to be constructed with parapet walls of brick, stone, or other materials of five feet in height, and of the clear and open width of thirty-three feet at the least between such parapets; and that the turnpike-road shall be made and altered at the expense of the company on both sides of such bridge, so that the surface of the turnpike-road shall, when completed, have one uniform inclination on both sides, not exceeding one in thirty; and so much of the turnpike-road as shall be broken up or damaged for the purposes of the act shall be reinstated and made good with the same materials as the road is now composed of, and the fences thereof, whenever necessary, reconstructed and put into complete order by the company, and kept in repair for the space of twelve calendar months, after the making, forming and completing thereof:—Held, first, that under 8 & 9 Vict. c. 20, s. 46 (without reference to the special act), the company was bound, at all times, to keep in repair the approaches to and road over the bridge. *Newcastle-under-Lyne Turnpike Trustees* v. *North Staffordshire Ry.*, 5 H. & N. 160. *S. C.*, nom. *Leech* v. *North Staffordshire Ry.*, 29 L. J., M. C. 150; 1 L. T. 332; 8 W. R. 216.

Held, secondly, that their liability was not restricted by the special act to the period of twelve months from the completion of the works. *Ib.*

A railway company pulled down a county bridge, and erected another, at the same time entering into an agreement with the trustees of the road to repair such portions of the approaches to the bridge as had previously been repaired by the county:—Held, that the company had not interfered with the road so as to bring the case within 8 & 9 Vict. c. 20, s. 58, and consequently that a mandamus to the company, commanding them to repair the road could not be granted. *Exeter Road Trustees Ex parte*, 16 Jur. 669.

The provisions of the Railways Clauses Act relating to the repair of approaches to bridges are not retrospective. *Taff Vale Ry.* v. *Davies*, 19 L. T. 278.

—— **Where Turnpike Trust Expired.**]—A special act of a railway company (incorporating the Railways Clauses Act, 1845, so far as it was not expressly varied or excepted) provided, that, if after notice the company did not, with reasonable expedition, repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees, the latter might repair and recover the costs; the Turnpike Act, however, was suffered to expire:—Held, that, though the Railways Clauses Act, 1845, s. 65, was expressly varied by the special act, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge might be made under it. *L., C. & D. Ry.* v. *Wandsworth Board of Works*, 42 L. J., M. C. 70; L. R. 8 C. P. 8.

—— **Where Road before maintained by Parish.**]—By 6 Will. 4, c. lxxv. s. 68, all bridges to be constructed by the South Eastern Railway

Company either under or over the railway, shall be maintained and kept in repair by and at the expense of the company :—Held, that this included the duty to keep in repair the roadway of a bridge constructed over the line, although that roadway had always been maintained and repaired by the inhabitants of the parish. *Reg.* v. *S. E. Ry.*, 32 L. T. 858.

—— **Order of Justices.**]—An order of justices directing a company to repair damage done by them to a road in the course of making the railway, need not specify the particulars of the damage, nor what repairs were to be done ; it is sufficient if it states the length of the damaged part of the road, and orders the company to make good all damage done. The order and conviction for disobedience of it may include several highways in the same parish. *L. & N. W. Ry.* v. *Wetherall*, 15 Jur. 247.

A justice of the peace, although interested, is not incompetent to act if the party knowing that he was interested assented to his acting. *Wakefield Local Board* v. *West Riding Ry.*, 6 B. & S. 794 ; 35 L. J., M. C. 69 ; L. R. 1 Q. B. 84 ; 12 Jur. (N.S.) 160 ; 13 L. T. 590 ; 14 W. R. 100 ; 10 Cox, C. C. 162.

The penalty for disobedience of an order to repair must be imposed by the same justices who made it. *Ib.* S. P., *Reg.* v. *Rawson*, 15 L. T. 179.

Justices have power to make an order upon a railway company to repair highways which they have used by the carriage of materials carried in the carts of contractors or of other persons employed by them. *West Riding and Grimsby Ry.* v. *Wakefield Local Board*, 5 B. & S. 478 ; 33 L. J., M. C. 174 ; 10 Jur. (N.S.) 1046 ; 12 W. R. 1076.

A railway act enacting, that "so much of the Railways Clauses Act, 1845, as relates to the mode of crossing roads and construction of bridges, shall respectively, except so far as the same may be by this act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated and form part of this act," incorporates not only all the provisions of the general act which regulate the crossing of turnpike-roads by the railway and the construction of railway bridges, together with s. 65, which imposes penalties for suffering the roads and approaches to the bridges to be out of repair, but also s. 145 and subsequent sections, which relate to the mode of enforcing such penalties. *Bristol and Exeter Ry.* v. *Tucker*, 13 C. B. (N.S.) 207 ; 7 L. T. 464.

e. Gauge.

Broad or Narrow.]—A railway act enacted that the railway should be constructed in all respects to the satisfaction of the engineer of the Great Western (a broad gauge railway), and that it should be formed of such gauge, and according to such mode of construction, as to admit of its being worked continuously with the Great Western. The court was of opinion that the railway might be constructed on the narrow gauge, as well as the broad. *Beaman* v. *Rufford*, 1 Sim. (N.S.) 550 ; 20 L. J., Ch. 537 ; 15 Jur. 914.

The act of parliament, constituting a railway company, directed that the railway, branch railways and works should be completed to the satisfaction of the engineer of a broad gauge railway company, and should be of such gauge and construction as would admit of the railway to be constructed being worked continuously with the broad gauge railway; and after reciting that the railway to be constructed was intended to be connected with two narrow gauge railways at specified junctions, the act directed, that, along the portions of the railway north of the specified point on their line, additional rails should be laid down, so as to adapt the line as well to the narrow as to the broad gauge there. The company proceeded to form a line on the narrow gauge for the whole length on the north of the specified point on its line, as also on a part of the line south of that point, with earthwork and timber-work so as to admit of the broad gauge rails being added, and of the railway being a mixed gauge line throughout, with double rails to the north of the specified point. The broad gauge company was entitled to shares in the mixed gauge railway company. And in a suit by the broad gauge company, suing on behalf of themselves and the other shareholders, against the directors of the mixed gauge company, it asked for an injunction to restrain the construction of the railway otherwise than upon the broad gauge throughout its entire length, or otherwise to restrain the laying down the narrow gauge at all south of the specified point ; also to restrain the laying down the narrow gauge north of the specified point, until the rails on the broad gauge had been laid down throughout the line, and also to restrain the opening the railway on any part till the rails on the broad gauge had been laid down on the whole line But held, that the court could not grant an injunction for any such objects. *G. W. Ry.* v. *Oxford, Worcester and Wolverhampton Ry.*, 5 De G. & Sm. 437 ; 16 Jur. 443.

A broad gauge railway company were shareholders in a mixed gauge railway company, who, by its act, were bound to construct their line throughout on the broad gauge, and as to part on the narrow gauge also. In March, 1852, it filed a bill, stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although its funds were insufficient to enable them to do so, and also to comply with their act as to laying down the broad gauge. The bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction upon that gauge until the broad gauge was complete. In April, 1852, the injunction was refused. From that time contests were carried on in parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company. From August, 1852, to January, 1853, correspondence was carried on between them as to traffic arrangements. In January, 1853, the broad gauge company filed a new bill, and sought an injunction to restrain the opening by the mixed gauge railway of any portion of the line upon the narrow gauge before the broad gauge was completed. In the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April, 1852 :—Held, that both motions were too late. Principles on which the court acts in refusing applications, either original or by way of appeal, on the ground of laches. Effect of objection in excluding laches. *S. C.*, 3 De G. M. & G. 341.

Alteration of—Expenses.]—A railway company, in accordance with the provisions of an act of parliament, altered the gauge of its line,

"on the terms of being paid an equitable portion of the expense thereof, such expense and proportions to be borne by the companies whose interest would be advanced by such alteration"; and it was enacted that the plaintiffs should pay to the defendants such proportion of the expense as should be agreed upon between the parties; or, in case of their differing, as might be determined by the award of the railway commissioners. The several companies not being able to agree, the question was referred to the commissioners, and an inquiry was by them instituted, at which no person on behalf of the plaintiffs attended, and at which it appeared from the evidence that no notice was formally given them to attend, but at which expenses of the alteration were divided and apportioned among the companies. Notice of the award by the commissioners was sent to the plaintiffs, and their portion of the expenses demanded, but not being paid, an action was commenced. The plaintiffs impugned the fairness of the award inasmuch as the sum demanded was the proportion of the expense for seventy-one miles, instead of for four only. On a bill by the plaintiffs to set aside the award and to restrain the action:—Held, that the authority of the commissioners to make the award having been conferred upon them by act of parliament the court had no jurisdiction by way of appeal to set it aside; and as the plaintiffs had subsequently had recourse to, and had memorialised, the commissioners, the bill must be dismissed, with costs. *Newry and Enniskillen Ry.* v. *Ulster Ry.*, 2 Jur. (N.S.) 936; 4 W. R. 781.

f. Branch Railway.

What is.]—The Taff Vale Railway obtained a lease from the trustees of the Bute Docks at Cardiff of land which they required for the purposes of their railway. The lease was for 250 years. With a view to securing that the proposed railway should not be used so as to take custom from the docks in which they were interested, the trustees inserted a covenant in the lease, on the part of the railway, that the company, so far as it was able, should cause all minerals which should be conveyed upon their line, or any part or branch of it, for shipment, to be shipped into vessels in the Bute Ship Canal (West Bute Dock), or in some basin or cut thereto belonging. Also, that when any minerals which should have been conveyed along the Taff Vale Railway, or any part or branch thereof, should be shipped into any vessel in any dock or basin whatsoever other than the Bute Ship Canal (West Bute Dock), or in some dock, basin or cut belonging thereto, the Taff Vale Railway Company should pay to the owners of the Bute Ship Canal for the time being the same wharfage dues in respect of such minerals as would have been payable for the same if such minerals had been shipped at the Bute Ship Canal. After the line of railway had been constructed on the land so leased to the Taff Vale Railway Company, the company took a lease of another line (the Penarth Railway) which terminated at Penarth Docks on the south-west side of the river Ely, the Bute Docks being on the north-east side of that river. The Penarth Docks and the Penarth Railway were one concern; the whole was leased by the Taff Vale Railway Company. The two were connected at a station on the Taff Vale Railway:—Held, that the Penarth Railway was not a part or branch of the Taff Vale Railway; that the words in the covenant, "any dock or basin whatsoever," must be controlled by some limitation, and so controlled, the covenant must be confined to any dock or basin in connection with the Taff Vale Railway, or some part or branch of it, terminating in or at a dock or basin, and that as the Penarth Railway was not a part or branch of the Taff Vale Railway, the covenant did not apply to minerals shipped or unshipped at Penarth Harbour, though they were carried for a certain distance along the Taff Vale Railway. *Taff Vale Ry.* v. *Macnabb*, 42 L. J., Q. B. 153; L. R. 6 H. L. 169; 22 W. R. 65.

Compelling Construction.]—A railway extension act enacted that it should be lawful for the company to make a branch railway, "and if they think fit," certain diverging lines to collieries shewn on the plans. The company was empowered to let on lease the diverging lines, either before or after the construction, to the owners of the collieries:—Held, that the statute did not cast upon the company the duty to make the branch railway, and therefore a mandamus would not lie. *G. W. Ry.* v. *Reg.*, 1 El. & Bl. 874; 16 6 Jur. 75—Ex. Ch.

Private Powers under Private Act.]—By a statute a company was empowered to make a railway through certain districts. By s. 5, they were directed to form new roads in lieu of any existing ones that might be injured by their railway. Sect. 70 empowered proprietors of lands, mines, &c., to make railways through their own lands and those of other persons consenting, and across any road or roads, to communicate with the principal railway, and no reference was made to any former limitation of powers:—Held, nevertheless, that the power in this clause was not absolutely given, but must be subject to the provision of s. 5, or to the condition of leaving space enough, independently of the railway, for the public to pass. *Rex* v. *Morris*, 1 B. & Ad. 441.

Permission to make Communications.]—By a clause in an act (similar to s. 76 of the Railways Clauses Act), owners or occupiers of land adjoining or near the railway might lay down or extend on their own lands, or on lands on the sides thereof, belonging to the company, any collateral or continuous branch from such lands to communicate with the railway for bringing carriages upon or across the same; but all the openings and communications for that purpose were to be made at such places as might, so far as practicable, be most convenient to all the parties interested, and so as not to endanger the safety of persons travelling on the railway, and in case of difference as to the proper places for the openings, they were to be determined by two justices of the peace; provided always, that the company should not be bound to make any such opening where they should have erected any building, station or yard:—Held, that the assent of the company to an opening being made at a station was not in the nature of a licence, and could not be revoked. *Bell* v. *Midland Ry.*, 3 De G. & J. 673.

Obstruction by Railway to.]—As to what acts constitute a permanent obstruction by a railway company to the right to use a private line communicating with their railway, so as to entitle the reversioner to maintain an action, see *Bell* v. *Midland Ry.*, 10 C. B. (N.S.) 28; 30 L. J., C. P. 273; 7 Jur. (N.S.) 1200; 4 L. T. 293; 9 W. R. 612.

Leave of Commissioners.]—Under an act of parliament, any owner of mines, &c., lying within a certain distance of a canal, was authorised to apply to the commissioners of the navigation, to have a railway made over the lands of other proprietors, intervening between them and the canal, for the purpose of communicating with it; and if it should appear to the major part of the commissioners that such road was fitting or necessary, it was to be lawful for the proprietor of the mine, &c., to make it, subject to certain restrictions expressed in the act; and it was provided, that if any person should think himself aggrieved by anything done in pursuance of the act, he might within six calendar months appeal to the quarter sessions. Under this act, the commissioners, by their award, authorised the defendant to make a railway over the lands of the plaintiff; the plaintiff having filed his bill to restrain the execution of the work, on the ground that the railway was not fitting and necessary, an injunction was granted. *Dudley* v. *Horton*, 4 L. J. (O.S.) Ch. 104.

For what Traffic.]—The plaintiff was a lessee for a term of twenty-one years of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, seams of clay, with full and free authority and power to enter and to cut down, and to dig, win, work, get and carry away the same, with free ingress, egress, way-leave and passage to and from the same, or to and from any other mines, quarries and seams of clay, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting waggon-ways in and over the demised premises, paying reasonable damages. The vice-chancellor, inclining to the opinion that the reservation did not enable the lessors to grant to a public company a licence to make a railway for the purpose of conveying passengers and general merchandise, but was only intended to enable the lessors or their grantees to convey mineral produce and wood from the demised lands to and from adjacent lands, granted an injunction restraining the lessors and their licensees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a court of law. *Farrow* v. *Vansitart*, 1 Railw. Cas. 602.

Semble, an agreement to grant a way-leave for the purpose of a mineral railway simply will not justify the construction of a railway for the purposes of general traffic. *Meynell* v. *Surtees*, infra.

Where, by a clause in an act of parliament, it was enacted "that nothing herein contained shall be construed to prevent any owner or occupier of any ground through which the said railway may pass, from carrying at his or their own expense any railway or other road, or any cut or canal which such owner or occupier is authorised to make in his or her lands or grounds across the said main railway within the respective lands or grounds of such owner or occupier":—Held, that the right given by this clause was not confined to the state of the land at the time the act passed, but was intended for the convenience of the occupiers from time to time of the land partly on one side and partly on the other of the principal railway, and that without reference to the title under which it was held. *Monkland* v. *Kirkintilloch Ry.*, 3 Railw. Cas. 273.

Semble, no interdict will be granted to prevent a party having the right to cross a railway from prolonging and extending it for the use of any persons with whom he might make an agreement for that purpose. *Ib.*

A neighbouring landowner proposed to construct a railway on his own land, and to carry it under the company's railway, and to use it as a public railway for general traffic:—Held, that he was entitled so to do, and that the clause in the act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighbouring lands. *Hughes* v. *Chester and Holyhead Ry.*, 3 De G. F. & J. 352; 31 L. J., Ch. 97; 8 Jur. (N.S.) 221; 7 L. T. 197; 10 W. R. 219.

Devolution of Title—Abandonment.]—A canal act, passed in 1789, empowered the proprietors of lands and their lessees to make railways or roads across lands of other persons to convey their coal and ironstone to the canal. Fifty-four years after the act the lessees of some coal mines gave a notice to an adjoining landowner of their intention to avail themselves of the powers of the act, to enable them to make a road over his land. This resulted in an agreement which authorised the lessees to make the road, paying annually 5*l.* 15*s.* This sum was paid irregularly. At intervals the ownership of the lands was changed, and the lessees afterwards abandoned the tramroad, and apparently without any consent, except that of the tenant, made a railroad across the estate in a different direction. They also erected an engine-house, partly on the old tramroad and partly on adjoining land, and for this they subsequently agreed to pay an additional 1*l.* 15*s.* The agreement contained no limit for the continuance of the road, but six months' notice of its discontinuance was to be given by the lessees, who were to restore it to agricultural purposes. Upon the defendant becoming owner of the lands, he complained of the carriage of goods not mentioned in the act, and gave the lessees notice that he should require an annual payment of 35*l.*, and, upon their refusing to pay that sum, he gave them notice to cease the use of the railway, and subsequently he took up the rails. Upon a bill by the lessees:—Held, that the landowner was bound by the agreement of his predecessor; that the abandonment of one way for another had not affected the agreement; that the alteration as well as the erection of the engine-house had been acquiesced in by the landowners; that the payment was fixed for the railway, but not for the engine-house; that the defendant was not justified in taking up the rails, and that he must answer in damages for the loss sustained by the lessees; that they might restore the rails, and that the defendant must be restrained from interfering with them or with their use and enjoyment of the railway for all purposes. *Mold* v. *Wheatcroft*, 29 L. J., Ch. 11; 6 Jur. (N.S.) 2; 1 L. T. 226.

Offer—Acceptance.]—An iron company, owners of a private railway, being desirous of connecting its line with other railways by means of a branch line, applied to various landowners, and to O. and his mortgagees, for way-leaves through their lands, and an offer in writing was made

to them in March, 1843, by O. and his mortgagees of a way-leave through their lands, by a lease for sixty years, by the payment of triple damages yearly. There was no express acceptance by the company of the offer. The iron company assigned all its interest to a railway company, which was to construct the line. In October, 1843, the proposed line was staked out over the lands of O., and in July, 1844 (all the other landowners being settled with), the works were commenced; and in 1845 the line was opened for traffic. In June, 1844, the mortgagees of O., under their power of sale, sold and conveyed the property, including the land on which part of the line was formed, to B., who sold to S. From 1844 to 1847 unsuccessful negotiations had been pending between the parties for settling the quantum of the yearly rent; and in 1847 S. brought ejectment against the company. The company then filed a bill to stay proceedings at law, and for specific performance, alleging acceptance of the offer of March, 1843, by the acts of the company, in staking out and making its line in accordance with the offer, and praying that the court would determine the quantum of rent to be paid:—Held, that the acts of the company did not amount to an acceptance of the offer so as to make it a contract binding the land, and the bill was dismissed. *Meynell* v. *Surtees*, 25 L. J., Ch. 257; 1 Jur. (N.S.) 737; 3 W. R. 535. Affirming 3 Sm. & G. 301.

Construction — Acquiescence.] — Where an incorporated company stands by and permits expensive works to be executed at the spot where its premises are situated and its operations carried on, the effect, for all purposes of knowledge and acquiescence, will be the same as in the case of an individual. *Laird* v. *Birkenhead Ry.*, 1 Johns. 500; 29 L. J., Ch. 218; 6 Jur. (N.S.) 140: 1 L. T. 259; 8 W. R. 58.

The plaintiff in 1855 submitted to the directors of a railway company a project for a private branch line, to be constructed at his cost and for his accommodation, to which the directors expressed their assent and agreement generally, but the terms and details were left for future arrangement. In 1856 he, at considerable cost, constructed the branch, and the company prohibited the user until a definite understanding should be come to. Semble, that at this time the company was bound to assent to reasonable terms, and the court, if possible, would have decreed specific performance. *Ib.*

Agreement to Construct—Specific Performance.] —The defendants agreed with the plaintiffs to undertake to execute a branch railway according to the terms of a specification to be prepared by the plaintiff's engineer for the time being, and to give a bond to secure the performance of their contract. The plaintiffs had at the date of the agreement a bill pending to enable them to make the branch, and holding them to complete within a specified time, on pain of a suspension of dividends on the capital of their entire line. The specification was prepared by the company's engineer, but prices having risen, the defendants repudiated their agreement. The plaintiffs then filed their bill for a specific performance of the agreement according to the terms of the specification, and to have the bond executed, charging that they would have withdrawn the bill before parliament, by reason of the liabilities incurred on the passing thereof, had not the defendants (to whom, as owners of a large estate adjacent to the proposed branch, it was of great importance that the plaintiffs should be bound to make the branch) assented to the terms of the agreement, and the plaintiffs believed that they would bonâ fide carry out the same: that the defendants, by their agreement, induced the plaintiffs to come under the obligation to make and complete the lines, and the act was passed upon the faith of the agreement; and charging that the not carrying out of the agreement was a fraud on the plaintiffs, there having been a part performance on their part. On demurrer, it was held (assuming the agreement to be valid within the Statute of Frauds, and in other respects one upon which the plaintiffs could recover), first, that the agreement could not be enforced as regards the construction of the railway, because, from the nature of the works, the subject of the agreement, it was an agreement the execution of which the court could not superintend consistently with public convenience, inasmuch as the motions would be incessant for committal or otherwise for non-performance of orders with regard to the making of particular works, besides the difficulty, on the ground of reciprocity, in enforcing that part of the agreement by which the plaintiffs were to provide the land, and because the plaintiffs having by their act power to acquire the land, could make the railway for themselves; and having so ascertained the expense the defendants had put them to, would have an adequate and the better remedy in damages, and that the circumstances of fraud alleged in the bill did not prevent the application of the foregoing reasons. Secondly, that as the court could not superintend the general execution of the whole works, or enable the defendants to earn the whole of the money to which they would be entitled for the works when made, the execution of the bond would be a piecemeal performance of the agreement, which the court would not direct, and the demurrer was allowed. *South Wales Ry.* v. *Wythes*, 1 Kay & J. 186; 3 Eq. R. 70; 24 L. J., Ch. 1; 3 W. R. 3. Affirmed, 3 Eq. R. 153; 24 L. J., Ch. 87; 3 W. R. 133.

Level Crossing—Gates.]—The provisions of the Highways Act (5 & 6 Will. 4, c. 50, s. 71), as amended by 2 & 3 Vict. c. 45, s. 1, and 5 & 6 Vict. c. 55 (for the better regulation of railways), s. 9, by which the proprietors of a railroad which crosses a highway at a level crossing are compelled to put up gates at such crossing, do not apply to a private line of railway, on private property used by the proprietors exclusively for their private purposes. *Matson* v. *Baird*, 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835—H. L. (Sc.)

g. Streams, User and Diversion of.

Dimensions of Arch.] —A railway company, in exercise of the powers conferred on it by an act of parliament, which gave compensation to persons whose property might sustain damage from its operations, was proceeding to erect an arch above a mill race, for the purpose of sustaining an embankment on which the railway was to be constructed, and it appearing that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain

larger dimensions, an injunction was granted to restrain the company from making over the mill race an arch of less than certain specified dimensions. *Coates* v. *Clarence Ry.*, 1 Russ. & M. 181 ; 8 L. J. (o.s.) Ch. 72.

Relief barred — Acquiescence.] — A railway company made excavations upon its own land, the purpose of which was the partial diversion of the stream of water of a navigable river ; and the works so prosecuted necessarily occasioned the obstruction of a private road. The plaintiffs, who were the owners of a fulling mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the act. The plaintiffs, who had a right of way over the private road, also alleged that the company was interfering with the road without the performance of the conditions imposed by the railway act, as preliminary to interfering with the road :—Held, that although the company were working on their own land, the plaintiffs must be held to have had notice of the intended works of the company ; and had by an acquiescence for eighteen months, during which the company had expended a large sum of money on the works, precluded themselves from asking for the interposition of the court by injunction. Semble, the plaintiffs, although interested, by the situation of their property or the nature of their business, in preserving open the navigation of the river Calder, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the railway acts protecting the Calder navigation from injury by the railway works. *Illingworth* v. *Manchester and Leeds Ry.*, 2 Railw. Cas. 187.

Powers of Diversion.]—A railway company is only justified in diverting streams and roads as authorised by s. 16 of the Railways Clauses Act, 1845, when such diversions are strictly necessary to enable the company to carry out the undertaking, and therefore the right to make such a diversion cannot be insisted on where it is only convenient or economical for the company to do so. A railway company, in order to avoid the expense of making two bridges within a very short distance of each other, diverted a stream and carried it along the east side of their line, so that it no longer entered the plaintiff's land, which lay on the west side of the line. The plaintiff only used the stream for the purposes of watering cattle ; and although the company provided (by means of culverts) for a sufficient flow of water for this purpose in the old bed of the stream :—Held, that the diversion of the stream being only convenient and economical, and not strictly necessary, was not justified by the act, and that the plaintiff was therefore entitled to an injunction to restrain the company from interfering with the flow of the stream, as formerly enjoyed. *Pugh* v. *Golden Valley Ry.*, 49 L. J., Ch. 721 ; 15 Ch. D. 330 ; 42 L. T. 863 ; 28 W. R. 863.

The power conferred on a railway by s. 16 of the Railways Clauses Act, 1845, to divert the course of a river or road, "in order the more conveniently to carry the same over or under, or by the side of the railway, as it may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering or repairing, and using the railway. *Ib.*

By an act of parliament authorising the construction of a railway, it was provided that nothing in the act should authorise or empower the railway company "to obstruct the navigation of a river, or any part thereof, or to divert any of the waters therein or which now supply the river" :—Held, that this clause applied only to the time of construction of the railway, and did not take away the rights of the company as a riparian proprietor. *Att-Gen.* v. *G. E. Ry.*, 23 L. T. 344 ; 18 W. R. 1187. Affirmed, L. R. 6 Ch. 572 ; 19 W. R. 788.

User of Stream.] — The owner of land not abutting on a river, with the licence of a riparian owner, took water from the river, and after using it for cooling certain apparatus returned it to the river undiminished and unpolluted :—Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Northam* v. *Hurley* (1 El. & Bl. 665) and *Sampson* v. *Hoddinot* (1 C. B. (N.S.) 590) distinguished. *Kensit* v. *G. E. Ry.*, 52 L. J., Ch. 608 ; 23 Ch. D. 566 ; 48 L. T. 784 ; 31 W. R. 603.

The ordinary right of the riparian proprietor is to take so much water as he requires for domestic or similar purposes :—Held, that the fact that the railway company did not require water for such purposes did not entitle it to take it for other purposes, such as supplying their locomotives. *Att.-Gen.* v. *G. E. Ry.*, supra.

A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying its engines and for the general purposes of the station. On a bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day :—Held, that the company, as riparian owner, was entitled to take a reasonable quantity of water for its purposes, and that in this case the quantity taken was reasonable. *Sandwich (Earl)* v. *G. N. Ry.*, 49 L. J., Ch. 225 ; 10 Ch. D. 707 ; 27 W. R. 616.

h. Level Crossings.

Inconvenience Caused by — Damages.] — Damages are not recoverable for stoppages and other mere inconveniences incident to the crossing of a public road by a railway on the level, under the sanction of parliament. *Caledonian Ry.* v. *Ogilvy*, 2 Macq. H. L. 229.

A level crossing in such a case is a grievance to be endured without complaint by private persons, from a consideration of the benefit gained by the public. *Ib.*

Hence where a railway passed within some few yards of a gentleman's lodge, across a public road, forming the chief access to his residence ; although he was liable to constant stoppages by the closing of the gates on the level crossing ; although the passing of trains frightened his horses and terrified his visitors, "particularly ladies" :—Held, that these annoyances did not ground a claim of damages against the company. *Ib.*

Held, also, that the inconvenience felt in such a case is one to which all the Queen's subjects are exposed, and for which no particular or individual remedy exists. *Ib.*

Agreement—Effect of, on General Rights.]—Where a person has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances, that agreement is not carried into effect, he cannot, on the ground of any general rights, under the railway acts, claim to have any other crossings made according to the discretion of the court, for that would be to get the court to substitute a new agreement, and not to enforce the performance of the original. *Darnley* (*Earl*) v. *L. C. & D. Ry.*, 36 L. J., Ch. 404; L. R. 2 H. L. 43; 16 L. T. 217; 15 W. R. 817.

Instead of Bridge—Obligation to Construct.]—Where a special railway act provided that the line should be made according to the level shewn on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street:—Held, that the latter provision was not obligatory, and did not prevent the company from carrying their line across the street according to the provisions of the general act. *Dover Harbour* (*Warden*) v. *L. C. & D. Ry.*, 3 De G. F. & J. 559; 30 L. J., Ch. 474; 7 Jur. (N.S.) 453; 4 L. T. 387; 9 W. R. 523.

A mandatory injunction will not lie to compel a railway company to construct a bridge instead of a level crossing pursuant to an order of the Board of Trade where the company is wholly without funds. *Bristol and North Somerset Ry., In re*, 47 L. J., Q. B. 48; 3 Q. B. D. 10; 37 L. T. 527; 26 W. R. 236.

Duty to Repair.]—When a railway, under the powers of an act of parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic. *Oliver* v. *N. E. Ry.*, 43 L. J., Q. B. 198; L. R. 9 Q. B. 409.

Duty to Protect.]—A plaintiff negligently fastened his horse by the bridle to a railing in the open yard of a public-house, within which he remained for two hours. The highway leading from the house crossed a railway on a level, and the company had set up gates across both ends of the highway at the crossing. The gates opened outwards from the railway, and closed with a catch, but were easy to open, and would open when a train passed, and there was no gatekeeper at the crossing. During the plaintiff's absence the horse escaped from the railing, owing to the negligent fastening, strayed to the highway and along that to the crossing, and, the gate there not being closed, through the gateway to the railway, where it was killed by a passing engine of the company:—Held, that, under 5 & 6 Vict. c. 55, s. 9, an obligation was imposed on the company to keep the gates closed against any stray cattle on the highway; that the accident had been caused by their statutory misconduct; and that the plaintiff was entitled to recover from them the value of the horse. *Dickinson* v. *L. & N. W. Ry.*, 1 H. & R. 399.

Where a tramroad ran parallel on land of a railway company with the line for some distance, and afterwards crossed the line on a level, there being gates at the crossing, and a person, who had a licence from the company to use the tramroad with his carts and horses, paying toll therefor to them, had his horse startled, and in consequence the horse, having dashed through the gates (which had been left open by the company), was killed by a passing train, and the jury, in an action to recover for the loss of the horse, found that there was no negligence on the part of the owner, but that the company was guilty of negligence in leaving the gates open:—Held, that a duty arose out of the circumstances, between the company and the owner, to use ordinary care in the management of the gates, and that the company was therefore liable for this loss as arising out of their neglect of that duty. *Marfell* v. *South Wales Ry.*, 8 C. B. (N.S.) 525; 29 L. J., C. P. 315; 7 Jur. (N.S.) 290; 2 L. T. 629; 8 W. R. 765.

A railway crossed a highway at a level, gates were provided at each side for carriages, and swing gates for foot passengers, and a watch-box and attendant to close the gates. A boy came to the crossing and followed a cart on to the line; then seeing an up train approaching he waited till it had passed but was caught and killed by a down train, which he might also have seen:—Held, evidence of negligence, the company being bound by 8 & 9 Vict. c. 20, s. 47, to have the gates closed at the time. *N. E. Ry.* v. *Wanless*, 43 L. J., Q. B. 185; L. R. 7 H. L. 12; 30 L. T. 275; 22 W. R. 561.

At the point where a railway crossed a high road by a level crossing there were two large gates, which, when closed, covered the entire width of the metalled road and fenced in the line therefrom. At the side of the large gates, and beyond the width of the metalled road, but communicating therewith by a short footpath, there was a small gate for foot passengers. A piece of fence, which stood immediately beyond the small gate, and against which it rested, was allowed by the railway company to get out of repair, and became rotten, in consequence whereof, some horses belonging to the plaintiff, which were straying on the high road, were enabled, by passing along the short footpath and pushing against the fence, to get on to the line, where they were killed by a passing train:—Held, that the company had failed to satisfy the obligation to fence their line imposed on them by s. 47 of the Railways Clauses Act, 1845, and were liable in an action for damages. *Charman* v. *S. E. Ry.*, 57 L. J., Q. B. 597; 21 Q. B. D. 524; 37 W. R. 8; 53 J. P. 86—C. A.

A declaration stated that the railway of a railway company crossed a public highway on a level, yet the company, disregarding their duty, and the statutes in that behalf, did not keep gates across the highway, at the point where the same is crossed by the railway, constantly closed, by reason whereof two horses of the plaintiff, lawfully being on the highway near to the railway at the point aforesaid, went and escaped from the highway into and upon the railway, and were by a locomotive engine and train of carriages run over and killed. Plea, that the horses were not lawfully on the highway at the time when the injury was done. The horses, which were grazing in the plaintiff's field, had leaped over the hedge into a turnpike-road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway:—Held, first, that the road formed by the company was a highway, though the parish might not be bound to repair it. *Fawcett* v. *York and North Midland Ry.*, 16 Q. B. 610; 20 L. J., Q. B. 222; 15 Jur. 173.

Held, secondly, that the company being required

by their act, and by 5 & 6 Vict. c. 55, s. 9, to keep the gates at the crossings constantly closed, the horses were, as against them, lawfully on the highway, and therefore the plaintiff was entitled to recover against the company. *Ib.*

Where Gates a Nuisance.]—If a railway company makes the railway so as to intercept a public highway in a manner not authorised by 8 & 9 Vict. c. 20, s. 47, or some other act, by putting up gates at the point of intersection, so as to constitute a nuisance in blocking up the way, a passenger along the highway is not justified in prostrating those gates to make his way good across the line of railway, but should seek his remedy by mandamus or other legal proceeding against the company. *Ellis* v. *L. & S. W. Ry.*, 2 H. & N. 424; 26 L. J., Ex. 349; 3 Jur. (N.S.) 1008; 5 W. R. 682.

Duty to keep Attendant.]—A railway company, acting under the provisions of special acts, which embodied the Railways Clauses Act (8 & 9 Vict. c. 20), constructed a railway crossing a highway on a level, and erected at the crossing sufficient gates, but did not employ persons to open and shut them. A person coming along the highway at night arrived at the crossing, and finding no person in attendance to open the gates, proceeded to open them himself, and was injured in consequence:—Held, that he had no right of action against the company. *Wyatt* v. *G. W. Ry.*, 6 B. & S. 709; 34 L. J., Q. B. 204; 11 Jur. (N.S.) 825; 12 L. T. 568; 13 W. R. 837.

The effect of s. 47 of the Railways Clauses Consolidation Act, 1845, is to make a road at a level crossing of a railway only a highway when the gates are opened by one of the railway company's servants, and if a servant when called upon does not come, and a person using the road opens the gates, that person commits an unlawful act, but if damage ensues, it is a question for the jury whether the damage was the reasonable natural consequence of the unlawful act. *Wyatt* v. *G. W. Ry.* (34 L. J., Q. B. 204) questioned, but followed. *Reg.* v. *Strange*, 16 Cox, C. C. 552.

The offence of failing to erect and maintain a lodge or watchman at a level crossing over a turnpike-road or public carriage road mentioned in s. 6 of the Railways Clauses Act, 1863, applies to any turnpike-road or public carriage road, and is not limited to such similar roads as are specifically mentioned in the special act authorising the construction of the particular railway. Quære, whether such roads where marked for level crossings on the statutory plan deposited under the special act, though not specifically mentioned in that act, may not be held to be turnpike or public carriage roads "authorised by the special act" for level crossings within s. 5 of the Railways Clauses Act, 1863. *Reg.* v. *Longe*, 66 L. J., Q. B. 278.

Delay in opening Gates—Obstruction of Highway.]—The plaintiff a medical man, whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the defendant railway company's servants in opening the gates at the crossing:—Held, that the defendants were liable in damages to the plaintiff for such delay. *Boyd* v. *G. N. Ry.*, [1895] 2 Ir. R. 555.

Jurisdiction of Justices—Erection of Fence and Hand-rails.]—Under s. 62 of the Railways Clauses Act, 1845, justices have no power to order the erection by a railway company of fences and hand-rails at a level crossing on a public carriage road, that section being ministerial only in respect of jurisdiction thereinbefore conferred by the act, and no provision applicable to the case of such a highway being contained in any previous section. *Reg.* v. *Schofield*, 5 R. 575; 69 L. T. 313; 58 J. P. 132.

Private Railway Gates.]—The provisions of the 5 & 6 Vict. c. 55, s. 9, as to making and maintaining gates where a railway crosses a road on a level, do not apply to a railway belonging to private owners, and not constructed under parliamentary powers, nor used for the conveyance of passengers. *Matson* v. *Baird*, 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835—H. L. (Sc.)

A horse escaped from a field without any negligence on the part of its owner, and strayed for two miles along a public highway to a point where the road was crossed on a level by a private railway. The horse then strayed along the railway for about half a mile farther till it reached the place of junction between the private line and the line of the North British Railway Company, where it was killed by a passing train. The private railway was not constructed under parliamentary powers, nor used for the conveyance of passengers, and there were no gates either at the level crossing or at the junction:—Held, that the owners of the private railway were under no obligation to erect gates at the level crossing, and were not liable at the suit of the owner of the horse. *Ib.*

Private Way over—How affected by Statute.]—Lands were bought by the crown under an act enabling the crown to buy lands for the purpose of fortifications, but providing that the lands were not to be built upon or sold. By an act authorising a railway to be made through these lands, the railway company was obliged to make level crossings giving access to part of the lands then a marsh or pasture. The crown, under the authority of a subsequent act, sold a part of the lands, and the purchasers proposed to build houses thereon:—Held, that the purchasers could build houses thereon, and that the occupiers of the houses would be entitled to make use of the level crossings, and an injunction granted against obstruction of the level crossings, but not so as to prevent the company from using the railway for the reasonable working of their traffic. *United Land Co.* v. *G. E. Ry.*, 44 L. J., Ch. 685; L. R. 10 Ch. 586; 33 L. T. 292; 23 W. R. 896.

A private railway act contained a recital that it was expedient that certain footways which were crossed by the railway on the level should be dealt with as by the act provided, namely, "that as regards five of such footways, the rights of way in respect thereof should be extinguished, and that the other footway should be carried by a bridge over the railway." One of the five footways to be extinguished was the subject of a previous agreement between the owners and the company, under which the owners, their heirs, tenants and assigns, were to have a free way of passage with horses, carts, waggons and carriages over the said footway. The act provided no compensation for the extinguishment. The company erected a fence across the level crossing without any notice to the owners, who brought their action to restrain the company from so doing:—Held, that their private rights

were not taken away by the act, which only dealt with public rights of way. *Wells* v. *London, Tilbury, and Southend Ry.*, 5 Ch. D. 126; 37 L. T. 302; 25 W. R. 325—C. A.

Negligence at.]—*See* CARRIERS—NEGLIGENCE.

i. Fences.

Duty to Owners of Lands.]—Sect. 68 of the Railways Clauses Act, 1845, imposes an absolute obligation on railway companies as between them and the owners and occupiers of adjoining lands, to make and maintain fences to prevent cattle straying on the line. *Buxton* v. *N. E. Ry.*, 9 B. & S. 824; 37 L. J., Q. B. 258; L. R. 3 Q. B. 549; 18 L. T. 795; 16 W. R. 1124.

The liability to fence imposed by s. 68 of the Railways Clauses Act, 1845, is the same liability as that which is imposed on an adjoining owner by prescription at common law. *Wiseman* v. *Booker*, 3 C. P. D. 184; 38 L. T. 292; 26 W. R. 634.

The obligation of a railway company to fence under s. 68, against the owners and occupiers of lands adjoining the railway, is co-extensive only with the common-law prescriptive obligation to repair fences. *Manchester, Sheffield, and Lincolnshire Ry.* v. *Wallis*, 7 Railw. Cas. 709; 2 C. L. R. 573; 14 C. B. 243; 23 L. J., C. P. 85; 18 Jur. 268; 2 W. R. 194.

Sect. 68 of the Railways Clauses Act, 1845, is a substitution for s. 10 of the 5 & 6 Vict. c. 55. *Ib.*

Sect. 68 of the Railways Clauses Act, 1845, requiring companies to fence their lines against adjoining landowners, does reach a case where the adjoining land belongs to the company themselves. *Marfell* v. *South Wales Ry.*, 8 C. B. (N.S.) 525; 29 L. J., C. P. 315; 7 Jur. (N.S.) 240; 2 L. T. 629; 8 W. R. 765.

The duty imposed upon railway companies by s. 68 of the Railways Clauses Act, 1845, as to the making and repairing of fences between their railways and the adjoining lands is not more extensive than that imposed upon ordinary tenants by the common law. *Ricketts* v. *East and West India Docks*, 7 Railw. Cas. 295; 12 C. B. 160; 21 L. J., C. P. 201; 16 Jur. 1072.

In consequence of the fences of a railway being out of repair, some sheep got upon it, which were run over and killed by a locomotive engine guided by a servant of the company who had received orders from them to travel at a certain rate per hour:—Held, that the remedy of the owner of the sheep against the company was in case, and not in trespass. *Sharrod* v. *L. & N. W. Ry.*, 4 Ex. 580; 14 Jur. 23.

B. folded his sheep in a field adjoining a railway, using the quickset hedge forming the company's fence as one side of the inclosure. Some of the sheep escaping through a small hole in the hedge, got upon the railway and were killed:—Held, that the company was liable, and that it was no misdirection to tell the jury that by s. 68 of the Railways Clauses Act, 1845, the company was bound to keep their fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands, the jury having found as a fact that the fence was insufficient. *Bessant* v. *G. W. Ry.*, 8 C. B. (N.S.) 368.

In 1862 a railway acquired lands under their statutory powers, and, in constructing their line, fenced it off from adjoining lands, occupied by plaintiff's predecessor, by a ditch or gripe, and bank with posts and rails on top; the ditch being on the plaintiff's side, the bank on the railway side, of the fence. In 1890 plaintiff's cow slipped into and was found dead in the ditch:—Held, that the fence was properly and sufficiently constructed by the defendant company. *Colley* v. *L. & N. W. Ry.* (5 Ex. D. 227) followed. *Corry* v. *G. W. Ry.* (7 Q. B. D. 322) distinguished. *Ryan* v. *Great Southern and Western Ry.*, 32 L. R., Ir. 15.

Owner releasing Right to Accommodation Works.]—The plaintiff in 1846 became tenant from year to year of land belonging to one G. In 1847 the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a fence of posts and rails between the land so occupied by the plaintiff and a ditch in the defendants' land adjoining the railway, and they planted a hedge on the side of the ditch nearest the railway itself, sufficient to prevent animals from straying thereon. They, however, neglected to keep up the posts and rails, and in consequence of their neglect to do so a cow belonging to the plaintiff, in 1879, whilst the plaintiff so continued in the occupation of the land under the original tenancy which had never been determined, fell into the ditch and was killed:—Held, that the defendants were liable for the loss of the cow, for that their arrangement with the owner did not exonerate them from their liability under the Railways Clauses Act, 1845, s. 68, to maintain the fence for the benefit of the occupier, and so as to prevent his cattle from straying from his land. *Corry* v. *G. W. Ry.*, 50 L. J., Q. B. 386; 7 Q. B. D. 322; 44 L. T. 701; 29 W. R. 623; 45 J. P. 712—C. A.

Duty to Passengers.]—Sect. 68 of the Railways Clauses Act, 1845, imposes no duty on a railway company towards its passengers to keep up the fences, and a railway company is not bound, at common law, to maintain fences sufficient to keep cattle off the line under all circumstances, but is bound to use every reasonable care to prevent them straying on to the line. *Buxton* v. *N. E. Ry.*, 9 B. & S. 824; 37 L. J., Q. B. 258; L. R. 3 Q. B. 549; 18 L. T. 795; 16 W. R. 1124.

There is no duty in a railway company to fence their line of railway as towards passengers or persons already on the line. The duty in them to fence is towards persons off the line, to prevent the latter from getting or straying upon it. *Harrold* v. *G. W. Ry.*, 14 L. T. 440.

Rights of Third Parties.]—A railway company let surplus land to a tenant, separating it from the adjoining land not taken by means of an open post-and-rail fence four feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of the defendant, by reason of the insufficiency of the fence, passed their heads through and over it, and did damage to the defendant's crops:—Held, that, the duty of fencing being by the Railways Clauses Act, 1845, s. 68, imposed upon the railway company, the defendant was not responsible to their tenant for the trespass of his cattle. *Wiseman* v. *Booker*, 3 C. P. D. 184; 38 L. T. 292; 26 W. R. 634.

Duty of adjoining Landowner to Servant of Company.]—The plaintiff, a platelayer, in the employment of a railway company, was returning from his work in a trolley propelled by hand, when some pigs belonging to the defendant, which had escaped through the fence, got in the way of the trolley and upset it. The fence erected by the company was sufficient to keep out horses, oxen, and sheep: — Held, that the fence was insufficient, but that the plaintiff was identified with the company, to whose neglect the accident was to be attributed. *Childs* v. *Hearn*, 43 L. J., Ex. 100; L. R. 9 Ex. 176; 22 W. R. 864.

Licensee.] — When a railway company has neglected the duty imposed on them by the Railways Clauses Act, 1845, s. 68, to fence its line from the adjoining lands, and in consequence of such neglect cattle in the adjoining lands pass on to the line and are injured by the company's trains, an action for the injury may be maintained against the company by the owner of the cattle, though he has no more interest in the adjoining lands than a licence from the occupier to graze the cattle there. *Dawson* v. *Midland Ry.*, 42 L. J., Ex. 49; L. R. 8 Ex. 8; 21 W. R. 56.

To Fence off their own Yards.]—A colt strayed from a field on to a public road, abutting upon which was a yard not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was being driven back to the field by the servant of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train:—Held, that the company was responsible. *Midland Ry.* v. *Daykin*, 17 C. B. 126; 25 L. J., C. P. 73; 4 W. R. 16.

A count stated that a company was the owner and occupier of a railway, and of a station thereon for the loading, unloading and delivery of cattle carried thereby, and of a yard adjoining the station and railway, into and through which yard cattle brought by the railway to the station were used and accustomed, and were obliged to pass in going from the station to a common highway near thereto; and that the company, by reason of the premises, ought to have made and maintained sufficient fences between the yard and the railway, so as to prevent cattle lawfully being in the yard from straying thereout into or upon the railway; but that they omitted to make and maintain such fences, whereby a bull of the plaintiff, lawfully being in the yard on his way to the highway, without default or negligence on his part, strayed from the yard on to the railway, and was killed by a passing train:—Held, that there was no liability upon the company, either by the common law or by 8 & 9 Vict. c. 20, s. 68, to fence their yard from the railway, and consequently that the count disclosed no cause of action. *Roberts* v. *G. W. Ry.*, 4 C. B. (N.S.) 506; 27 L. J., C. P. 266; 4 Jur. (N.S.) 1240.

Level Crossings.]—*See* ante, col. 1449.

Proof of Negligence.]—A count alleged that a bull of the plaintiff was lawfully in a close adjoining a railway, of which the company was the owner and occupier, along which railway they had not made any fences for preventing cattle being in the close from straying thereout upon the railway, and that whilst the bull was lawfully in the close, the company and their servants negligently and wrongfully chased, startled and frightened the bull, and so caused it to run upon the railway, where it was killed. At the trial it appeared that the bull, with other cattle, which had been brought by the railway, being in the station yard, a place unlighted and not fenced from the railway, a porter came out of the office with a lantern, such as was ordinarily used by porters, in his hand; and that the light startled some of the beasts, and caused the bull to run upon the line, where it was knocked down and killed by a passing train:—Held, no evidence for the jury that the company's servants had been guilty of negligence. *Roberts* v. *G. W. Ry.*, supra.

A party kept bullocks on a marsh, which was separated from the railway line by a gate put up by the railway company, under the Railways Clauses Act, 1845, s. 68. Three of his bullocks were found dead upon the line, and the gate had been broken down. The gate had become thin and the post decayed; it had been hanging upon hooks without anything to prevent its being lifted off. Hair like that of one of the bullocks was found upon the gate, and a horn of one of the dead animals appeared to have been rubbed. Afterwards the company put bolts into the posts, which prevented the gates from being lifted:—Held, in an action for the value of the bullocks, that these facts constituted evidence of negligence on the part of the company; that the owner was not bound to apply to justices under the Railways Clauses Act, s. 69; and that evidence of what the company did to this gate and posts after the accident was admissible. *Page* v. *G. E. Ry.*, 24 L. T. 585.

—— **Different Species of Animals.**]—A platelayer in the employment of a railway company was returning from his work along their line upon a trolley propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolley; the trolley ran over the pigs and was upset, and the plaintiff was injured. The defendant was owner of the adjoining land; the fence erected by the company under s. 68 of the Railways Clauses Act, 1845, was sufficient against horses, oxen, and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the pigs had in fact crawled under the fence. There was evidence to shew that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to shew how the pigs got from the defendant's farmyard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:—Held, that the word "cattle" in s. 68, included pigs, and that the fence was, therefore, insufficient. *Childs* v. *Hearn*, 43 L. J., Ex. 100; L. R. 9 Ex. 176; 22 W. R. 864.

Contributory Negligence.]—A railway crossed land on a level, and there was an accommodation road over the railway. Two descriptions of fastenings were provided by the company for the gates leading from this road to the railway, and it was arranged between the owner and the company that one should be used by day and the other by night. The former was insufficient; the latter sufficient. Complaints had been made to the company of the insufficiency of the day fastening, of which no notice was taken. The

owner's servants, notwithstanding its insufficiency, continued to use it. A pony strayed through one of the gates on to the line, and was killed, and in an action against the company to recover the value of the pony, the jury found that the company had not provided a sufficient protection, but that the servant had not used the precaution he ought:—Held, that upon this finding, the verdict was rightly entered for the company. *Haigh* v. *L. & N. W. Ry.*, 1 F. & F. 646; 8 W. R. 6.

A railway crossed an occupation way which connected lands of the plaintiff lying on each side of the railway, and which was also a public footway. The crossing being on the level, at the point of intersection the company set up high gates, of which they gave a key to the plaintiff. The gates obstructed the footway, but the company did not make a bridge over the railway, or provide a stile for foot-passengers, in pursuance of ss. 46, 61, 68 of the Railways Clauses Act, 1845. The key having been lost, one of the gates was left open, and some colts of the plaintiff having escaped on to the railway, were killed by a passing train:—Held, that it was a question for the jury whether the plaintiff, by his own negligence, had contributed to the accident. *Ellis* v. *L. & S. W. Ry.*, 2 H. & N. 424; 26 L. J., Ex. 349; 3 Jur. (N.S.) 1008; 5 W. R. 682.

Remoteness of Damage.]—Cattle were being driven along a road across which were some sidings belonging to a railway company, when some trucks of the company were negligently allowed to run down the siding, across the road, separating the cattle from the drovers, and frightening them so that some of them ran down the road, broke through an imperfect fence into an orchard, whence they strayed upon the line and were killed by a passing train:—Held, that the company was liable, and that the damage was not too remote; and that the imperfect state of the orchard fence afforded no defence to the action. *Sneesby* v. *Lancashire and Yorkshire Ry.*, 45 L. J., Q. B. 1; 1 Q. B. D. 42; 33 L. T. 372; 24 W. R. 99—C. A.

j. Junctions.

Expenses of Erecting Signals.]—Under the Railways Clauses Act, 1863, s. 12, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction, as may be necessary for the prevention of danger to or interference with the traffic at or near the junction; and the expenses of erecting and maintaining such signals and conveniences are at the end of each half year to be repaid by the company making the junction:—Held, that, to sustain an action for such expenses, proof must be given that they have been actually paid: proof that a liability has been incurred for them is not enough. *Carmarthen and Cardigan Ry.* v. *Manchester and Milford Ry.*, 42 L. J., C. P. 262; L. R. 8 C. P. 685.

—— **Private Siding—Board of Trade Order.**]—The plaintiff and his predecessors in title, as owners of land adjoining a single line of railway, had ever since the year 1861 used a junction siding connecting the railway with a foundry on their land, the siding being the only access to the foundry. The defendants, the railway company, having doubled their line, the board of trade, acting on the report of their inspector, and as a condition for certifying the line to be fit for traffic, required the company either to provide the junction of the siding with the modern and improved system of interlocking and signalling apparatus, or to remove the junction, which was of an old-fashioned description. The company then called upon the plaintiff to execute the work or pay the costs of it, but this the plaintiff declined to do, whereupon the company took up the junction points:—Held, by Bacon, V.-C., that the plaintiff had, under s. 76 of the Railways Clauses Act, 1845, a statutory right to the use of his siding in connection with the company' railway, the company's parliamentary powers being subject to that right; and an injunction was therefore granted restraining the company from continuing to prevent communication between his siding and the railway, and compelling the company to restore the junction:—Held, on appeal, that as the plaintiff's predecessors in title had acquired a perpetual right to use the siding under a clause as to sidings in an old local act for making a tramway, which had since been converted into the railway of the defendants, and the subsequent acts contained saving clauses sufficient to protect all rights acquired by the plaintiff under the old act, the case did not depend on the Railways Clauses Act, and that the plaintiff retained the right acquired under the old act to use the siding without contributing to the expense of the new apparatus, such act containing nothing to oblige the plaintiff to make or pay for the interlocking apparatus. *Woodruff* v. *Brecon and Merthyr Tydvil Ry.*, 54 L. J., Ch. 620; 28 Ch. D. 190; 52 L. T. 69; 33 W. R. 125—C. A.

Held, also, that if the case had turned on s. 76 of the Railways Clauses Act, the court would not have decided the question whether the plaintiff was bound to pay for the interlocking apparatus, without first ascertaining what, in the year 1845, was included in the terms "offset plates" and "switches" used in that section. *Ib.*

Rendered Impossible—Constructing Line.]—Semble, that companies have a right to carry on their railway according to the plan laid down in their act, although a junction contemplated in procuring such act may be frustrated by the abandonment of the line with which it was the original intention of the company to unite. *Clarence Ry.* v. *Great North of England Ry.*, 2 Railw. Cas. 763; 6 Jur. 269.

k. Tunnels.

Deviation.]—The effect of ss. 13—15 of the Railways Clauses Act, 1845, taken together, is, in the case of a tunnel marked on the deposited plans, that the tunnel must be made in the exact position indicated, and that the line cannot deviate at all at that portion of it without the consent required by s. 13, or special powers in the special act. *Little* v. *Newport, Abergavenny and Hereford Ry.*, 7 Railw. Cas. 280; 12 C. B. 753; 22 L. J., C. P. 39; 17 Jur. 209; 1 W. R. 81.

Right to Support.]—The grant to a railway company of the right to make, maintain and use a tunnel does not give the company such a right to support to their tunnel that the grantor, acting duly in accordance with the Railways Clauses

Act, ss. 77 and 78, cannot work or have the benefit of mines under and adjacent to the tunnel. *L. & N. W. Ry.* v. *Ackroyd*, 31 L. J., Ch. 588; 8 Jur. (N.S.) 911; 6 L. T. 124; 10 W. R. 367. *See* MINES AND MINERALS.

Payment for User of Land.] — Semble, that under the Railway and Lands Clauses Acts companies are entitled permanently to use the land for the purposes of tunnels without doing more than paying for the permanent user and occupation of the land. *Pinchin* v. *London and Blackwall Ry.*, 2 Eq. R. 1172; 24 L. J., Ch. 417; 1 Jur. (N.S.) 241; 2 W. R. 696. *See* LANDS CLAUSES ACT.

Sale of Land — Acquiescence.] — A railway company, having constructed a tunnel, proceeded to dispose of the ground under which the tunnel ran, and contracted on the 5th June to sell a portion to B., subject to the condition that he was to erect no buildings nor make any excavations, &c., but according to a specification approved in writing by the principal engineer. B. entered immediately, and sent in plans in August to the resident engineer, for the approval of the principal engineer. The resident engineer never submitted them to the principal, but told B. verbally that he might proceed. B. thereupon proceeded till the 26th October, when the conveyance was completed, and the company's solicitor, finding him carrying on building operations, asked if he had the approval in writing of the principal engineer, and told him he must procure it. The principal engineer then for the first time saw the plans of the proposed buildings, and immediately condemned them as dangerous to the tunnel, and therefore, of course, also dangerous to the proposed houses. B. insisting on proceeding, the company caused an information to be filed to restrain him, on the ground of danger to the public. A counter information was thereupon filed against the company to restrain it from running its trains, on the same ground of danger to the public. The fact of danger to the public by the continuation of B.'s plans was fully made out. An injunction had been obtained on the first information, and refused on the second:—Held, at the hearing, first, that the approval of the company's resident engineer was not binding on the company; and, secondly, that the defendant B. having been allowed to continue his works from August to the 26th October was, under the circumstances, not such an acquiescence on the part of the company as to exempt B. from being restrained from further prosecuting his building. *Att.-Gen.* v. *Briggs*, 1 Jur. (N.S.) 1084.

—— **Buildings over.**]—A railway company acquired land under special acts, which contained no provision as to sale of superfluous lands, but incorporated the Lands Clauses Act, 1845. It made its line in a cutting, which it covered over with an arch forming a tunnel:—Held, that the company had no right to grant building rights over the crown of the tunnel. *Metropolitan District Ry. and Cosh, In re*, 40 L. T. 482.

Right to Construct — Cul-de-sac.]—In 1871 the plaintiff became the purchaser in fee simple of hereditaments, described in the deed of conveyance as "all that piece of ground with the sixteen messuages thereon." The houses were divided into two blocks by a cul-de-sac or passage open at one end only, which had been dedicated to the use of the public for twenty years, but the soil of which the plaintiff claimed as his private property by virtue of his conveyance. A railway company, being about to tunnel under this cul-de-sac, gave the plaintiff a notice to treat in respect of three houses on each side of it, but not in respect of that part of the cul-de-sac between them, the company contending it was a public way or street:—Held, that the cul-de-sac was a public way or street, and that the company was entitled to tunnel under it without paying the plaintiff any compensation. *Souch* v. *East London Ry.*, 42 L. J., Ch. 477; L. R. 16 Eq. 108.

Agreement to Construct — Acquiescence.] — Circumstances of acquiescence and part performance, under which a railway company was held bound by an agreement for making a tunnel running into and upon their land, although no contract had been executed pursuant to the 8 & 9 Vict. c. 16, s. 97, and although the terms of such agreement were not ascertained without some difficulty. *Laird* v. *Birkenhead Ry.*, 1 Johns. 500; 29 L. J., Ch. 218; 6 Jur (N.S.) 140; 1 L. T. 259; 8 W. R. 58.

1. Accommodation Works.

Discretion of Company as to the most Convenient Mode of doing the Works.] — Lands required by a railway company for accommodation works are lands required for the purposes of "the undertaking" or "of the railway." Every work which a railway company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking. The word "necessary" in s. 68 of the Railways Clauses Act, 1845, refers to the obligation to make good the interruption, and does not confine the company to any particular mode of doing the works. Where there are several modes of doing the works, the company, acting under the advice of their engineer, are the sole judges which mode should be adopted; but if they do not act bonâ fide, the court will interfere. A railway company having intersected the lands of two adjoining landowners, A. and B., by an embankment, proposed to connect the severed portions of A.'s land by an arch through the embankment, and to give B. a right of way through the same arch, which they proposed to connect with his land by an occupation road carried through A.'s land. The strip of A.'s land proposed to be taken for this road was included in the lands delineated. A. objected to this arrangement, as being beyond the powers of the company:—Held, that the company had power to take the strip of land compulsorily for the proposed purpose. *Wilkinson* v. *Hull, &c., Ry. and Dock Co.*, 51 L. J., Ch, 788; 20 Ch. D. 323; 46 L. T. 455; 30 W. R. 617—C. A.

Agreement — Effect on General Rights.] — Where a person has made a special agreement as to crossings on a line of railway, and, from particular circumstances, he allows that agreement to fall through, he cannot afterwards set up general rights under the railway acts to have other crossings made. *Darnley (Earl)* v. *L. C. & D. Ry.*, 36 L. J., Ch. 404; L. R. 2 H. L. 43; 16 L. T. 217; 15 W. R. 817.

Specific performance will not be decreed of an act which the defendant cannot lawfully carry into execution, and which would be useless to the

plaintiff if it were carried into execution. A railway company ordered to make a drain contracted for. *Powell* v. *South Wales Ry.*, 1 Jur. (N.S.) 773.

What are—Insufficient Drains.]—The owners of mines extending under a railway, which had been made by a railway company under the powers of their act, which contained provisions similar to those in the Railways Clauses Act, 1845, gave notice to the company in 1858 of their intention to work the mine under the line of railway, and the company declined or neglected to purchase. At this point the line of railway was in a deep cutting, and the company had made drains upon the line for the purpose of carrying off the water which fell upon the railway and ran from the sides of the cutting. The working of the mine had caused the land on which the railway was constructed to sink, so that the company was compelled to fill up such sinkings in order to preserve the level of the railway, and thereby the drains had become in some places choked up, and the water percolated through the broken strata, and through the cinders used by the company for filling up the sinkings, and so passed into the mines:—Held, that these drains were not accommodation works within ss. 68, 69 of the Railways Clauses Act, 1845. *Reg.* v *Fisher*, 3 B. & S. 191; 32 L. J., M. C. 12; 9 Jur. (N.S.) 571; 7 L. T. 325; 11 W. R. 69.

Duty to Fence where Owner releases Right to.]—*See* ante, col. 1454.

Whether Action lies for Insufficiency.]—A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by s. 73 of the Railways Clauses Act, 1845. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company, in which it was alleged that the culvert was insufficient:—Held, on demurrer, that the action would not lie. *Colley* v. *L. & N. W. Ry.*, 49 L. J., Ex. 575; 5 Ex. D. 277; 42 L. T. 807; 29 W. R. 16; 44 J. P. 427.

A railway company was, by its special act, required to construct and maintain such culverts, drains, &c., under the railway as two justices should, upon the application of any landowner in case of dispute, judge to be necessary for his accommodation. In 1841 the company constructed an embankment for the railway across lands belonging to the plaintiff's predecessors, and made a culvert under the embankment for the purpose of draining the lands. Twenty years afterwards the plaintiff came into possession of the lands, and found that, owing to the height of the bottom of the culvert, the water could not be properly drained off. Upon a suit by him to compel the company to provide a proper drain:—Held, that the Court of Chancery, independently of the question whether it had jurisdiction or not, would not interfere in questions of accommodation works, but that such questions ought to be referred to two justices, as provided by the act. *Hood* v. *N. E. Ry.*, 40 L. J., Ch. 17; L. R. 11 Eq. 116; 23 L. T. 433; 19 W. R. 266.

A railway was carried along an embankment upon low lands lying between a river and A.'s land. The low lands were separated from A.'s land by a bank which, before the railway embankment was placed there, sufficed to protect his land from the flood-waters of the river; but, in consequence of the embankment, the flood-waters were unable to spread themselves over the low lands as formerly, and flowed over the bank into his land:—Held, that although the company were not required by their act to make flood-openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might by proper caution have prevented the injury sustained by A., an action was maintainable against them for such injury. *Lawrence* v. *G. N. Ry.*, 16 Q. B. 643; 6 Railw. Cas. 656; 20 L. J., Q. B. 293; 15 Jur. 652.

By a railway act it was provided, that, where any part of any carriage, horse or foot road, railway or tramroad, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable, or inconvenient for the passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandise; the company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope or other communication as the case shall require, to be set out and made instead thereof as convenient for passengers, and for transporting goods and merchandise, as the road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be. B. had a wharf on the river Humber, between which and the low-water mark the company constructed their railway (in the line prescribed by the act of parliament), thereby rendering the communication between the wharf and river inconvenient and dangerous:—Held, that the wharf was thereby injured, within the meaning of the section (which was not confined to an injury done bodily to the wharf itself); that he was entitled to have a new wharf constructed for him by the company, and was not bound to apply for compensation under another section, which empowered a jury to assess the sum payable for any future, temporary, or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act. *Bell* v. *Hull and Selby Ry.*, 6 M. & W. 699; 2 Railw. Cas. 279; 9 L. J., Ex. 213.

—— **Delay.**]—A railway company had constructed its line so as to leave for the passage for a private road two intervals of nine feet three inches each. The interval required by the Railways Clauses Act, for a similar right of way, was twelve feet. The plaintiff's right of way was not disputed; but he had lain by and allowed the railway works to proceed, and the damage accruing to the plaintiff in consequence was of small amount:—Held, that he, having delayed the assertion of his legal right, and the damage being slight, the court would not grant an injunction to restrain the infringement on the legal right. *Wintle* v. *Bristol and South Wales Union Ry.*, 6 L. T. 20; 10 W. R. 210.

Order of Justices.]—Under ss. 68, 69 of the Railways Clauses Act, 1845, justices have power

only to order accommodation works with reference to the present use of the land, not prospectively. Therefore a jury summoned should assess compensation for severance of agricultural land, valued as building land, on the assumption that no remedy could be afforded by accommodation works ordered by justices. *Reg.* v. *Midland and S. W. Junction Ry.*, 8 B. & S. 456.

Fence Erected more than Five Years after Opening of Railway—Damage from Insufficiency—Liability.]—The general obligation imposed upon a railway company by s. 68 of the Railways Clauses Act, 1845, to make and maintain sufficient fences, is not affected by the provision in s. 73 that the company shall not be compelled to make "any further or additional accommodation works" after five years from the opening of the railway, in a case where the company have made no such works at all within that period. A railway company are therefore liable for injury arising from the defective state of a fence erected by them after the expiration of the five years. *Dixon* v. *G. W. Ry.*, 66 L. J., Q. B. 132; [1897] 1 Q. B. 300; 75 L. T. 539; 45 W. R. 226—C. A.

"Accommodation Works"—"Insufficient"—Landowner's Power to make Additional Works.]—In s. 71 of the Railways Clauses Consolidation Act, 1845, the words "accommodation works" mean such works as are mentioned in s. 68—that is, works for the benefit of lands adjoining the railway; and "insufficient" means insufficient for the use of the lands in the condition in which they were when the line was made. *Rhondda and Swansea Bay Ry.* v. *Talbot*, 66 L. J., Ch. 570; [1897] 2 Ch. 131; 76 L. T. 694—C. A.

Sect. 71 does not enable owners of adjoining lands to construct accommodation works at their own expense, unless there have been some previous accommodation works made by the railway company which have proved insufficient. Therefore where, on the purchase of the site of the line, the company and the landowner have agreed that no accommodation works shall be made by the company, the landowner cannot subsequently construct works under that section. *Ib.*

Compensation—Mandatory Injunction.]—The metropolitan board of works, under the powers conferred on them by the Thames Embankment Act, 1862, cut off from its river frontage a piece of land belonging to the defendant. The question of compensation was referred to an umpire, who made his award in the belief that the land had been made inaccessible to carriages by the embankment works. By s. 62, the board of works was bound to provide means of access to the land. The defendant filed a bill to compel them to make the land accessible to carriages, and at the same time commenced an action for the whole amount awarded. The board of works filed a bill for an injunction against the action:—Held, that the action must be restrained until the hearing of the cause. *Metropolitan Board of Works* v. *Salisbury (Marquis)*, 26 L. T. 390; 20 W. R. 507.

S. was entitled to houses in Cecil and Salisbury streets, and to a piece of low level ground at the south ends of these streets. The low level communicated by means of two lanes at the banks of the streets with the Strand on the north side, and by means of wharves, with the river Thames on the south side. In 1862 the Thames Embankment Act authorised the construction of the embankment road and of the ornamental gardens alongside of the river. These improvements were completed in 1870; their effect was to deprive the low level ground in question, and also the two streets, of all communication with the river or with the embankment on the south side. S., as the owner of the depreciated property, had obtained 10,000*l.* as compensation assessed by an umpire; but under s. 2 of the act of 1862, S. was entitled besides to full and free communication to the embankment road and the river, and he claimed that such right belonged to him in respect as well of the houses in Cecil and Salisbury streets as of the low level ground, and that the right in dispute was to a wheel or a cartway, and not to a footway merely. The makers of the improvements had offered to construct a convenient footway across the gardens to the embankment road, but such offer had not been entertained. A wheel or cartway would have seriously injured the ornamental gardens:—Held, that having regard to the circumstances of the property in 1862, and to an act of Geo. 3, relative to the buildings upon it, the act of 1862 did not reserve any right of way, much less a wheel or cartway, to the low level; and that a mandatory injunction to construct a convenient footway for the occupiers of Cecil and Salisbury streets could not be granted on the state of the pleadings, or an inquiry directed at that stage of the suit. *Metropolitan Board of Works* v. *Salisbury (Marquis)*, 21 W. R. 259

User of Accommodation Bridge — Tramway.]—An estate was intersected by a canal under the powers of its act, and an accommodation bridge was built by the company, over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal-owners subsequently carried the tramway across the bridge (excavating the soil of the roadway on the bridge and approaches), in order to carry their coals to a line of railway on the other side of the property. An action for trespass having been commenced, and a writ of injunction applied for by the canal company, the coal-owners submitted in the action to judgment for 1*l.* damages and costs, and gave an undertaking not to repeat the trespass complained of. The coal-owners having, a few months afterwards, again laid down the tramway, but without breaking the soil on the bridge:—Held, that, independently of the undertaking in the action, by which the right of the canal company had been recognised and established, the defendants' right of access to and passage over the accommodation bridge did not justify the making by them of a tramway upon the bridge and the approaches thereto, and an injunction was granted accordingly:—Held, on appeal, that the undertaking given by the defendants formed a good ground for the interference of the court, without going into the question of their right to make the tramway. *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.*, L. R. 10 Ch. 450.

Repair — Abandonment — Severed Land—Different Ownership.]—A railway company which

on cutting through a landowner's property has been obliged, under s. 68 of the Railways Clauses Consolidation Act, 1845, to make accommodation works, is not bound to keep up such works when the two parts of the lands so severed have passed into the hands of different owners neither of whom has any right of passing over the other's land. The right to such works is then abandoned, and finally extinguished, and will not revive even if the whole of the land afterwards belongs to one owner. *Midland Ry.* v. *Gribble*, 64 L. J., Ch. 826; [1895] 2 Ch. 827; 12 R. 513; 73 L. T. 270; 44 W. R. 133—C. A. Affirming 60 J. P. 55.

Expenses of Communication—Costs.]—When a party has required a communication to be made between adjoining lands, and it is found by a jury that the expense of making the communication will be greater than the value of the land, which the company then tenders, electing to take the land; this is not a case of disputed compensation, and the claimant is not entitled to his costs by reason of the omission of any previous offer of compensation. *Cobb* v. *Mid-Wales Ry.*, 35 L. J., Q. B. 117; L. R. 1 Q. B. 342; 12 Jur. (N.S.) 228; 13 L. T. 342; 14 W. R. 775.

Supply of Water — Duration of Duty.]—A clause in an agreement by a railway company to purchase land, binding the company to procure a supply of water as good as the supply of water cut off by the construction of the line from the severed lands of the vendor, only binds the company to do once for all that which may reasonably be expected to insure a sufficient supply of water, and does not bind them to do whatever may be necessary from time to time to secure that result. *Gray and Metropolitan Ry., In re*, 44 L. T. 567.

Transfer of Undertaking — Nonperformance of Covenants—Liability of Transferee Company.]—By a conveyance dated in December, 1873, certain lands comprised in a settlement were conveyed to the L. company for the purpose of their undertaking, and the company entered into covenants with all persons claiming under the settlement to make and maintain certain accommodation works and to perform certain personal services upon such lands. By an act passed in 1892, the line having then been closed for some years, the undertaking was, "subject to the contracts, obligations, debts and liabilities" of the L. company, transferred to the C. company, provision was made for the dissolution of the former company, and "claims" against that company unknown to them, not notified within a certain time, were to be barred. In August, 1893, the covenants having remained unperformed up to that date without objection from any person claiming under the settlement, and no claim having been notified within the time limited, the then tenant for life thereof brought an action against both companies, claiming specific performance of such covenants:—Held, that he was entitled to an order against the C. company. *Fortescue* v. *Lostwithiel and Fowey Ry.*, 64 L. J., Ch. 37; [1894] 3 Ch. 621; 8 R. 664; 71 L. T. 423; 43 W. R. 138.

Agreement—Enforcement of.]—Where land is taken by a railway company, not under its compulsory powers, but by private contract, the jurisdiction of the Court of Chancery to secure to the vendor the easements he contracted for is not ousted by the provisions of the railway acts. *Sanderson* v. *Cockermouth and Workington Ry.*, 2 H. & Tw. 327; 19 L. J., Ch. 503. Affirming 11 Beav. 497.

A railway company, about to sever the plaintiff's land by its railroad, agreed to purchase the necessary portion of land, "subject to the making such roads, ways and slips for cattle as might be necessary":—Held, that, although it was very difficult to execute an agreement thus expressed, yet that the plaintiff was entitled to a specific performance; that the word "necessary" must receive a reasonable interpretation. The expression was held to mean "such roads, ways and slips for cattle as might be necessary and proper for convenient communication between the severed portions of the plaintiff's land"; and a reference was therefore directed to ascertain what was necessary and proper. *Ib.*

In a contract between a railway company and a proprietor of land to be crossed by the line of railway, the Railways Clauses Act should be expressly referred to, if the company intends to claim the benefit of its provisions. Therefore, where a company contracted "to provide and erect a suitable bridge over a street (marked in a plan referred to in the deed) as then planned and intended"; and the plan shewed that the street was intended to be forty-two feet wide:—Held, in the absence of any reference in the deed to the act, that the company was not at liberty to narrow the street to the dimensions specified in s. 49 (twenty-five feet), but must make a bridge, with an arch of the full width of the street (forty-two feet). *Clarke* v. *Manchester, Sheffield and Lincolnshire Ry.*, 1 Johns. & H. 631.

A railway company obtained a conveyance, for the purposes of the railway, of land from C.; and in the conveyance the company bound themselves to erect and maintain a bridge over the road leading to C.'s property, which was to be, according to the plans, thirty-five feet wide and leaving a road under it of fifteen feet wide. Afterwards this bridge was made, but the company, some years later, amalgamated with the H. company, and the latter company's act authorised a junction with the former railway, at a point near this bridge. The two companies then agreed as to the mode of effecting the junction; and part of the plan was to widen the arch or bridge over C.'s road so as to extend the bridge from thirty-five feet to fifty-five feet wide, thereby darkening the road beneath. C. applied for an injunction to restrain the companies from carrying out this plan:—Held, that the first company having, in the first instance, obtained the conveyance from C., on certain conditions as to the width of the bridge, was bound not to depart from those conditions; and the H. company was equally bound, as claiming under the first company; for it was part of the consideration to maintain the bridge of the height and width originally fixed. *Edinburgh and Glasgow Ry.* v. *Campbell*, 4 Macq. H. L. 570; 9 L. T. 157.

—— **Power of Statutory Officer to bind Company.**]—Where by a local act the promoters of a railway company were authorised to take lands for the purposes of their undertaking to be acquired by them through a government officer appointed under s. 20, compensation being payable by the government, and the owners of the lands being entitled by s. 29 to such accommodation works as may be fixed by agreement at the time when the amount of compensation is

being settled :—Held, that the statutory duty of conducting the assessment of compensation having been intrusted to such government officer, the making of agreements for accommodation works was also within the scope of his authority, and he could within reasonable limits bind the company thereby, although the statutory duty of defraying the costs thereof was imposed upon the company. *West India Improvement Co.* v. *Att.-Gen. of Jamaica*, [1894] A. C. 243 ; 70 L. T. 80—P. C.

Substituted Agreement for making Roads.]—A landowner through whose land a railway company proposed to pass, agreed in May, 1864, to withdraw his opposition to their bill on the terms that the company would vary the course of their line and make certain bridges, works and approaches. The company gave a notice to treat, and on the 20th of March, 1867, they went into possession. On the 27th of May, a further agreement was come to that the company should pay 2,250*l.* for purchase-money and compensation, and should construct the bridges askew according to an agreed plan. The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase-money, nor the interest, though the completion of the works was demanded in July, 1868, and payment of interest in December, 1868. On the 6th of February, 1869, a substituted agreement was made between the landowner and the company, whereby it was agreed that an estimate should be made by the company's engineer of the costs of completing the road, and submitted to A., the landowner's agent, "for approval ; in case of difference the amount to be determined by B." ; the amount when agreed or determined to be paid to the landowner, in discharge of all obligations as to the road ; and the purchase to be completed forthwith. In December, 1871, A. died ; and in May, 1872, the company, for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, and neither the purchase-money nor any interest had been paid. B. was living : —Held, that the submission of the estimate to A. for approval was of the essence of the agreement of the 6th of February, 1869 ; and that inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the court could not enforce performance of it. *Firth* v. *Midland Ry.*, 44 L. J., Ch. 313 ; L. R. 20, Eq. 100; 32 L. T. 219 ; 23 W. R. 509.

A railway company agreed with a landowner to make a bridge and other accommodation works, and upon the works being commenced in a manner at variance with the agreement, the landowner filed a bill for specific performance of the agreement, and for an injunction to restrain the completion of the works in progress. The motion for an injunction was ordered to stand over until the hearing of the cause, upon the company's undertaking to deal with the work as the court should direct. Before the hearing of the cause the works were completed, and the line of railway was open for public use :—Held, that the possible inconvenience to the public was no ground for refusing specific performance of the agreement ; and a decree was made according to the prayer of the bill. *Raphael* v. *Thames Valley Ry.*, 36 L. J., Ch. 209 ; L. R. 2 Ch. 147 ; 16 L. T. 1; 15 W. R. 322.

In consideration of certain landowners obtaining from the admiralty a waiver of an obligation imposed upon a railway company by their act to construct certain works, and upon conveyance of the necessary land by the landowners, the company entered into an agreement with them to make a carriage road between certain specified points, and also to make and maintain a wharf for loading and discharging vessels at a specified place, of a stipulated length and of a suitable and convenient height. The obligation imposed upon the company by its act had been waived by the admiralty, and the land required had been conveyed to the company, which had commenced, but had not finished, the road, and had not commenced the wharf :—Held, first, that having obtained the benefit of the agreement by being released from an onerous obligation, and allowed to substitute something more easy of performance, the company would not be allowed to evade the agreement. *Wilson* v. *Furness Ry.*, 39 L. J., Ch. 19; L. R. 9 Eq. 28; 21 L. T. 416, 553; 18 W. R. 89.

Held, secondly, that the agreement was not ultra vires, and might be enforced against it. *Ib.*

Held, thirdly, that the attorney-general was not a necessary party to a suit for specific performance of an agreement entered into with a company by certain persons on their own behalf, and as representing the inhabitants of the district. *Ib.*

Held, fourthly, that if necessary, the court might permit the plaintiffs themselves to do the work at the company's expense. *Ib.*

Insufficient Watering-Places.] — A company was required to make watering-places for cattle in all cases where, by means of the railway, the cattle of persons occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same with water. After the act passed, by deed made between the company and M., in consideration of the latter withdrawing his opposition to the progress through parliament of a bill to amend that act, the company covenanted to pay M., as and for the special damage to be thereby occasioned to his estate, and particularly to his mansion-house, 5,000*l.*, and that whenever any close of his should be intersected by the railway, the different parts adjoining should be thrown together, and properly levelled ; and that the company should at their own expense make and complete such good and sufficient fences, drains, gates, stiles and other conveniences, as might be necessary for the redividing of the fields which might be intersected by the railway, and for laying them to the adjoining fields of the same estates, for the purpose of convenient occupation, or otherwise would pay to M. the costs incurred by him in so doing. The money was paid by the company. A mandamus issued reciting these acts, and suggesting that the company made their railway through and intersected eight closes of M., in which there were ponds or watering-places for cattle, so as to cut off the ponds from such one portion of the closes respectively ; and that application had been made to the company, but refused. The writ, therefore, commanded the company to make proper watering-places for cattle in such portions respectively of the several closes. The return stated the deed, and a notice under it by M., that he required the company to make, amongst other conveniences, the ponds in question, and that they executed the works except the ponds, alleging that the cutting off the ponds was part of the damage covered by the

5,000*l*., and also the ponds were not conveniences within the meaning of the deed. The Queen's Bench held, that the deed furnished no sufficient answer; that even if the ponds could be included in the word "conveniences," they were not intended to be provided for by the 5,000*l*., and a peremptory mandamus was, therefore, issued. But held, by the exchequer chamber, that the writ was bad, as it ordered the company to do more than the act required, namely, to make a pond in each of the portions of the closes, there being nothing to shew that one watering-place would not have been sufficient for all the portions. *York and North Midland Ry.* v. *Milner*, 3 Railw. Cas. 764; 15 L. J., Q. B. 379.

m. Unauthorised Application of Funds.

Interference by Court—General Principles.]—Although the court will not interefere with a company merely because a particular act has been done in an informal way, which may afterwards be legally set right by it, the rule does not apply to cases of misapplication of funds which could not under any circumstances be rendered legal. *Bagshaw* v. *Eastern Union Ry.*, 2 H. & Tw. 201; 2 Macn. & G. 389; 6 Railw. Cas. 169; 19 L. J., Ch. 410; 14 Jur. 491.

The doctrine of ultra vires as explained in *Ashbury Ry. Carriage Co.* v. *Riche* (L. R. 7 H. L. 63) is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the legislature has authorised by an act of parliament ought not (unless expressly prohibited) to be held as ultra vires. In a railway act granting special powers, what is not permitted is prohibited. *Att.-Gen.* v. *G. E. Ry.*, 49 L. J., Ch. 545; 5 App. Cas. 473; 42 L. T. 810; 28 W. R. 769—H. L. (E.)

There is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of avoiding competition. Though a public company constituted for a particular purpose will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, the court will not interfere with a traffic agreement between two lines of railway to divide the nett earnings in certain definite proportions. *Hare* v. *L. & N. W. Ry.*, 2 John. & H. 80; 30 L. J., Ch. 817; 7 Jur. (N.S.) 1145.

A railway company is bound to apply all its moneys and property for the purposes directed and provided for by the act of parliament, and not for any other purposes whatever. Any application of or dealing with the capital funds or money, in any manner not distinctly authorised by the act, is illegal; and where directors, for purposes not authorised by the act, are proceeding to involve the company or shareholders in liabilities to which they never consented, relief may and ought to be given in this court. In such a case one shareholder may sue on behalf, &c. *Salomons* v. *Laing*, 12 Beav. 339; 6 Railw. Cas. 289, 303; 19 L. J., Ch. 225; 14 Jur. 279, 471.

Promotion of Bill.]—Although it is competent to directors of every railway company, on complying with the Wharncliffe Order, to apply to parliament for an extended line, or for any other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the company, and from issuing new shares, purporting to be shares in the company, except for the purposes and under the powers of existing acts. *Vance* v. *East Lancashire Ry.*, 3 Kay & J. 50.

The majority of shareholders in a company incorporated by act of parliament, approved at a meeting of a contract to sell the concern to F., who was one of the committee of management, and passed a resolution that the contract should be confirmed by a special act, and that if the act should not be passed the expenses of promoting the bill and of the agreement should be partly borne by the company. At a Wharncliffe meeting subsequently held, a resolution was passed by a majority of more than thirty to one, authorising the presenting by the company of a bill in parliament to enable it to dispose of the concern. One of the dissentients at the Wharncliffe meeting moved to restrain the company from carrying out the agreement, and from presenting the proposed bill in parliament, and from applying any part of its funds towards its promotion. On the company undertaking not to apply any of its funds towards promoting the bill, the court refused the motion. *Mathias* v. *Wilts and Berks Canal Navigation Co.*, 34 L. T. 346.

It is not lawful to apply the funds of a company in an application to parliament for powers to extend the business of the company beyond the objects for which it was constituted, and the court will interfere, by injunction, at the suit of a shareholder, to restrain any such application. *Simpson* v. *Denison*, 10 Hare, 51; 16 Jur. 828.

The same principles which regulate the rights of parties in ordinary partnerships are applicable in determining the duties of the managing bodies in joint stock companies, as between them and members of such companies. *Ib.*

Railway—River Navigation.] — A railway communicated with a river, upon the banks of which the company was empowered to erect wharves, &c., and take tolls. The navigation of the river having become deteriorated, the company was about to support a bill for improving it. An injunction was granted to restrain the application of the funds of the company towards that object. *Munt* v. *Shrewsbury and Chester Ry.*, 13 Beav. 1; 20 L. J., Ch. 169; 15 Jur. 26.

—— **Other Railway Undertakings.**] — It is improper and wrong for railway companies to embark their funds in other railway undertakings; and they have no right to engage or pledge their funds or entangle their affairs, in unauthorised transactions, upon the speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done. *Logan* v. *Courtown (Earl)*, 13 Beav. 22; 20 L. J., Ch. 347.

A railway company, incorporated, by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. A company, incorporated by an act of parliament for making and maintaining a railway and works, was empowered to raise money to be applied in discharging the costs incurred in obtaining the act, and the remainder towards making and maintaining the railway and works; and the profits of the company, after defraying the expenses of making, maintaining and working the railway, were to be divided amongst the proprietors. The company afterwards covenanted

with a railway company, to take a lease of their line, and to find the capital necessary for the construction of the branches and works authorised to be constructed by bills then pending in parliament, and to pay the costs of preparing and promoting such bills :—Held, that the railway company having a limited authority only, and being a corporation only for the purpose of making and maintaining the railway sanctioned by the act, could only apply its funds for the purposes provided by the statute ; and that such an agreement was illegal, though the object of it might have been the increase of the profit of their railway. *East Anglian Ry.* v. *Eastern Counties Ry.*, 7 Railw. Cas. 150 ; 11 C. B. 775 ; 21 L. J., C. P. 23 ; 16 Jur. 249.

—— **Steam Vessels.**]—The directors of a railway company, for the purpose of increasing the traffic, proposed to guarantee certain profits, and secure the capital of an intended steam-packet company, which was to act in connection with the railway :—Held, that such a transaction was not within their powers, and they were restrained by injunction. *Colman* v. *Eastern Counties Ry.*, 10 Beav. 1 ; 16 L. J., Ch. 73 ; 11 Jur. 74.

A railway company had authority to keep steam-vessels for the purposes of a ferry :—Held, that such vessels, when otherwise unemployed, might be used by the company for excursion trips to the sea. *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry.*, 30 Beav. 40.

A railway company having a branch terminating at Milford Haven, declared upon a contract whereby the defendant undertook to provide a suitable steam-vessel to run between that place and Dublin and Cork, for the conveyance of passengers, goods, &c., in connection with the railway ; and alleged that the defendant provided a vessel which was unseaworthy, and a master who was incompetent, whereby certain pigs and cattle intrusted to them for carriage were damaged and lost. Plea, that the contract was entered into contrary to and in violation of the purposes for which the company was incorporated, and was one which the company could not lawfully enter into, and was void :—Held, that there was no illegality of contract apparent on the face of the declaration, the contract being strictly in furtherance of the object of the company's incorporation ; and that the plea afforded no answer. *South Wales Ry.* v. *Redmond*, 10 C. B. (N.S.) 675 ; 4 L. T. 619 ; 9 W. R. 806.

—— **Canals.**]—By a private act a railway company was authorised to purchase a canal, and was bound to maintain the canal and keep it open for traffic when purchased. By this act it was provided that, as soon as the purchase was completed, the railway company might exercise all the rights, powers and privileges which the canal company might, before the sale, have exercised in relation to the canal under any acts relating to the canal which might be in force at the time of the conveyance. The canal company did not, before the sale, take any steps to adopt the powers of 8 & 9 Vict. c. 42. After the purchase the railway company proceeded, under the 8th section of that act, to take a lease of the tolls of another canal :—Held, that by the purchase of the canal the railway company had become a canal company, so as to be entitled to avail itself of the powers given to canal companies by 8 & 9 Vict. c. 42 ; and that the taking of such lease was not ultra vires. *Rogers* v. *Oxford, Worcester and Wolverhampton Ry.*, 2 De G. & J. 662.

Injunction refused—Delay.]—An incorporated railway company having powers within a fixed time to complete a branch line, commenced, but afterwards, by a vote of the proprietary, suspended for a time the works. Before its powers expired, the works, on a resolution of the shareholders, were resumed, and actively prosecuted. After a lapse of nearly a year, the powers having then expired, and the branch railway still being unfinished, two shareholders, on behalf of themselves and the other shareholders, filed a bill to restrain the further prosecution of the works. On a motion for an injunction :—Held, that the plaintiffs having been aware of the intention to construct the line, and not having applied with diligence, the court would not grant the injunction. *Effooks* v. *L. & S. W. Ry.*, 1 Sm. & G. 142 ; 17 Jur. 365 ; 1 W. R. 175.

A shareholder who had acquiesced in the recommencement of the works, afterwards sold his shares to a purchaser, who objected to the further prosecution of the works :—Held, that the purchaser was bound by the acquiescence of his vendor. *Ib.*

See also COMPANY.

Unauthorised Trading.]—A railway company will be restrained, at the information of a relator, from carrying on a trade not authorised by the act constituting the company. *Att.-Gen.* v. *G. N. Ry.*, 29 L. J., Ch. 794 ; 6 Jur. (N.S.) 1006 ; 8 W. R. 556.

The information may be filed without the certificate of the board of trade, mentioned in 7 & 8 Vict. c. 85. *Ib.*

See also COMPANY.

n. User of Land, Extent of.

Specified Purpose.]—Where purchases of land are made under the compulsory powers of an act of parliament, the purchasers on the one hand, and the vendors on the other, have a right to confine the exercise of the ownership to the specified purpose. *Bostock* v. *North Staffordshire Ry.*, 3 Sm. & G. 283 ; 5 De G. & Sm. 584 ; 25 L. J., Ch. 325 ; 2 Jur. (N.S.) 248 ; 4 W. R. 336.

The rights of ownership in fee conferred on public companies by act of parliament are, by the settled doctrine of the court, restricted and qualified by the terms of the legislative contract ; and therefore where in an act of parliament it was said in express words that the fee-simple and inheritance of property were to vest in a company "to and for the use of navigation, but to or for no other use or purpose whatever" :—Held, that the words were inserted for the benefit of the vendors of the land, and the company was restrained from using the land for any purpose not authorised by the act. *Ib.*

A provision in an act for making a railway, that certain land to be purchased by the railway company should be appropriated to, and used solely for, the purposes of the railway and the buildings connected therewith (except such part as might be required by the board of ordnance, or for widening approaches to the station), and should not be used or employed for erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted) by which any nuisance might be created, or the other property of the vendors in any way damaged :—Held, to refer to the use of the land, or the mode in which it was to be laid

out or applied, and not to refer specifically to the use of the buildings which might be erected upon the land; that "buildings connected therewith" did not mean buildings only connected locally with the railway, but meant buildings especially applicable to the uses of that particular railway, and that the construction of the clause was not to be governed by considerations of what would or would not be connected with other and different railways; that the building erected by the company being used as a custom-house for the examination of the luggage of passengers landing from the Continent, many of whom travelled by the railway, such user was for the purpose connected with the railway, and that, the use being to some extent for such purpose, it did not cease to be so, within the meaning of the provision, merely because all the purposes for which the building was used were not purposes connected with the railway. *Dover Harbour (Wardens)* v. *S. E. Ry.*, 9 Hare, 489; 21 L. J., Ch. 886.

Where there is a parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, and a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser, who becomes the owner in fee, shall not be extended beyond its necessary limits. *Ib.*

A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railway. *Norton* v. *L. & N. W. Ry.*, 47 L. J., Ch. 859; 9 Ch. D. 623; 39 L. T. 25. Affirmed 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173—C. A.

—— **Rights of Adjoining Owner—Injunction.**]—A railway company who had acquired land compulsorily, on part of which their railway was subsequently built on arches, such arches being let on very short terms to tenants, will not be restrained by injunction from using the arches and the land necessarily occupied therewith, or from permitting such arches and land to be used in a manner not incompatible with the purposes of their undertaking (not amounting to a nuisance), at the instance of an adjoining owner who complained that he had been inconvenienced by such user. *Foster* v. *L. C. & D. Ry.*, 64 L. J., Q. B. 65; [1895] 1 Q. B. 711; 14 R. 27; 71 L. T. 855; 43 W. R. 116—C. A.

Where part of an estate, which is subsequently developed as a building estate, has been compulsorily taken by a railway company for the purposes of their undertaking, the temporary letting of a small portion of the lands (not required for the immediate purposes of the railway) for the erection of a chapel is not an unreasonable user of the land, nor inconsistent with the purposes for which the railway company has been formed. And this would be the case even if it were shewn that some damage was likely to accrue to the owners of the building estate from such a user. *Onslow* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 64 L. J., Ch. 355; 72 L. T. 256.

C. MANAGEMENT OF BUSINESS.

1. *Opening Line*, 1474.
2. *User of Railway by the Public*, 1476.
3. *Rolling Stock*, 1478.
4. *Lease of Line*, 1482.
5. *Running Powers*, 1486.
6. *Working Agreements*, 1488.
7. *Amalgamation*, 1499.
8. *Trains*, 1502.
9. *Bookstalls*, 1504.
10. *Refreshment Rooms*, 1505.
11. *Clearing House*, 1506.

1. OPENING LINE.

Power of Board of Trade.]—When an inspector of the board of trade reports to the board of trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict. c. 55, s. 6, are satisfied. The board of trade has exclusive jurisdiction in the matter, and the court will not enter into the question whether the reasons given by the inspector do not shew on the face of the report that he has come to a wrong conclusion. *Att.-Gen.* v. *G. W. Ry.*, 46 L. J., Ch. 192; 4 Ch. D. 735; 35 L. T. 921; 25 W. R. 330—C. A.

—— **Incompleteness.**]—The term "incompleteness" in s. 6 of 5 & 6 Vict. c. 55, includes defectiveness or imperfection generally, and such incompleteness may arise from the state of the works upon a neighbouring line with which the railway in question is connected. *Ib.*

Previous Notice to Board of Trade, when Necessary.]—Under statutory powers junctions were made between the main line of a railway company and two branches of a railway on opposite sides of the main line, so that trains coming from one of the branch lines ran for some distance along the main line and then passed on to the other branch line. Some years afterwards the company laid down a line of railway parallel to their main line for about a mile and substituted for one of the original junctions a new junction, nearly opposite to the other original junction, so as to form between the two branch lines a level crossing over the main line. The company also made two new stations on this new line:—Held, that the new line was a railway or a portion of a railway which, under 5 & 6 Vict. c. 55, s. 4, could not be opened without previous notice to the Board of Trade. *Att.-Gen.* v. *G. W. Ry.*, L. R. 7 Ch. 767.

Opened for Public Traffic.]—When a petition was presented by a judgment creditor for the appointment of a receiver of the tolls of a railway company, and it appeared that the line had not been used by the company, although a portion of it had been occupied, and maintained by another company, without payment of compensation:—Held, that the railway had not been opened for public traffic within the meaning of its act. *Beddgelert Ry., In re*, 19 W. R. 427.

Opening of Part Sanctioned.]—A railway company, being empowered by their act to make a double line of mixed gauge lines, opened the down line of rails on the mixed gauge with the sanction of the board of trade. Afterwards they gave notice to the board of trade that the up line was ready to be opened, and the board of trade appointed an inspector, who reported that the up line was not safe by reason of the incompleteness of the permanent way. The board accordingly gave notice to the company, under the 5 & 6 Vict. c. 55, to postpone the opening of

the line for a month. The company disregarded the notice and opened the line. The attorney-general filed an information to restrain the company from using the up line without the sanction of the board of trade:—Held, on a motion for an injunction, first, that the board of trade were not functi officio by reason of having sanctioned the opening of the down line; secondly, that the court of chancery will interfere at the instance of the attorney-general to restrain an act which has been declared by a competent authority to be illegal, without considering the grounds on which the act has been declared illegal; thirdly, that in the present case the court would grant an injunction without looking at the grounds on which the inspector had given his certificate. *Att.-Gen.* v. *Oxford, Worcester, and Wolverhampton Ry.*, 2 W. R. 330.

Opening of Part—Payment.]—It being proposed to form a railway from A., through N. and G., to B., and it being known that the line when open from A. to N. would compete with and injure the N. canal, and when open from N. to G. would in like manner compete with and injure the G. canal, a special act of parliament was obtained, which authorised the formation of the whole railway from A. to B., and which stated that it was intended that the canals and railway should be worked in connection, and that the canal companies should be incorporated with the railway company, and also provided that the railway company should be liable to pay to the canal companies a certain price per share for all their shares "from and immediately after the opening of the railway between A. and G. for public use." The railway was afterwards made and opened for a portion only of the space from A. to G., namely, from N. to G.:—Held, that the opening for public use of any portion of the line between A. and G. rendered the railway company liable to pay for the canal shares. *Grantham Canal Co.* v. *Ambergate Ry.*, 21 L. J., Q. B. 322; 15 Jur. 991—Ex. Ch.

Before Construction of Branch and Junctions.]—A declaration stated that, before and after the passing of an act for making a railway from Chester to Birkenhead, the plaintiff was the owner of a ferry across the Mersey, from Tranmere to Liverpool; and that by the act the company was empowered to make a railway, with all necessary stations, commencing in Chester, and terminating at or near Grange lane, in Birkenhead. The declaration then stated a section of the act, whereby the company was prohibited making a railway from the station at or near Grange lane, in or to communicate with Woodside ferry, until a branch railway should have been made from the main line to Birkenhead and Tranmere ferries, and alleged that the company wrongfully, and for the purpose of evading the act, opened a railway from Grange lane station to and to communicate with the shore of the Mersey between Woodside ferry and Birkenhead ferry, and near Woodside ferry, and conveyed passengers along the same to the Grange lane station, although no branch had been made from the main line to Tranmere ferry, in contempt of the act, and to the plaintiff's damage:—Held, first, that the declaration was bad, inasmuch as it did not contain any averment that the company had made a railway to, or to communicate with, Woodside ferry, or anything which amounted in terms to an infringement of the act. *Chamberlaine* v. *Chester and Birkenhead Ry.*, 1 Ex. 370; 18 L. J., Ex. 494.

Held, secondly, that had the declaration contained such an averment, the action might have been maintained without any allegation of special damage, the prohibition being obviously for the special protection of a particular person. *Ib.*

An information was filed praying a declaration that a railway company, constituted for making a principal and a diverging line of railway, was bound to construct the diverging line as well as the principal, and to open the whole for public traffic simultaneously, and for an injunction to prevent it from making one line until another was made, or until the notices to treat were given to the landowners preliminarily to making such other line. A general demurrer to this bill was allowed, the vice-chancellor guarding himself from expressing any opinion as to what he should have done if this had been a bill by a shareholder, or an information and bill, instead of an information only. *Att.-Gen.* v. *Birmingham and Oxford Junction Ry.*, 3 Macn. & G. 453; 16 Jur. 113. Affirming 4 De G. & Sm. 490.

If the public interests represented by the attorney-general were entitled to have the second line of railway made, they should proceed by mandamus. *Ib.*

The defendants were, by act of parliament, authorised to make a short line uniting their main line with the plaintiffs' line; but the defendants were prohibited from opening their main line until the junction should be completed. In default of the defendants making the junction within a specified time, the plaintiffs were author-ised to make it. The defendants proposed opening their main line before the completion of the junction:—Held, that the plaintiffs had a sufficient interest to entitle them to an injunction to prevent this proceeding, and that it was not necessary to resort to an information for that purpose, and an injunction was granted, although the delay in opening the main line might be prejudicial to the public. *Cromford and High Peak Ry.* v. *Stockport, Disley, and Whaley Bridge Ry.*, 24 Beav. 74; 3 Jur. (N.S.) 628; 5 W. R. 636.

Held, on appeal, that it is not imperative on the court to enforce by interlocutory injunction a statutory prohibition, and where a railway company was about to violate a clause in its act expressly prohibiting the opening of a main line until a junction line was opened, but which appeared to have been introduced merely for the purpose of obliging the company to complete speedily the junction line, the court, on an undertaking being given to complete the junction line, with all practicable diligence, suspended an interlocutory injunction granted by the court below to restrain the opening of the main line. *S. C.*, 1 De G. & J. 326.

2. User of Railway by the Public.

Court cannot compel Use of Signals.]—A railway company having refused to allow a colliery company to run engines and carriages over part of its line under the powers of the Railways Clauses Act, 1845, s. 92, the colliery company filed a bill for an injunction to restrain the railway company from preventing its exercise of the right:—Held, that inasmuch as the colliery company could not run over the line unless the points and signals on the line were properly worked by the railway company, the court could not grant

relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the court. *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry.*, 43 L. J., Ch. 575; L. R. 9 Ch. 331; 30 L. T. 208. Affirming 22 W. R. 182. See *S. C.*, 26 L. T. 357; 20 W. R. 460.

The absence of a proper method of enforcing the provisions of s. 92 is no reason for extending the jurisdiction of the court. *Ib.*

Motive Power.]—Upon the construction of a contract between an individual and a railway company:—Held, that nothing had taken place which could give him a right to use horses, as the moving power, against the will and consent of the company. *Thorne* v. *Taw Vale Ry.*, 13 Beav. 10.

A plaintiff sued as one of the public to restrain a railway company from closing it:—Held, that such a suit could not be maintained. *Ib.*

The court will enforce, by injunction, the provision of s. 115 of the Railways Clauses Act, 1845, that no engine or other description of moving power shall be brought or used upon a railway unless the same shall have been approved by the railway company as therein mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the act; and notwithstanding also that to enforce such right of inspection would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over its line of a competing company. *Midland Ry.* v. *Ambergate, Nottingham, and Boston Ry.*, 10 Hare, 359; 1 W. R. 162.

Approval, under s. 115, of the engines to be used, is a condition precedent to the user of the line under s. 92. *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry.*, supra.

A railway company has a common law right of distress damage feasant on an engine incumbering the railway, if there is no certificate of approval. *Ambergate Ry.* v. *Midland Ry.*, 2 El. & Bl. 793; 23 L. J., Q. B. 17; 18 Jur. 243.

Whether inclusive of Power to use Stations.]—Although the expression "the railway" is, by the interpretation clause of the Railways Clauses Act, s. 3, defined to mean "the railway and the works by the special act authorised to be constructed," and these words have been construed to include a station, yet it is doubtful whether the power reserved to the public by s. 92 to use "the railway" with engines and carriages, upon payment of tolls which are calculated at a certain rate per mile, includes the power of using also the stations of the company. *Midland Ry.* v. *Ambergate, Nottingham, and Boston Ry.*, 10 Hare, 359; 1 W. R. 162.

Liability of Company for Condition of Foreign Trucks.]—A railway company is compelled to forward foreign traffic from other lines, and they must take due care that trucks belonging to other persons are in such a state as to travel safely. But the company cannot stop all foreign trucks and empty them for the purpose of a minute examination; to do so would practically destroy the right given by statute to other companies of having the traffic forwarded, and give a monopoly to the company itself. There must be some reasonable limit to the amount of examination required, and the substantial question in cases of accident is, whether the mode of examination adopted by the forwarding company was reasonable. *Richardson* v. *G. E. Ry.*, 1 C. P. D. 342; 24 W. R. 907—C. A. Reversing 37 L. T. 248.

Derelict Line — Statute of Limitations.]—A railway company constructed under their statutory powers a railway through certain quays, and one of the clauses of their act provided that the line should be so constructed as not to unnecessarily interfere with or inconvenience the general traffic on the quays or the roads leading therefrom and thereto. After 1875 the railway company never made any use of this line. There was evidence that the public, including the occupiers of the quays, passed over the line as they wished, and a tenant of the owner of the lands compulsorily taken for the construction of the line was in the habit of carting coal and salt, in which he dealt, over the railway:—Held, that no title had been acquired under the Statute of Limitations by the original owner or the occupiers of the quays. *Duffy's Estate, In re*, [1897] 1 Ir. R. 307. Affirmed in C. A.

Station—Right of Access to—Jurisdiction—Railway Commission.]—So long as there is no decision to the contrary by the railway commission, it is within the discretion of the owner or managers of a railway station either to exclude from the station, or to admit upon such conditions as may be thought fit, any person not using or being desirous of using the railway. Any complaint as to want of facilities, undue preference, or other matters, which a member of the public may have to make, must be addressed to the railway commission, and a court of law can give him no remedy. *Perth General Station Committee* v. *Ross*, 66 L. J., P. C. 81; [1897] A. C. 479; 77 L. T. 226—H. L. (Sc.)

The appellants claimed an interdict against the respondent from unlawfully entering their station by his boots or other servant, and particularly from sending his boots in uniform or wearing a badge of the respondent or of the Royal British Hotel, of which he was proprietor:—Held (Lord Morris diss.), that, subject to the terms of any order or regulation to be hereafter made by the railway commission, the respondent had no right by himself or his servants to enter upon or use the appellants' railway station, except with the leave of the appellants or subject to such terms as they might prescribe. *Ib.*

3. Rolling Stock.

Contract to supply, whether ultra vires.]—The doctrine of ultra vires, as explained in *Ashbury Ry. Carriage Co.* v. *Riche* (L. R. 7 H. L. 63), is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the legislature has authorised by an act of parliament ought not (unless expressly prohibited) to be held as ultra vires. *Att.-Gen.* v. *G. E. Ry.*, 49 L. J., Ch. 545; 5 App. Cas. 473; 42 L. T. 810; 28 W. R. 769; 44 J. P. 648—H. L. (E.)

In an act of this kind granting special powers, what is not permitted is prohibited. *Ib.*

Per Lord Watson: The test applied in the *Ashbury Case* to the powers of a joint-stock company (limited) registered under the Companies

Act, 1862, applies with equal force to the case of a railway company incorporated by act of parliament. *Ib.*

An act of parliament authorised a company to make a railway to T. and S. There were two other railway companies which were afterwards combined into one called the Great Eastern Railway Company. This latter company entered into a contract with the T. and S. Company, with which it was in connection in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the Great Eastern Company, and an injunction asked for to restrain it from executing this contract. One of the acts relating to the two companies contained (clause 14) the following provision: "The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway (this was the T. and S. Railway), or any part thereof, and of the railways of the two companies connected therewith (these were the two companies which had been incorporated under the name of the Great Eastern), and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other matters incident to the carrying out the purposes of this act." The 15th clause of the act was in these words: "The directors of the T. and S. Company and the directors of the two companies respectively may (subject to the sanction of the shareholders) enter into any contracts or agreements for effecting all or any of the purposes of this act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto":—Held, that the contract of the Great Eastern Company to supply the T. and S. Company with rolling stock was not ultra vires, but was warranted by the words of these sections of the act. *Ib.*

A railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling stock to a waggon company for 30,000*l.*, at the same time making a contract with the waggon company for the hire of this rolling stock at a rent which would repay the 30,000*l.* and interest in five years. At the same time three of the directors of the railway company guaranteed to the waggon company the payment of the rent. The waggon company brought an action against the sureties and the railway company for rent due:—Held, that the transaction, being bonâ fide and what it purported to be, was not an illegal and void transaction under 7 & 8 Vict. c. 85, s. 19, and 30 & 31 Vict. c. 127, s. 4, by being a cloke for borrowing money. *Yorkshire Ry. Waggon Co.* v. *Maclure*, 51 L. J., Ch. 857; 21 Ch. D. 309; 47 L. T. 290; 30 W. R. 761—C. A.

Held, also, that if the transaction had been a mere device for borrowing money, it would have been illegal. *Ib.*

Rights of Debenture-holders.]—Although the fact of the railway company having a debenture debt could not affect the liability of the railway company on the contract, debenture-holders have some sort of security on the rolling stock for the time being, subject to the right of the railway company to use and otherwise deal with it in the ordinary course of business, but the railway company cannot sell the whole of the rolling stock to pay debts which are subsequent in priority to the debentures. *Ib.*

—— **"Working Expenses"—"Proper Outgoings."**]—A railway company sold its rolling stock to a waggon company for a sum of money, and the waggon company let the rolling stock back to the railway company at a rent, on payment of which for a term the railway company were to become repossessed of the rolling stock, the rent being equal to the purchase-money and interest. The court of appeal decided that the transaction was a bonâ fide sale and rehiring, and not a sham transaction as a cloke for a borrowing. (See *Yorkshire Waggon Co.* v. *Maclure*, supra.) A receiver of the railway company's undertaking having been appointed under s. 4 of the Railways Companies Act, certain moneys which represented rent of some of the rolling stock let by the railway company to another company and proceeds of sale of other rolling stock were paid to the receiver. Debenture-holders who had become such after the date of the above-mentioned agreement of sale and rehiring, and also the waggon company, claimed the money:—Held, that, although by s. 23 of the act "all money borrowed . . . by a company on . . . debenture stock . . . shall have priority . . . over all claims on account of any debts . . . or engagements" (except as in the section specified), that section was subject to s. 4, by which moneys received by a receiver under the act were not payable to creditors until after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, and that the rent of the rolling stock was a "working expense," and a "proper outgoing," and entitled to priority over the claim of the debenture-holders. *Cornwall Minerals Ry., In re*, 48 L. T. 41—C. A.

Exemption from Distress.] — A locomotive engine, which was hired by a railway contractor from the respondents, was seized under a distress for rent due from the contractor to the appellants. At the time the engine was seized it was standing in a shed which the contractor rented from the appellant, and which was connected by a siding with the railway:—Held, that the engine was rolling stock in a "work" within the meaning of s. 3 of the Railway Rolling Stock Protection Act, 1872, and was therefore not liable to distress for rent payable by the tenant of the work. The "work" in s. 3 means any establishment or place, used for the purpose of trade or manufacture, which is connected with a line of railway by sidings along which the rolling stock may be propelled. *Easton Estate Co.* v. *Western Waggon Co.*, 54 L. T. 735; 50 J. P. 790.

By s. 4 of the Railway Companies Act, 1867, the rolling stock of a railway company is protected from distress. *Eyton* v. *Denbigh, Ruthin, and Corwen Ry.*, 38 L. J., Ch. 74.

—— **Though Railway be closed.**]—The protection from seizure in execution by a judgment creditor, given by the Railway Companies Act, 1867, s. 4, to the rolling stock and plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic. *Midland Waggon Co.* v.

Potteries Ry., 50 L. J., Q. B. 6; 6 Q. B. D. 36; 43 L. T. 511; 29 W. R. 78.

Execution against — Railway ancillary to Docks.]—The protection against seizure afforded by the Railway Companies Act, 1867, ss. 3, 4, applies to the railway plant of every company constituted by a statute for the purpose of constructing or working a railway, even although the railway is merely a subordinate and ancillary part of the undertaking authorised by the statute. By two local statutes a company was authorised to construct a wet dock, a lock forming an entrance to the dock, and two short railways, each about half a mile long, to connect the dock with other railways. The plaintiffs had lent money to the company upon mortgage-debentures. The defendants were creditors of the company, and having obtained judgment, seized in execution certain railway plant belonging to it. The plaintiffs having brought an action for an injunction to prevent the defendants from realising their execution:—Held, that the dock company was a "company" within the Railway Companies Act, 1867, s. 3, and that the railway plant belonging to it was protected from seizure by s. 4. *G. N. Ry.* v. *Tahourdin*, 53 L. J., Q. B. 69; 13 Q. B. D. 320; 50 L. T. 186; 32 W. R. 559—C. A.

—— **Agreement between Companies—Statutory Obligation—"Action on a Contract."**]—Sect. 4 of the Railway Companies Act, 1867, prohibits the issue of execution against the rolling stock and other chattels of a railway company in two classes of cases—namely, first, where the judgment is recovered in an action on a contract entered into after the passing of the act (August 20, 1867); and, secondly, where the judgment is recovered in an action not on a contract commenced after the passing of the act. Under the terms "action on a contract" and "action not on a contract," as used in s. 4, every kind of action is included. Where three railway companies entered into an arrangement in 1861, which was ultra vires, but was followed and sanctioned by a private act of parliament in 1862, empowering one of the companies to construct and maintain certain works, and in respect thereof to receive certain payments, and imposing on the other companies an obligation to make such payments to be recoverable by action, an action to enforce the liability is not an "action on a contract" within the meaning of s. 4 of the act of 1867, but an action on a statute, and consequently leave to issue execution against the rolling stock and other chattels of the company against which judgment has been recovered will not be given. *Rothes (Countess)* v. *Kirkcaldy Waterworks Commissioners* (7 App. Cas. 694) discussed and distinguished. *Manchester and Milford Ry., In re*, 66 L. J., Ch. 139; [1897] 1 Ch. 276; 75 L. T. 416; 45 W. R. 331.

Valuation—Stock taken over—Working Railway.]—By a contract under seal between a railway company and J. it was agreed that the rolling stock of the company should be valued and handed over to J., who was to work the railway at certain mileage rates to be paid monthly, subject to a deduction by way of remuneration for the use of the stock, and also to a deduction on the value of the stock, as a "depreciation fund." Valuations of the stock were made at the commencement and during the continuance of the contract, on the assumption that the "depreciation fund" was merely a "guarantee fund" in the hands of the company, and was not to belong to them eventually, save so far as it was necessary to meet actual depreciation. On the faith of the depreciation fund being a guarantee fund only, J. made considerable expenditure, which diminished or prevented the depreciation of the rolling stock. Upon the determination of the contract, J. brought an action at law against the company, in which it was determined that the depreciation fund was not a guarantee fund, but belonged to the company in all events. It was held by the Lord Chancellor of Ireland, but overruled on appeal, that an equity had arisen from the dealings between the parties subsequently to the contract, and that J. was not precluded by the result of the action from obtaining relief in equity. The Lord Chancellor was of a different opinion as to the rule of equity, and Lord Wensleydale as to the facts assumed by the Lord Chancellor of Ireland, as the ground of the equity on which he decided. Per the Lord Chancellor: The fact that a person has acted upon a mistaken view of his right under a contract, does not entitle him to relief in equity or at law. *Midland Great Western Ry.* v. *Kinder*, 4 Jur. (N.S.) 643; 6 W. R. 510.

4. Lease of Line.

Effect of—New Rights acquired by Lessor.]—In 1846 the Reading Company proposed to make a railway meeting the South Eastern and the South Western lines and another railway. Part of the line proposed to be made ran so nearly in the same direction with part of a branch line proposed to be made by the plaintiffs, that it was proposed that the Reading Company should, for that space, adopt the line to be made by the plaintiffs. The Reading Company and the plaintiffs obtained acts of parliament in 1846, which came into operation on the same day. By s. 44 of the Reading Act, after reciting that a bill was then pending in parliament for enabling the plaintiffs' company to make the portion of the line, and that it was thereby intended that the Reading Company should have the use of it for the purposes of their traffic, it was enacted, that, if the plaintiffs' company did not complete the portion of the line, the Reading Company might make it; and they were empowered to lease their railway to the defendants' company, for such term and upon such conditions as should be agreed upon between the two companies. By the plaintiffs' company's act, after reciting that a bill was then pending in parliament for making the Reading Railway, it was enacted that, in case the bill should pass into a law, the Reading Company might use the portion of the line, and the stations, warehouses, works, and conveniences belonging thereto, subject to such reasonable terms as should be agreed upon between the plaintiffs' company and the Reading Company. By 8 & 9 Vict. c. 20, s. 113, which was incorporated into these special acts, in cases where a railway is authorised to lease its line, or any portion of it, such lease shall entitle the lessees to enjoy all the powers and privileges granted to and enjoyed by their lessors. In 1847 an agreement was entered into between the Reading Company and the plaintiffs, to the effect that the Reading Company should have the right in perpetuity of using, for the purposes of their

traffic, the above-mentioned portion of railway, upon certain terms. In 1850 the Reading Company leased their line, with all their powers, privileges, and all the benefit and advantage to be derived from the agreement of 1847, to the defendants for 1,000 years, subject to the obligations and liabilities of the company:—Held, that, by virtue of the special acts of parliament, the 8 & 9 Vict. c. 20, incorporated therewith, and the lease of 1850, the agreement of 1847 was binding upon the plaintiffs and defendants; and that the defendants were entitled, as against the plaintiffs, to stand in respect of the agreement, in the situation of the Reading Company. *L. & S. W. Ry.* v. *S. E. Ry.*, 8 Ex. 584; 22 L. J., Ex. 193—Ex. Ch.

Construction of—Passenger Traffic.]—The plaintiffs had constructed a railway which joined the defendants' railway and the Great Western; and by their act, if they abandoned any part of the railway, or if after its completion it ceased to be used for three years, the land purchased was to revert to the owners of the adjoining lands. An agreement was entered into between the plaintiffs and the Great Western Company, by which the latter covenanted to construct a station at the point of junction of the two railways, and to stop their trains at this station. An act was obtained, which empowered the plaintiffs to lease to the defendants their railways, stations, &c., and all their rights, powers and privileges in relation thereto. A lease was accordingly executed, in which there was a covenant that the defendants should "efficiently work and repair the railway and works demised, and indemnify the plaintiffs against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of not working, or in any manner connected with the working of the railway and works":—Held, first, that the defendants were not bound to work the demised railway for passenger traffic. *West London Ry.* v. *L. & N. W. Ry.*, 11 C. B. 327; 7 Railw. Cas. 477; 22 L. J., C. P. 117; 17 Jur. 301—Ex. Ch.

Held, secondly, that the defendants were not bound to work for passenger traffic, even if such traffic presented itself. *Ib.*

—— **Stopping Trains at Junction.**]—Held, thirdly, that the rights of the plaintiffs, under the agreement with the Great Western, were vested in the defendants, and that the defendants had power to compel a performance of the covenant to stop trains by the Great Western, that being a covenant running with the estate in plaintiffs' railway. *Ib.*

Held, fourthly, that although the defendants had power to compel the Great Western to stop their trains at the point of junction, they were not bound to exercise that power. *Ib.*

—— **Mode of Working.**]—Held, fifthly, that the defendants were not bound to work the plaintiffs' line in connection with the Great Western, nor with trains on their own line, if they could efficiently work the plaintiffs' line without so doing. *Ib.*

Held, sixthly, that the defendants must not be treated for the purpose of considering their liability under the covenant, as if they were lessees of a separate and independent line, having no control over any other line, but the covenant must be construed with reference to the subject-matter and character of the defendants, the degree of efficient working by the defendants being different and greater than would be required from a company or an individual possessed only of the demised railway. *Ib.*

No Evasion of Agreement before Lease.]—By a deed between the plaintiffs and defendants, two railway companies, it was recited that a portion of a line was common to the plaintiffs and another company, and that a bill had been introduced into parliament to enable the latter company to lease the undertaking to the defendants, and that such bill had been opposed by the plaintiffs, but that they had agreed to withdraw their opposition, on its being mutually agreed between the plaintiffs and defendants that the covenants in the deed after contained should, upon the passing of the bill, be entered into; and it was further recited that the bill had passed; whereupon it was covenanted and agreed between the plaintiffs and defendants, that the companies working on the common line should, during the lease authorised by the bill, keep accounts of traffic thereon, and should during the lease divide the profits earned thereon; and that during the lease the defendants and the other company should not in any way carry passengers, cattle, &c., between certain points, so as to compete for any traffic which properly belonged to the plaintiffs; and there was a covenant between the plaintiffs and defendants that the agreement come to between them should not in any way be evaded or eluded by the defendants, and that no arrangement, scheme, device, or contrivance should be resorted to or attempted by them for that purpose:—Held, that the last-mentioned covenant was operative upon the passing of the bill, before the granting of the lease; that a breach by which it was averred that the defendants had evaded the agreement, was good, although there was no averment that the lease had been granted; and that the agreement to withdraw their opposition to the bill in parliament was no fraud upon parliament, so as to make the agreement between the companies invalid. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 17 Q. B. 652; 21 L. J., Q. B. 89; 16 Jur. 311.

Agreement for Lease — Validity.] — The Brighton and South Western Railway Companies jointly became purchasers, under an act obtained in 1847, of a line of railway called the Portsmouth Extension Railway, including the station known as the Landport station. A section enacted, that each of the two companies might at all times thereafter use the joint line for the purposes of conveying passengers, animals, and things upon the same, and for all such other purposes as should be necessary for the traffic or business thereon of the respective companies. There were provisions for the tolls to be demanded, and for enabling the companies to enter into a contract between themselves for the purpose of ascertaining the profits of the joint line and the division of such profits. The South Western and the Portsmouth Companies entered into an agreement in 1858, by which they agreed to apply to parliament in the then ensuing session for an act to enable the latter company to lease their line to the former company for the term of 999 years, at a rental of 18,000*l.* a year; and, if unsuccessful in obtaining the act, that they should repeat their efforts in 1860, and that in the meantime the South Western should work

the Portsmouth line and pay the rent. By this arrangement the traffic of the South Western was greatly increased:—Held, that the agreement for the lease between the two companies was illegal, being unauthorised by parliament; and that the South Western was not entitled to use the joint station for passengers or goods conveyed under such agreement. *L. B. & S. C. Ry.* v. *L. & S. W. Ry.*, 4 De G. & J. 362; 28 L. J., Ch. 521; 5 Jur. (N.S.) 801; 7 W. R. 591.

A railway company entered into an agreement to lease its line to another company. The agreement contained provisions which were legal, and others which were ultra vires, but an application was to be made to parliament for power to carry out such provisions as should be ultra vires:—Held, that as the agreement provided for a number of things to be done, which were all for the purpose of accomplishing an object that was ultra vires, the parties had no right by virtue of that agreement, until they had obtained the authority of parliament to do even those acts which, independently of the agreement, they did not require the authority of parliament to do. The court, in granting an injunction to this extent, refused to restrain two directors, appointed under the agreement, from acting on the ground that the shareholders had power to remove them, and that their removal might be detrimental to the business of the company. *Hattersley* v. *Shelburne (Earl)*, 31 L. J., Ch. 873; 10 W. R. 881.

An act of parliament empowered one railway company to grant, and another company to accept, a lease of railway upon such terms as should be agreed upon, provided that the power to lease should not arise till the board of trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised, and applied for the purposes of its acts: and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting:—Held, that no lease, or binding agreement for a lease, could be made before the certificate had been obtained. *Kent Coast Ry.* v. *L. C. & D. Ry.*, L. R. 3 Ch. 656; 19 L. T. 174; 16 W. R. 1027.

—— **Ratification by reference in Act.**]—Heads of agreement for a lease were sanctioned by majorities of three-fifths at meetings of the two companies without any certificate of the board of trade being obtained, and were acted upon for several years, but no formal lease, or agreement for a lease, was ever executed. The heads of agreement were also invalid as providing for payment of the rent out of profits not so applicable:—Held, that the arrangement was not ratified by references to it in subsequent local and personal acts of parliament not expressing any direct intention to confirm it. *Ib.*

—— **Specific Performance.**]—Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or is not legally valid, equity will not aid in enforcing it by a decree for specific performance. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 6 H. L. Cas. 113; 26 L. J., Ch. 482; 3 Jur. (N.S.) 775.

A private act of parliament authorised one railway company to accept a lease of another railway; the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed during the continuance of such lease. No lease within the provisions of the act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the companies:—Held, that equity could not enforce it by a decree for specific performance. *Ib.*

An act of parliament recited three other acts, one only of which had relation to an agreement entered into between the plaintiffs and defendants. By the 1st section, on the completion of the works of the three lines of railways, by the recited acts authorised to be made, so as to be opened for public traffic, or at such other period as might be agreed upon, the S. U. R. Co. were empowered to grant to the L. & N. W. R. Co. a lease in perpetuity of the undertaking. By the 11th section of the same act, it was enacted, that as each of the lines of railway should be completed, the same should be worked and used by the L. & N. W. R. Co., and for the purposes of such working, the L. & N. W. R. Co. were to exercise the powers before given by the act to the S. U. R. Co. in relation to every such completed railway. Other sections of the act spoke of the "lease of the said railways," and the "making of such lease":—Held, that according to the true construction of the act, there was no postponement of the rights of the parties to the benefits of the provisions of the lease until the whole of the three lines had been completed. *S. C.*, 2 Macn. & G. 324; 2 H. & Tw. 257; 20 L. J., Ch. 90; 14 Jur. 921, 1125.

5. Running Powers.

Right dependent on Rules and Regulations.]—A right to run over a line of railway cannot be claimed independently of the rules and regulations which, by act of parliament, the directors are empowered to make for the management of the line. *Rhymney Ry.* v. *Taff Vale Ry.*, 29 Beav. 153; 30 L. J., Ch. 482; 7 Jur. (N.S.) 202; 4 L. T. 227; 9 W. R. 222. Affirmed 4 L. T. 534; 9 W. R. 362—L.C.

Rules and Regulations — Reasonableness — Enforcement.]—Parties, whose right to use a railway is secured by act of parliament, cannot insist upon their right, and at the same time contend that the rules and regulations made for the security of the line, the passengers, and the traffic, are unreasonable, unnecessary, and inapplicable to their particular traffic. *Ib.*

Where a railway company, over whose line another railway company has running powers, is empowered to make regulations as to the construction of the carriages to be used on the railway, the onus lies upon the company having the running powers to shew that the regulations are unreasonable and unnecessary. *Ib.*

The fact of the regulations having been wholly or in part relaxed in the past is no reason for the court to interfere to restrain them from being strictly enforced in the future. *Ib.*

Joint Station.]—A railway, associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it; and an agreement to amalgamate as from a time past may possibly in equity amount to amalgamation, but an agreement to do so at a

future period will not until that period arrives. *Shrewsbury and Birmingham Ry.* v. *Stour Valley Ry.*, 2 De G. M. & G. 866.

Pending the progress of a bill through parliament, authorising the S. V. Company to lease its line to the N. W. Company, the bill was opposed by the S. B. Company, and, upon a compromise, a clause was inserted, securing to the S. B. Company the use of part of the land and the joint use of a station, subject to the cesser of these rights in the event of the S. B. Railway Company being leased to or amalgamated with a fourth company, viz., the G. W., who were rivals to the N. W. Company. At this time the S. B. Company was under no engagements to the G. W. Company. Subsequently, however, those two companies entered into agreements, giving facilities and preference to each other's traffic, and agreed to amalgamate at a future time, if the sanction of parliament could be obtained:—Held, that this was not such a change of circumstances produced by the conduct of the S. B. Company as to exclude it from equitable relief by injunction for the enforcement of the right of user conferred on it by the act. *Ib.*

The court may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management; but such interference is not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver, if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the court will withhold its interposition until the remedy thus provided has been resorted to. *Ib.*

Three railway companies, under an act of parliament, being entitled to the joint use of a station, one of them, as it was alleged by one of the others, unfairly used the station to the detriment of such other company, which filed a bill to restrain the use of the station by such other company, except in accordance with the act. A general demurrer was put in to the bill, on the ground chiefly that a committee of the three companies was, under the act, the proper tribunal, and it was overruled. *Mid-Wales Ry.* v. *Cambrian Ry.*, 21 L. T. 16.

Joint Line.]—The Brighton Railway Company and the South Western Railway Company jointly became purchasers, under an act obtained in 1847, of a line of railway called the Portsmouth Extension Railway, including the station known as the Landport station. The 13th section enacted "that each of the two companies might at all times thereafter use the joint line for the purposes of conveying passengers, animals, and things upon the same, and for all such other purposes as should be necessary for the traffic or business thereon of the respective companies." There were provisions for the tolls to be demanded, and for enabling the companies to enter into a contract between themselves for the purpose of ascertaining the profits of the joint line, and the division of such profits. The South Western and the Portsmouth Companies entered into an agreement in 1858, by which they agreed to apply to parliament in the then ensuing session for an act to enable the latter company to lease its line to the former company for the term of 999 years, at a rental of 18,000*l.* a year; and, if unsuccessful in obtaining the act, that they should repeat their efforts in 1860, and that in the meantime the South Western Company should work the Portsmouth line and pay the rent. By this arrangement the traffic on the South Western Company was greatly increased. On a bill filed by the Brighton Company to restrain the other companies from using the joint station for the traffic coming from the Portsmouth line, and for an account:—Held, that the act of 1847 did not create a joint tenancy carrying with it the right of using for every kind of traffic a station appurtenant to the joint line, and that the South Western had no right to use it except for what was properly traffic of that company. *L. B. & S. C. Ry.* v. *L. & S. W. Ry.*, 4 De G. & J. 362; 28 L. J., Ch. 521; 5 Jur. (N.S.) 801; 7 W. R. 591.

Payment for Accommodation, Conveniences, and Facilities.]—A special act provided that the H. company should afford to the G. company all needful accommodations, conveniences, and facilities at a station of the H. company, and provided for payment in respect of the accommodation and conveniences:—Held, that the forwarding of through traffic and the convenient timing, number, and speed of trains were facilities and not accommodation and conveniences for which payment could be demanded, and that the G. company were not liable to pay a proportion of the annual cost of working and other annual charges or interest on the capital expenditure on the station. *Highland Ry.* v. *Great North of Scotland Ry.*, 7 Ry. & Can. Traff. Cas. 90.

Condition Precedent.]—A special act provided that the T. railway should have running powers over the B. railway, and that "any differences which may from time to time arise between the two companies as to the terms and conditions on which the T. railway may exercise such running powers and the tolls, or as to the sufficiency, extent, or cost of sidings, shall be settled by arbitration":—Held, that it was not a condition precedent to exercising running powers that certain differences should be settled by arbitration. *Taff Vale Ry.* v. *Barry Dock*, 7 Ry. & Can. Traff. Cas. 52—C. A.

6. Working Agreements.

Validity of—Generally.]—There is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of avoiding competition. *Hare* v. *L. & N. W. Ry.*, 2 Johns. & H. 80; 30 L. J., Ch. 817; 7 Jur. (N.S.) 1145.

A stipulation not to compete upon parts of the line held to be no such fraud upon the public as rendered the agreement between the companies invalid. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 17 Q. B. 652; 21 L. J., Q. B. 89; 16 Jur. 311.

An agreement between two railway companies, that the one company will not carry traffic over a particular portion of its line:—Held, obiter, not illegal. *Lancaster and Carlisle Ry.* v. *L. & N. W. Ry.*, 2 Kay & J. 293; 25 L. J., Ch. 223; 4 W. R. 220.

Alienation by an incorporated railway company of the tolls to arise from any portion of its line of railway is contrary to public policy as well as ultra vires of the directors of the company. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 22 L. J., Ch. 682; 17 Jur. 845; 1 W. R. 172.

The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. *Midland Ry.* v. *L. & N. W. Ry.*, 35 L. J., Ch. 831; L. R. 2 Eq. 524; 15 L. T. 264; 15 W. R. 34.

Certain railway companies, including the plaintiffs, entered into an agreement by which, having provided that it should relate to and include all traffic of whatever description despatched or carried from either of two specified routes from or to the several places therein mentioned, they stipulated that all through traffic from or to any of those places should be carried and sent by them along and over the said two routes, and the gross profits divided between them in certain proportions; a special clause in the agreement provided that none of the companies, parties thereto, should, by any of the devices there particularised, or by any other means or inducement whatsoever, cause or promote the said traffic to go or pass, so that the same should not be treated as part of the traffic to which the agreement related, and the profits derived therefrom be apportioned accordingly. The plaintiffs subsequently acquired and opened a new route to and from the termini specified in the agreement. Upon the question whether the traffic proceeds of this new route were within the terms of the agreement:—Held, that the agreement only embraced the traffic on the then existing lines, that there was nothing to prevent the formation of a new line by the plaintiffs, and that it was not compulsory upon them to bring into the common fund the proceeds of their new route. *Ib.*

Semble, that the agreement would have been illegal and ultra vires if it had contained an express or implied condition prohibiting any of the companies from making or being party to the making of any new line, except on the terms of the agreement. *Ib.*

—— **Agreement to apply for Powers.**]—An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement. *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Ry.*, 5 De G. & S. 562; 16 Jur. 1035.

—— **Delegation of Statutory Powers.**]—An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by parliament, is an unlawful attempt to effect that which parliament alone can authorise, and is against public policy; and a court of equity will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *G. N. Ry.* v. *Eastern Counties Ry.*, 9 Hare, 306; 7 Railw. Cas. 643; 21 L. J., Ch. 837.

A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice. Quære, whether such an agreement is consistent with public policy. *Johnson* v. *Shrewsbury and Birmingham Ry.*, 3 De G. M. & G. 914; 22 L. J., Ch. 921; 17 Jur. 1015.

An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them nor accepted by the other company, without the authority of parliament. *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Ry.*, 5 De G. & S. 562; 16 Jur. 1035.

A railway company, constituted under an act of parliament, agreed with two other railway companies that the whole concern, without incumbrance when completed, should be worked by those two companies, who should have perfect control and exercise all the rights of the first-mentioned company, and who should find stock and work the concern for twenty-one years:—Held, that the agreement was illegal, as being in violation of the act under which the first-mentioned company was constituted. *Beman* v. *Rufford*, 1 Sim. (N.S.) 550; 20 L. J., Ch. 537; 15 Jur. 914.

An agreement between two companies provided that one company, in the event of their exercising certain running powers, should be at liberty to have their own staff of clerks at the stations on the other company's line, and should carry the local traffic if required to do so:—Held, that this was not a handing over of the management of the one company to the other such as would be contrary to the spirit of the railway acts if done without express parliamentary sanction. *Llanelly Ry.* v. *L. & N. W. Ry.*, 45 L. J., Ch. 539; L. R. 7 H. L. 550; 32 L. T. 575; 23 W. R. 927.

A. company, being owner of a station, entered into agreement with B. company to make a new junction between their respective lines, so that B. company may use such station. C. company, having running powers over A. company's line, subsequently entered into an agreement with B. company for use of B. company's line. An attempt of C. company to go from B. company's line to A. company's line over the junction was resisted on the ground that C.'s agreement with B. was ultra vires and invalid, as being a delegation of statutory powers, and as such against public policy:—Held, that the agreement as stated did not amount to a delegation of statutory powers, nor was it ultra vires. *Midland Ry.* v. *G. W. Ry.*, 42 L. J., Ch. 438; L. R. 8 Ch. 841; 28 L. T. 718; 21 W. R. 657.

—— **Giving Interest in Profits.**]—The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. *Midland Ry.* v. *L. & N. W. Ry.*, 35 L. J., Ch. 831; L. R. 2 Eq. 524; 15 L. T. 264; 15 W. R. 34.

An agreement between two groups of railway companies, being respectively the owners of independent conterminous routes, to divide the profits

of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic, being bonâ fide, is not ultra vires. *Hare* v. *L. & N. W. Ry.*, supra.

An agreement between two railway companies that they shall work together, and that the profits shall be shared, so as to give a certain percentage to each, is beyond the powers of the companies, and illegal. *Charlton* v. *Newcastle and Carlisle Ry.*, 5 Jur. (N.S.) 1096 ; 7 W. R. 731.

A bill in parliament to authorise a railway company to grant a lease in perpetuity to another railway company of certain projected lines was opposed by a third railway company, who withdrew their opposition on an agreement being come to that during the continuance of any lease to be authorised by the act the companies should participate in portions of each other's profits, and that the two former companies should not take traffic on specified portions of their lines :—Held, that the agreement was ultra vires, and ought not to be decreed to be specifically performed. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 4 De G. M. & G. 115 ; 22 L. J., Ch. 682 ; 17 Jur. 845. Affirmed 6 H. L. Cas. 113 ; 26 L. J., Ch. 482 ; 3 Jur. (N.S.) 775.

A stipulation to divide the profits earned upon the common portion of line held to be no such fraud upon the shareholders of either company as rendered the agreement between the companies invalid. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 17 Q. B. 652 ; 21 L. J., Q. B. 89 ; 16 Jur. 311.

Effect of s. 87 of Railways Clauses Act.]—The object of s. 87 of the Railways Clauses Act, 1845, is to enable one railway company to contract for the passing of its trains to the limits of the railway of another company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line, and carrying passengers and goods to and from such stations. But it does not enable one railway company, under colour of passing over the line of another company, to carry the whole of the traffic of the other railway over which it may agree to pass. *Simpson* v. *Denison*, 10 Hare, 51.; 16 Jur. 828.

An agreement by one railway company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other capital, is not an agreement for the payment of a toll within s. 87 of the Railways Clauses Act. *Ib.*

Semble, a toll is a payment for the right of passing along a highway, public or private ; it is a payment connected with the passing over, and should probably be reserved with reference to the number of carriages passing over the line. *Ib.*

A railway company contracted with another for the use of the line of the latter for a term, at graduated tolls, according to the tonnage carried, which were to be a charge on the tolls and dues of the former company. The former company had no express parliamentary power thus to charge its tolls :—Held, that the charge was of too doubtful legality to be enforced by an injunction to restrain the former company from paying a dividend to its shareholders until the sums due upon the agreement were provided for, no case being made out shewing a probability of there being no fund forthcoming to answer the demand at the hearing. *South Yorkshire Ry.* v. *G. N. Ry.*, 3 De G. M. & G. 576; 22 L. J., Ch. 761; 1 W. R. 203.

Semble, that such an agreement is not a contract for the use of a line, nor for any apportionment of tolls within s. 87 of the Railways Clauses Act, 1845. *Ib.*

Heads of a proposed agreement were arranged between the directors of two railway companies, by which one company was to allow the other company, for ninety-nine years, to work the lines, and use the property and plant of the granting company, except certain specified lands and buildings, upon certain terms of allowance for working expenses and charges, and the maintenance for works and ways, the property and plant to be restored on the termination of the agreement, on terms of profitable return to the granting company ; and provision was made for application to parliament for powers, if needful. On a bill by a shareholder in the granting company, on behalf of himself and all the other shareholders in that company except the directors, against that company and the other company :—Held, that such an agreement is not distinguishable on principle from a lease, to grant which, is clearly not within the statutory powers of the granting company, and that s. 87 of the Railways Clauses Act merely gives to one company a limited power to run a portion of its traffic only, when it is necessary for the purposes of its own traffic, over the line of another railway company. *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Ry.*, 5 De G. & Sm. 562 ; 16 Jur. 1035.

A bonâ fide agreement by deed was executed by the plaintiffs and the defendants, two railway companies. The deed provided, first, that the defendants might, for twenty-one years, pass over the railway of the plaintiffs, and have free use of their works and conveniences, with engines and waggons, for the purpose of carrying coal. Secondly, that such passage should be had and made on payment of the tolls, and under the following restrictions and conditions ; that is to say, when the quantity of coal carried over any part of the plaintiff's railways to the defendants' railway, and thence to certain places, should not amount to 125,000 tons in the period of six calendar months, during the term of twenty-one years, then the defendants would pay to the plaintiffs such toll for such passage for such period of six calendar months as would, with any clear profit which might be made by the plaintiffs before the same period after payment of all annual and half-yearly charges for interest and outgoings, and all expenses of management or otherwise, be sufficient to enable the plaintiffs to pay such dividends as might become payable in respect of any guaranteed or preference stock of the plaintiffs already issued or thereafter to be issued with the consent of the defendants, and also a clear net dividend at the rate of 3*l.* per cent. per annum for such period of six calendar months upon the ordinary capital stock for the time being of the plaintiffs ; and when the quantity of coal for any such period of six calendar months should exceed 125,000 tons and not 150,000 tons, such sum as would make up in manner before mentioned the demand upon the preference stock, and 3*l.* 5*s.* per cent. upon the ordinary stock ; and when the quantity of coal during the like period of six calendar months should exceed 150,000 tons and not 175,000 tons, such sum as would make up in like manner the dividend upon the preference stock, and 3*l.* 10*s.* per cent. upon the ordinary stock, and so on progressively up to the carriage of upwards of 400,000 tons during any such period

of six calendar months, in which case the defendants were to pay the plaintiffs such sum as with the clear profits made by plaintiffs during the same period would pay the dividends upon the preference stock, and 6*l.* per cent. upon the ordinary stock. The deed went on to provide with respect to the calculations of the number of tons, and that if the payment made by the defendants for any period of six months once made up 4*l.* 10*s.* per cent. upon the ordinary stock of the plaintiffs, it should never otherwise recede:—Held, that the contract was not ultra vires, but one which the companies were competent to enter into, and valid in law, the payments to be made being tolls within s. 87 of the Railways Clauses Act. *G. N. Ry.* v. *South Yorkshire Ry.*, 9 Ex. 642; 23 L. J., Ex. 186—Ex. Ch.

By an agreement between the directors of two railway companies, the North Western Company was to have running powers over the Llanelly Railway Company's lines, subject to its by-laws; was to be at liberty to have its own staff at its stations, and be allowed a reasonable sum for cartage, clerkage, &c.; the latter company was to be at liberty to call on the North Western Company to carry passengers and goods for the Llanelly Company upon its local lines, and both sets of directors bound themselves to send by each other's lines all traffic not otherwise consigned. Such an agreement appeared to be authorised by s. 87 of the Railways Clauses Act, 1845; and any differences arising between the two companies occasioned by any hardship felt in the working of the agreement, on either side, might be made the subject of arbitration under 22 & 23 Vict. c. 59. *Llanelly Ry.* v. *L. & N. W. Ry.*, 45 L. J. Ch. 539; L. R. 7 H. L. 550; 32 L. T. 575; 23 W. R. 927.

Whether s. 92 of the Railways Clauses Act, 1845, does or does not convert railways into public highways, and whether that section be or be not controlled by s. 87 of the same act, giving powers to companies to enter into agreements as to passing over or along each other's lines, yet when an agreement as to the terms of passing over or along each other's lines has been entered into between railway companies, their rights in respect of such passing depend upon the terms of the agreement, and are no longer governed by the provisions of the Railways Clauses Consolidation Act. *G. N. Ry.* v. *Eastern Counties Ry.*, 9 Hare, 306; 7 Railw. Cas. 643; 21 L. J., Ch. 837.

Construction of Agreement.]—Construction of an agreement between two railway companies, enabling one to pass over and use the railway stations, watering places, and sidings upon and appertaining to the other, and giving the right of access to such parts of the stations and appurtenances as were necessary to the traffic on and over the other, with a covenant to give the same facilities and assistance as its own traffic of the like character should receive. *Ib.*

One railway company having granted to another the use of its lines and of all conveniences upon the lines, cannot object to its grantees using the rights so granted for any purposes to which it may be able to apply them, even if the grantors were not entitled to use them for such purposes, semble. *Ib.*

—— **Maintenance in Substantial Repair—Original Defects.**]—A working agreement provided that the Scarborough company were to complete their railway, and that twelve months after the opening of the railway for public traffic, the North Eastern company were "ever thereafter to maintain the same in substantial repair and in good working order and condition." Landslips from time to time occurred at various places on the railway during the eight years after its opening for traffic. The North Eastern company alleged that the landslips occurred owing to the nature of the strata through which the cuttings had been made, and the original defective construction of the line. The North Eastern company executed certain works to make the line safe for working. In so doing they made good defects in the original construction of the line, the cost of which they sought to recover from the Scarborough company:—Held, that on the true construction of the working agreement, the expenditure incurred should be borne by the North Eastern company. *N. E. Ry.* v. *Scarborough and Whitby Ry.*, 8 Ry. & Can. Traff. Cas. 157—C. A.

—— **Maintenance and Possession of Premises.**]—The S. railway company were authorised by their act to "make and maintain" a railway, with all proper stations, approaches and works, and were empowered to transfer or sell the railway before or after completion, and all the powers of the company, to the D. railway company. By a working agreement, the terms of which were incorporated in the act, it was provided that the S. company were to complete the line, and that, when completed, it should be maintained and worked by the D. company in perpetuity, and that they were to pay an annual sum to the D. company. On the completion of the line the D. company took possession of and worked the same under the agreement, but no sale to them of the railway had been effected. While the D. company was thus in possession the S. company, acting under the alleged powers in the act, in order to provide a better access to a station on the line, erected some stone steps in the station yard, which the D. company removed. In an action for a mandatory injunction to compel the D. company to restore the steps:—Held, that, on the true construction of the act and working agreement incorporated therewith, the D. company were entitled to the exclusive possession and right of maintenance of the railway and works; and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the S. company. *Sevenoaks, Maidstone, and Tunbridge Ry.* v. *L., C. & D. Ry.*, 48 L. J., Ch. 513; 11 Ch. D. 625; 40 L. T. 545; 27 W. R. 672.

Under a power to "maintain" a railway and works, reasonable improvements, consistent with the purpose of the undertaking, are included. *Ib.*

—— **Local Traffic—What is.**] — When two railway companies gave mutual running powers to one another over parts of their respective lines, with a stipulation that local traffic should be respected:—Held, that by local traffic was meant the traffic between two stations, both being on one of the lines over which the running powers extended. *Midland Ry.* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 22 L. T. 601.

—— **Rights on Amalgamation.**]—A railway company, A., made an agreement with another railway company, B., to allow B. to carry passengers and goods over the A. line on certain terms. There was a station at the A. line, towards

the increased extent and accommodation of which the B. company was to contribute a limited sum. The A. company amalgamated with other companies, obtained several branches, and assumed a different name. The B. company did the same :—Held, that the agreement applied to all traffic coming from the B. line upon the A. line, however originating, whether only upon the original B. line, or in, from, or through any of its amalgamated lines. *Lancashire and Yorkshire Ry.* v. *East Lancashire Ry.*, 5 H. L. Cas. 792; 25 L. J., Ex. 278; 2 Jur. (N.S.) 767; 4 W. R. 780.

—— **User of New Junction or New Connection.**]—A. company, being owner of a station, entered into agreement with B. company to make a new junction between their respective lines, so that B. company might use such station. C. company, having running powers over A. company's line, subsequently entered into agreement with B. company for use of B. company's line. An attempt of C. company to go from B. company's line to A. company's line over the junction was resisted on the ground that C.'s agreement with B. did not give a right to use such junction: —Held, that the effect in law of the right to make the junction was to make the two lines one continuous line, which the public had a right to use, and therefore also a company working under arrangements with companies owning the two lines. *Midland Ry.* v. *G. W. Ry.*, 42 L. J., Ch. 438; L. R. 8 Ch. 841; 28 L. T. 718; 21 W. R. 657.

The court refused to restrain one railway company from using the station of another, under an agreement which was made between the two companies before a connection had been established between the company using the station and a third company, which brought such third company into competition with the company to whom the station belonged, it not being clear that the right of the defendants to use the station was not intended to be given by their special act, the agreement being open to the construction that the extent and terms of the station accommodation were from time to time to form the subject of reference to arbitration, and there being no award specifying the time at which it should determine; the rival or competing company having also been in existence at the time the agreement was made, and the plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising; and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction. *Midland Ry.* v. *Ambergate, Nottingham, and Boston Ry.*, 10 Hare, 359; 1 W. R. 162.

Enforcement.]—Where an agreement was entered into by two railway companies giving mutual rights of running trains on each other's lines, and company A. had possessed and enjoyed for several years the rights granted to them, while company B. took no steps to enforce the stipulation in their favour, and allowed the time to expire within which it should have been performed, an injunction was granted to restrain company B. from disturbing the enjoyment of the rights of company A. *G. N. Ry.* v. *Lancashire and Yorkshire Ry.*, 1 Sm. & G. 81. See *G. N. Ry.* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 5 De G. & Sm. 138; 16 Jur. 146, infra.

By an agreement between two railway companies, which was to last for fifty years, the Great Northern Company should book and invoice, and cause or permit to be conveyed or despatched by and along the lines of the Sheffield Company, all traffic originating upon any of the lines of the Great Northern Company, for which the railways of the two companies formed a convenient route "not otherwise specially consigned or addressed," or the subject of agreements (if any) subsisting with other companies. The Sheffield Company in like manner contracted to carry on its lines (mutatis mutandis). By an agreement between the Sheffield Company and the Midland Company, by which running powers and access to Manchester over the Sheffield lines were conceded to the Midland Company, the effect was to give the latter company a through route to Manchester wholly independent of the Great Northern Company. On application for an injunction to restrain the Sheffield company from carrying out this latter agreement :—Held, that the Sheffield Company had not been guilty of fraud or breach of that agreement, and the injunction refused. *G. N. Ry.* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 5 L. T. 667.

How Determinable.]—The usage and rules of law applicable to the determination of contracts for hiring, service or partnership, have no application to contracts between railway companies. An agreement between railway companies not ultra vires, and by its terms unlimited in duration of time, can only be determined, failing mutual consent, by an act of parliament. *Llanelly Ry.* v. *L. & N. W. Ry.*, 45 L. J., Ch. 539; L. R. 7 H. L. 550; 32 L. T. 575; 23 W. R. 927.

The Llanelly Railway Company executed an agreement by which it conceded to the London and North Western Railway Company running powers over its lines, subject to the company's by-laws and to the payment of dues. The agreement specified no limit as to its duration, nor that either company was to have power to determine it, but some of its terms indicated that it was intended to be permanent. It provided that, whether the running powers were exercised or not, there should be a complete system of through booking, and that the two companies should send by each other all traffic, not otherwise consigned, to or from stations on the lines of each whenever such lines formed the shortest route :—Held, that these provisions constituted a sufficient consideration to support the agreement, so that neither company could determine it without the consent of the other on the ground of want of reciprocity, although it neither gave to the Llanelly Company any running powers over the lines of the London and North Western Company nor laid any obligation on the latter company to exercise the powers conceded to it. *Ib.*

In 1848 the East Lincolnshire Railway Company agreed with the defendants that a station on the defendants' line should be used equally by both companies, but should be subject to the by-laws of the defendants, and that a committee of three from each board should be appointed to arrange the working of the traffic, &c.; that the cost and maintenance of the station and the working should be borne by the two companies equally; that the defendants should afford to the East Lincolnshire Railway Company facilities for access to the Great Grimsby Docks; and that the East Lincolnshire Railway Company should give up a piece of land to the defendants; that the defendants should have the right of running

with their engines, &c., on the East Lincolnshire line between Great Grimsby and Louth; and that the East Lincolnshire Railway Company should have the same right over the defendants' line between Great Grimsby and New Holland, paying in either case 66 per cent. of the gross receipts to the company whose line was used; and that each company should provide station accommodation for the other at New Holland and Louth respectively for three years, as therein mentioned. The said East Lincolnshire line of railway became vested in the plaintiffs as lessees thereof, for 999 years. Disputes arose between the companies, which ended in the defendants preventing the plaintiffs from running their engines, &c., on the line between Great Grimsby and New Holland, and giving them a formal notice to determine the agreement. On motion, an injunction was granted to restrain the defendants from obstructing the plaintiffs running their engines, &c., over that part of the defendants' line mentioned in the agreement:—Held, that the agreement was permanent, and could not be determined without the consent of both parties, and was not a mere licence revocable at the will of either. An agreement to grant an easement of this nature to a corporate body need not be by deed, and might be permanent, although it was to the company only, and not to the company and its successors. *G. N. Ry.* v. *Manchester, Sheffield and Lincolnshire Ry.*, 5 De G. & Sm. 138; 16 Jur. 146.

Held, also, that the terms of the contract were not too vague, but that the user conceded was one consistent with the proper engagement of the railway, the subject-matter of the contract, and with the rights of the granting party; held, also, that this court will grant an injunction, restraining the defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *Ib.*

Railway Commissioners—Jurisdiction to Revise.]—In 1858 two railway companies entered into a working agreement under a special act, which enabled them so to do, with this proviso, "That no such agreement shall be valid until the same has been approved, both as to the period of its continuance and in other respects, by the board of trade." The 17th clause of the agreement empowered the board of trade, once in every ten years, "to cause this agreement to be revised, but in the interest of the public only." In 1873, the powers and duties of the board of trade "under any special act with respect to the approval of working agreements between railway companies" were transferred to the railway commissioners:—Held, that the power given under clause 17 of the agreement to the board of trade, was a power with respect to the approval of a working agreement, and was also a power under a special act, so that the railway commissioners had power to revise the agreement, and to consider it, in the interest of the public. *Huddersfield Corporation* v. *G. N. Ry.*, 50 L. J., Q. B. 587.

—— **Reference to Arbitration of.**]—*See* post, col. 1526.

Arbitration Clause—Notice to Terminate.]—An agreement between two railway companies by which one had a right to run over the other's lines, contained a clause referring all matters in difference between the parties to arbitration. The lessor company gave the lessee company notice that they should consider the agreement at an end after a fixed day: the lessees took no heed of the notice and continued running their trains:—Held, that the matter came within the terms of the agreement for reference to arbitration and must accordingly be referred. *Llanelly Ry.* v. *L. & N. W. Ry.*, 20 W. R. 898. Affirmed 45 L. J., Ch. 539; L. R. 7 H. L. 550; 32 L. T. 575; 23 W. R. 927.

—— **Ouster of Jurisdiction of Court.**]—By an agreement of the 26th of February, 1866, and afterwards confirmed by act of parliament, the plaintiff company agreed to construct a line of railway between certain termini, and the defendant company agreed to work it, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified; and it was agreed that all differences under the agreement should be determined by a standing arbitrator to be named by the companies in January in each year, or failing such nomination, by the board of trade on the application of either company in February in each year; and that all such clauses of the acts of parliament for the time being in force in regard to railways as should relate to the settlement of disputes by arbitration should, as far as applicable, and except as therein otherwise provided, be deemed incorporated with the agreement, and that the agreement should continue for 999 years from its date. The plaintiff company constructed the line, and the defendant company entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the plaintiffs' line by other lines belonging to the defendant company, and a bill was filed to restrain the defendant company from so doing:—Held, first, that inasmuch as no standing arbitrator had been appointed in accordance with the agreement, the jurisdiction of the court was not ousted; and secondly, that the case was one in which the court could interfere by injunction. *Wolverhampton and Walsall Ry.* v. *L. & N. W. Ry.*, 43 L. J., Ch. 131; L. R. 16 Eq. 433.

—— **Injunction to Restrain from Proceeding.**]—The Judicature Act, 1873, s. 25, sub-s. 8, has given no power to the high court to issue an injunction in a case in which no court before that act had power to give any remedy whatever. Therefore the high court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious:—Semble, per Brett, L.J., that the Judicature Act, 1873, has dealt only with procedure, and not with jurisdiction at all, and that if no court had power to issue an injunction before that act, the high court has no such power now. *North London Ry.* v. *G. N. Ry.*, 52 L. J., Q. B. 380; 11 Q. B. D. 30; 48 L. T. 695; 31 W. R. 490—C. A.

Transfer of Line — Commencement of Payment.]—The Caledonian Railway Company for thirteen years up to July, 1879, had been proprietors of the D. & A. railway, and had incurred certain liabilities in respect to payment of dividends to preference and ordinary shareholders of the D. & A. line. The preamble of the North British Railway (D. & A. joint line), passed July, 1879 (42 & 43 Vict. c. clv.), set forth

that it was expedient that the Caledonian and North British companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the D. & A. line. Sect. 3 provided that on and after the 1st February, 1880, called the "vesting period," all interest which the Caledonian possessed should be transferred to the Caledonian and North British jointly and in equal proportions in manner hereinafter provided by the act. Sect. 6 provided that the consideration for the transfer of the joint line should be as follows: "(1) From and after the vesting period the company (the North British) shall pay to the Caledonian Railway Company half-yearly, on the 1st of March and 1st of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments, for which the Caledonian Railway Company are now liable in respect of their acquisition of the D. & A. railway." The Caledonian Railway Company claimed that under this section, there was a half-yearly payment amounting to 5,903*l.* 15*s.* due on the 1st of March, 1880:—Held, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the 1st of February, 1880. *Caledonian Ry.* v. *North British Ry.*, 6 App. Cas. 114; 29 W. R. 685—H. L. (Sc.)

7. Amalgamation.

Position of Officers on.]—A bill was filed by a former officer of a railway company to obtain distribution of a sum of money which had been set apart for the compensation of the officers of the company on its amalgamation with another company. An inquiry was directed, and the chief clerk found that he was an officer of the company, at an average salary of 500*l.* a year, although at the actual time of the amalgamation he only held the appointment of consulting engineer, at the annual retaining fee of 100*l.*, and in arriving at this result the chief clerk took into consideration his former engagement of traffic manager. The chief clerk submitted to the court what shares the persons entitled were to take. The other parties appealed from the decision of the chief clerk as to the right of the party to participate in the fund:—Held, that he was an officer of the company, and that the shares of the parties entitled to share must be determined on the principle of annuities, having regard to their several ages and the amount of their salaries. *Bruff* v. *Cobbold*, 30 L. T. 597.

Action on a bond given by a party to the L. & C. railway company, as surety for the due performance by G. of his duties as clerk. The condition of the bond was, that if G. should render to the L. & C. railway company, or to the committee for managing the London terminus of the L. & C., L. & B., and S. E. railways, a true account of all the receipts and payments of him, as such clerk, and also should pay to the L. & C. railway company, or to the committee, all sums as he should receive on account of the company or committee, then the obligation to be void. The surety pleaded that the bond was made before the passing of an act to consolidate the L. & B. and L. & C. railway companies, and that the action was commenced afterwards, and that the L. & C. railway company thereby became dissolved:—Held, that the plea was bad, and was no defence to the action, inasmuch as the new company was the same as the two old ones, with additional powers, and that the amalgamation of the companies did not affect the responsibilities of the surety or G. *L. & B. Ry.* v. *Goodwin*, 6 Railw. Cas. 177; 3 Ex. 736; 18 L. J., Ex. 337. See *S. C.*, 3 Ex. 320; 18 L. J., Ex. 174; *Eastern Union Ry.* v. *Cochrane*, 9 Ex. 197; 7 Railw. Cas. 792; 2 C. L. R. 292; 23 L. J., Ex. 61; 17 Jur. 1103; 2 W. R. 43.

Effect of, on Agreement to withdraw Opposition.]—A landowner, being a peer of parliament, entered into an agreement with the projectors of a railway, stipulating that they should take certain portions of his land, and pay him specified sums for the same, and by way of compensation for permanent injury to his mansion and estate, that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages and horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors and co-operate with them, and use his best endeavours to prevent the bill of a rival company from passing into law, but that if the bill of the rival company should pass, then the first-mentioned company should pay him certain sums for the land the rival company might take, and recover from the latter and pay to the first-mentioned company the largest amount of price and compensation which could be obtained; and also a provision that either of the parties might determine the agreement by notice to the other, if the bill of the first-mentioned company should not pass within six months; and a further provision that if the two projected companies should be amalgamated, the amalgamated company should pay certain sums to the landowner as purchase-money and compensation; and that the covenants and agreements concerning the purchase and taking of land, not making deviations without his consent, and the making and maintaining such station, and all other the covenants and agreements thereinbefore contained on the part of the first-mentioned company, so far as the same should be applicable, should be performed by the amalgamated companies. By an act passed within six months, the subscribers to the two projected companies were incorporated in one body, and authorised to make certain of the projected lines of railway, and it was enacted that the shareholders of each company should be entitled in certain rates or proportions to the shares of the united company:—Held, that, notwithstanding the bill of the first-mentioned company did not pass, the agreement could not be determined by a notice given by the projectors who were parties to the agreement, or by the amalgamated body. *Lindsey (Earl)* v. *Capper*, 2 Ex. 801—Ex. Ch. Affirmed 3 H. L. Cas. 293.

The amalgamated company having then taken the land referred to in the agreement, and paid for it the price thereby stipulated, and having, in a suit in equity brought against them by the landowner, claimed the benefit of the agreement, he filed a bill for a specific performance of his contract with the projectors of the first-mentioned company:—Held, in equity, that the union and incorporation of the shareholders of the two companies in one body and the consolidation of their several shares under the act of

parliament, constituted an amalgamation within the meaning of the agreement, and that the amalgamated company was bound by the agreement entered into with the landowner by the projectors of the first-mentioned company. *Lindsey (Earl)* v. *G. N. Ry.*, 10 Hare, 665 ; 22 L. J., Ch. 995 ; 17 Jur. 552 ; 1 W. R. 527.

Powers of Directors—Effect of Act.]—Two companies proposing to construct railways which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees or directors "to demise or sell the undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways." In pursuance of the powers thus conferred upon them, the directors of the two companies agreed to amalgamate and to form a united company, and this agreement was carried into effect by resolutions made at board meetings of the respective committees, and by a deed executed by a competent number of the directors of each company :—Held, that the power to amalgamate was vested in the two boards, and that those powers were well and effectively exercised, and that the company so united and amalgamated might maintain an action for calls against a shareholder of either company who had executed the parliamentary contract and subscribers' agreement. *Cork and Youghal Ry.* v. *Paterson*, 18 C. B. 414.

A company for making a railway from Dublin to Mullingar was incorporated in July, 1845, under the name of the Midland Great Western Railway Company of Ireland. Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the registration office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. L. applied for and received scrip certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented in its own name and under its corporate seal, a petition to parliament for an act to make a railway from Mullingar to Galway, undertaking at its own expense to make the railway. The act which was passed upon this petition, in July, 1846, only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the act to raise the necessary sums, "by contributions among themselves or by the admission of other parties." The additional capital required for extension was directed to form "part of the general and original capital of the company" ; and the provisions of the recited act (that of 1845) were to extend to and be read with the new act. The expression "the company," in the new act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting the seal of the Midland Great Western was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them, that of L., was inserted ; three calls were made, the first was dated previously to the insertion of the extension subscribers in the shareholders' book ; the two others after that insertion :—Held, that the act did not amalgamate the two companies, and that even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power so as to render L. liable for any one of the calls at the suit of the Midland Great Western. *Midland Great Western Ry.* v. *Leech*, 3 H. L. Cas. 872.

Referee under Contract.]—A contract between a railway company and certain contractors for works upon the line, contained a stipulation, that any difference arising thereon should be referred to T., "if and so long as he should continue to be the company's principal engineer." After the making of the contract, the railway company became merged in and amalgamated with another railway company, under an act which provided that, notwithstanding the amalgamation, and the partial repeal of the special act of the first-mentioned railway company, all contracts should be proceeded with and enforced as if such repeal had not taken place, the new railway company being in all respects with reference to such matters substituted for the former railway company :—Held, that T., who still continued to be the engineer of a portion of the former railway, but was not the "principal engineer" of the amalgamated company, was the proper referee in cases of disputes arising out of the contract. *Wansbeck Ry. and Trowsdale, In re*, L. R. 1 C. P. 269 ; 12 Jur. (N.S.) 746.

Arbitration—Method of taking Accounts—Jurisdiction.]—On an amalgamation of railway companies under an act of parliament, some of the shareholders filed a bill for the purpose of determining the principle upon which the accounts were to be taken :—Held, that the question being merely one of account as between two classes of shareholders for the determination of which the act of parliament had provided sufficient machinery by means of arbitration, the court would not interfere, and the bill was dismissed with costs. *Yool* v. *G. W. Ry.*, 39 L. J., Ch. 562 ; 22 L. T. 781 ; 18 W. R. 825.

8. Trains.

Express Trains, what are.]—The trains called "express trains," in the bills of the Great Western Railway Company, are not within the exception contemplated in a covenant to cause "all trains carrying passengers, not being goods trains, or trains to be sent express or for special purposes," to stop for refreshments at the refreshment rooms of the lessee of the company ; and the lessee has a sufficient interest, without his sublessee, to carry on a suit ; and where the material rights of parties rest on covenant each is primâ facie entitled to sue either at law or in equity, though such party may be liable at the time in respect of other covenants. *Rigby* v. *G. W. Ry.*, 4 Railw. Cas. 175 ; 1 Coop. C. C. 7 ; 10 Jur. 488. See also *Rolfe* v. *Rolfe*, 1 Coop. C. C. 8, n. ; 10 Jur. 61.

A train on a local line running in connection with trains between London and Scotland cannot

be said to lose its character of an express train by stopping at junctions connecting the line with other important lines, although it should stop at two such junctions within eight miles of one another. *Hood* v. *N. E. Ry.*, 19 W. R. 523.

Ordinary Trains.]—When a branch railway act gave a landowner the right to stop by signal all ordinary trains: — Held, that accelerated trains, forming part of fast through trains from London, were not ordinary trains, though the fares charged were at the ordinary rate. *Turner* v. *L. & S. W. Ry.*, 43 L. J., Ch. 430; L. R. 17 Eq. 561.

When an act confers upon a landowner a private right creating a burthen upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly. *Ib.*

Not under Control of Company.]—A railway company covenanted with the builders of refreshment rooms at a station on the line of railway that all trains which should pass the station carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, should stop for a reasonable period of about ten minutes. The postmaster-general, proceeding under 1 & 2 Vict. c. 98, which was passed before the covenant was made, required the company to run a train carrying mails at a certain hour, and stopping at the station for five minutes only:—Held, that such a train was a train "not under the control of the company" within the meaning of the exception. *Phillips* v. *G. W. Ry.*, 41 L. J., Ch. 614; L. R. 7 Ch. 409; 26 L. T. 532; 20 W. R. 562.

"**All Passenger Trains.**"]—By feu charter, dated 1863, between A., the proprietor of land through which a railway was authorised to run, and the railway company, it was provided that the company should be bound to erect on a piece of ground conveyed to them by A. at a nominal feu rent, "a station for passengers and goods travelling by the said" railway, "at which all passenger trains shall regularly stop," to be called Crathes station. The station was erected. Subsequently certain trains were run, namely (1) excursion trains at low fares to certain places on the line, but not to Crathes station. They were advertised by special handbills, and were not included in the time tables except in error. (2) Trains called the Queen's messenger trains, ran by arrangement with the home office, who paid the railway company a subsidy. (3) Trains called the post-office trains, ran by arrangement with the post-office, for which a subsidy was also paid. The Queen's messenger trains and the post-office trains only ran during her majesty's stay at Balmoral; but they were advertised in the railway company's time table, and through passengers were allowed to travel by them. They stopped at Crathes by signal, but did not stop regularly for setting down or taking up passengers. There was no contract with the home office or post-office that they should not do so. A. sought declarator that all trains, including the above, except only such as might be hired for an individual or individuals for his or their exclusive use, should regularly stop:—Held, that the trains called the Queen's messenger trains, and the post-office trains, fell within the terms of the contract; but that the excursion trains in the circumstances materially differed from ordinary passenger trains, and did not come within the obligation. *Burnett* v. *Great North of Scotland Ry.*, 54 L. J., Q. B. 531; 10 App. Cas. 147; 53 L. T. 507—H. L. (Sc.)

Amalgamation—Injunction.]—In 1846 two competing lines of railway, the D. N. and the L. & Y., being before parliament, L. agreed with eleven persons (the promoters of the D. N. railway) to give them certain portions of land, at different prices; to withdraw all parliamentary opposition from them, and offer every description of opposition to the L. & Y. railway; and that if an amalgamation took place on any grounds, he would not oppose the amalgamated company. In case of the amalgamated company obtaining their bill, they were to adopt this agreement and all the covenants, &c., one of which was that the D. N. railway company were to build a station near T., at a point to be approved by L., at which station all trains should stop. The two companies did amalgamate, by the name of the "G. N. Railway Co." Litigation took place, both in equity and at law, upon the construction of the agreement, the validity of which was never impeached in such litigation. The G. N. company now refused to stop their express trains at the T. station:—Held, first, that the agreement was legal in itself, was now decided by authority, but, semble, that if such authority had been wanting, it would not have been open to the defendants now to impeach it, after having brought it forward as a defence in former litigation. Secondly, that the balance of inconvenience on stopping such trains was in favour of a specific performance of the agreement, and that the court would not hesitate to interfere to restrain a breach of it on interlocutory application. Thirdly, that the amalgamated company's act having been passed without opposition by L., which might reasonably be supposed to be in consequence of the agreement, acts done by the company under their act were to be looked at as if done under the agreement. *Lindsey (Earl)* v. *G. N. Ry.*, 10 Hare, 665; 22 L. J., Ch. 995; 17 Jur. 522; 1 W. R. 257.

"**First-class Station.**"]—A railway company having covenanted with a landholder that they would use a piece of land purchased from him as a first-class station for the purpose of taking up and setting down passengers, was restrained from running any trains other than mail or express or special trains without stopping at the station built thereon. *Hood* v. *N. E. Ry.*, L. R. 8 Eq. 666; 20 L. T. 970; 17 W. R. 1085.

9. Bookstalls.

Lease—Construction.]—A railway company granted to two lessees the sale and exclusive licence and privilege, for ten years, of selling books and other publications at such of the company's stations as the lessees should think fit, and of using the bookstalls thereat respectively, and covenanted that all books sent by the lessees to be sold, pursuant to such licence, should be conveyed by the company's train to any such station without any charge; and warranted quiet and peaceable enjoyment:—Held, first, as to stations where bookstalls were in existence at the date of the grant, that the company must be taken to have granted the user of those specific stalls, and if not, still it was incumbent on the company to shew that stalls to which it attempted to remove the

lessees would be equally convenient. *Holmes* v. *Eastern Counties Ry.*, 3 Kay & J. 675 ; 3 Jur. (N.S.) 737 ; 5 W. R. 870.

Held, secondly, as to other stations, that if the lessees could be entitled, in any case, to erect stalls thereat, the court would make a declaration to that effect, because the court could not judge whether sales from stalls, or by colportage, should be adopted ; and also, because such a declaration would lead to continual applications with reference to the gradual increase in size of the stalls. *Ib.*

Held, thirdly, that the privilege of selling books, &c., authorised a bonâ fide sale to passengers and such other persons as ordinarily attended the company's stations on business connected with railways, and not a general agency, consequently that the lessees were not entitled to free carriage, except in respect of books to be so sold. *Ib.*

Rating.]—*See* RATES AND RATING.

10. REFRESHMENT ROOMS.

Covenant as to Stopping Trains.]—In a lease by a railway company of their refreshment rooms at Swindon, the company covenanted with the lessee that all trains carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, which should pass the Swindon station either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes, and that, as far as the company could influence the same, trains not under its control should be induced to stop for the like purpose. The postmaster-general having in the exercise of his power required that trains carrying mails should not stop at Swindon more than five minutes :—Held, first, that those trains were not as regards stopping under the control of the company ; and secondly, that the company was not by its covenant prohibited from carrying passengers by such trains. *Phillips* v. *G. W. Ry.*, 41 L. J., Ch. 614 ; L. R. 7 Ch. 409 ; 26 L. T. 157 ; 20 W. R. 562. And see *Rigby* v. *G. W. Ry.*, 4 Railw. Cas. 175 ; 1 Coop. C. C. 7 ; 10 Jur. 488, supra, col. 1502.

—— **Specific Performance — Termination of Occupation.**]—In 1840 a railway company entered into an agreement under seal to grant A. a lease for ninety-nine years of the hotel to be erected at X. station, with power for the company to determine the lease if any complaint as to the mode of carrying on the business should not be remedied within three months after notice of such complaint. It was also agreed that the lessees "should have the occupation of the refreshment rooms at X. station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions, and management thereof." The lease granted in pursuance of this agreement was confined to the hotel, and contained no mention of the refreshment rooms. The refreshment rooms on the up line adjoining the hotel had been always occupied with it. In 1849 B., a director of the company (head of a firm at X., who were assignees of the lease of the hotel), erected at a cost of 200*l.* refreshment rooms on the down line, pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment rooms for a term co-extensive with the lease of the hotel. The only evidence of such agreement was this minute in the books of the company : "A ground rent of 6*l.* per annum was ordered to be fixed for the new refreshment rooms built by the lessees at the down station in X." In 1867 the company gave notice to C., the assignee from B. of the lease and occupier of both refreshment rooms, that its arrangements with reference to a new station (recently erected) at X. would involve the determination of his tenancy of the existing refreshment rooms :—Held, first, as to the refreshment rooms on the down line, that no agreement of which the specific performance could be granted was proved, and that in any case the court could not enforce specific performance of an agreement by a director with the company for the benefit of himself or his firm ; and, secondly, as to the up-line refreshment rooms, that the occupation was not determinable at the mere will of the company, and that C. was entitled to have the agreement of 1840 carried into effect by having a deed executed to him as the assign of A., with all proper provisions granting the right of occupation of the upper refreshment rooms to him, his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions contained in the agreement. *Flanagan* v. *G. W. Ry.*, 38 L. J., Ch. 117 ; L. R. 7 Eq. 116 ; 19 L. T. 345.

11. CLEARING-HOUSE.

Sureties—Demand of Secretary.]—The defendants as sureties for a railway company by deed covenanted to pay to the plaintiffs as trustees for the railway clearing committee under the Railways Clearing Act, 1850, such balances and sums as, from time to time, should be settled and adjusted by the secretary of such committee as due from the company pursuant to the said act, or should be settled or determined by such secretary as the amount to be from time to time contributed to the funds of the clearing system by the company, or should in case of difference respecting the accounts of the clearing system be decided by such committee to be the balance or sum payable by the company to the committee, or should in any way become a debt due by the company to the committee pursuant to the said act, or should by such secretary be demanded of the company by a written demand in the form given in the schedule to the said act, and reciting that it was of paramount importance that the adjustment of such accounts by the clearing system should not be disputed and should be indisputable, it was by the said deed further declared and agreed that the said sureties were not to be at liberty to dispute the amount which should be so settled and adjusted by such secretary, as due from the company to such committee, or which should be settled and determined by such secretary as the amount to be contributed to the funds of the clearing system by the company, and which should be decided by the clearing committee to be the balance or sum payable by the company, or the amount which should as aforesaid be demanded by the secretary ; and every such amount should be payable and forthwith paid by the said sureties, notwithstanding any error or alleged error in law, in principle or in fact, and no plea or defence should be admissible or evidence be necessary or

required in any action or proceedings under the said deed which should be admissible or required against the said company under the said act:—Held, that construing the words of the covenant according to their obvious and ordinarily reasonable meaning, the demand of the secretary made in accordance with the terms of the covenant was alone sufficient to entitle the plaintiffs to sue the defendants for the amount so demanded. it being the manifest intention of the parties that such demand should be conclusive in the matter; and also that the word "or" prefixed to the several alternative clauses in the deed of covenant was meant to have its usual meaning as a disjunctive conjunction, and could not therefore be read in a conjunctive sense as "and." *Benson* v. *Dunn*, 23 L. T. 848.

D. TRESPASS ON RAILWAY.

By Cabs.]—A railway company was possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. A person, not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:—Held, that he was a wilful trespasser within 3 & 4 Vict. c. 97, s. 16. *Foulger* v. *Steadman*, 42 L. J., M. C. 3; L. R. 8 Q. B. 65; 26 L. T. 395.

Van outside Public-house.]—G. kept his van standing for twenty minutes outside a public-house, during part of which time he was refreshing himself within. The ground upon which the van stood was part of the premises of a railway company, whose station was close by, but the only access to the public-house was across this ground, and the customers frequently went there with vehicles. G. was charged under 3 & 4 Vict. c. 97, s. 16, with wilfully trespassing on railway premises, but the justices considered his claim of right to use the ground as a customer of the public-house to be bonâ fide, and their jurisdiction to be ousted thereby:—Held, that, as there might be a legal foundation for this claim of right, the justices came to a proper conclusion. *Wilkinson* v. *Goffin*, 33 L. T. 824.

Undue Preference.]—If a railway company licenses one man to ply with carriages for passengers within their station yard, any person not so licensed may not do so, and if in attempting to do so he commits a trespass within the meaning of s. 16 of 3 & 4 Vict. c. 97, the justices cannot acquit him on the ground that such licence is, in their opinion, an undue preference, and, therefore, contrary to 17 & 18 Vict. c. 31, s. 2. *Hole* v. *Digby*, 27 W. R. 884.

By adjoining Owner—After receipt of Compensation.]—An owner of lands severed by a railway claimed compensation from the company, and it was submitted to a jury, who awarded to him compensation, on the footing that there was to be a total separation of the land without any communication being made, and he received from the company the amount awarded as such compensation:—Held, that the verdict of the jury, and the receipt of compensation under it, was an arrangement with the company; and that the party had no right afterwards to cross the railway for the purpose of the occupation of his lands, and was, in so doing, a trespasser within 3 & 4 Vict. c. 97, s. 16. *Manning* v. *Eastern Counties Ry.*, 12 M. & W. 237; 13 L. J., Ex. 265; 3 Railw. Cas. 637.

—— **Where no Accommodation Works.**]—By the construction of the act 3 & 4 Will. 4, c. xxxiv., establishing a railway, a party whose property has been cut through by the railway is entitled to cross it at any point by himself, his servants and cattle, in order to get to his land on the other side, unless the company, under the provisions of the act, makes a sufficient and proper communication for him to pass from one side of it to the other. *Grand Junction Ry.* v. *White*, 8 M. & W. 214; 10 L. J., Ex. 292.

Public Right of Way before making Railway—Jurisdiction of Justices.]—The appellant was convicted by justices in petty sessions—(1) under s. 38 of 45 & 46 Vict. c. 214, for having unlawfully trespassed on a railway in such a manner as to expose himself to danger, and (2) under s. 23 of the Regulations of Railways Act, 1868, for having been unlawfully on the railway after receiving warning not to go or pass thereon. There was, prior to the making of the railway, and prior to the acts of parliament authorising the same, a public right of way for persons on foot over the land now occupied by the railway at the place where the appellant crossed, and the appellant went upon and crossed the railway in the assertion of the right of way which formerly existed, and believing that he was entitled to do so by virtue thereof:—Held, that the conviction on both summonses was wrong—(1) because the claim of the right of way set up by the appellant ousted the jurisdiction of the justices to determine the case; and (2) because there was no provision in the act of parliament extinguishing the right of way, which was consequently still in existence. *Cole* v. *Miles*, 57 L. J., M. C. 132; 60 L. T. 145; 36 W. R. 784; 53 J. P. 228.

Workman of Third Party—Wilful Trespass.]—Upon complaint against A. before justices for wilfully trespassing upon the premises of a railway company, and refusing to quit them upon request, it appeared that A. had gone on to the premises for the purposes of repairing, under a contract to do so, a carriage which was there, by the permission of the company, and which belonged to a third party; that he had previously been prohibited by the company from entering; and that, upon being requested by the company to quit, he refused to do so, insisting on his right to remain, for the purpose of completing the repair, without which repair the carriage could not quit the yard. The magistrates having refused to convict:—Held, that they were not bound to convict, inasmuch as it was competent to them, if they thought fit, to decide that A. was not a wilful trespasser. *Jones* v. *Taylor*, 1 El. & El. 20.

Obstruction to Railway—Evidence.]—Upon an information before justices on behalf of a railway company, for an offence against its act of incorporation, in placing stones and rubbish on the railway, and thereby obstructing the free passage of the same, evidence that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining; and that on one occasion the defendant himself, who was standing by nodded his head, and directed the workmen to go on, is sufficient to warrant the justices in

convicting him. *Roberts* v. *Preston*, 9 C. B. (N.S.) 208. *See* 24 & 25 Vict. c. 97, s. 35.

Accidental Obstruction through Carelessness.]—By a railway act it was enacted "that if any person shall do any act, matter or thing to obstruct the free passage of the railway or any part thereof," he shall be liable to a penalty:—Held, that, to render a party liable, he must have intended to have committed the obstruction complained of. *Batting* v. *Bristol and Exeter Ry.*, 3 L. T. 665; 9 W. R. 271.

Where, therefore, a person was crossing the railway at a crossing which he had a right to use, with a waggon laden with timber, and the waggon got accidentally hitched with the gate-post, and a collision occurred with it and a train whilst it was so hitched:—Held, that, although the party was guilty of carelessness, yet, as he did not intend to create an obstruction, he was not liable to a penalty. *Ib.*

By Telegraph Company.]—An act which incorporated an electric telegraph company enacted, that it shall be lawful for the company to lay down and place their pipes and wires under any public roads, streets and highways, and along or across the same for the telegraph, and to break up the pavement or soil for that purpose, but that nothing in this provision contained shall extend to any railway or canal, except that it shall be lawful for the company to carry their wires and pipes "directly, but not otherwise, across any railway." A railway company had carried their railway on a level across a part of a public highway, the public having the full use of the highway, except when the trains were passing:—Held, that the highway was not a highway within the telegraph act, and that it was a trespass to dig and bore under the railway for the purpose of carrying the telegraph under the spot where the railway crossed the highway. *S. E. Ry.* v. *European and American Electric Printing Telegraph Co.*, 9 Ex. 363; 2 C. L. R. 467; 23 L. J., Ex. 113.

Distress Damage feasant—Engine.]—A railway company has a common-law right of distress damage feasant on an engine incumbering the railway, if there is no certificate of approval. *Ambergate Ry.* v. *Midland Ry.*, 2 El. & Bl. 793; 23 L. J., Q. B. 17; 18 Jur. 243.

Proceedings against Persons for Obstructing Trains and Signals.]—*See* CRIMINAL LAW.

Liability of Passengers in respect of Fares and Tickets.]—*See* CARRIERS (*Of Passengers*).

E. PASSENGER DUTY.

Cheap Trains.]—A cheap train within the meaning of 7 & 8 Vict. c. 85, s. 6 (the fares of passengers travelling in which are exempted from the payment of duty to government), must necessarily be a train carrying third-class passengers at an uniform rate of one penny a mile, both for the whole distance between the termini of the railway on which it travels and for the intermediate distances between any one station and another on such railway. *North London Ry.* v. *Att.-Gen.*, 45 L. J., Ex. 315; 1 App. Cas. 148; 34 L. T. 297; 24 W. R. 852—H. L. (E.)

A cheap train must necessarily stop for the purposes of taking up and setting down passengers at every passenger station between each end of the trunk, branch, or junction line on which it travels. *Ib.*

To constitute a train complying in other respects with the statutory requirements, a cheap train within s. 6 of 7 & 8 Vict. c. 85, entitling the railway company to exemption from passenger duty under s. 9, no third-class passenger must be charged more than the parliamentary fare. *Att-Gen.* v. *Metropolitan Ry.*, 50 L. J., Q. B. 573.

—— **Workmen's Trains.**]—A train is not the less a "workmen's train" within the meaning of the Cheap Trains Act, 1883, because a railway company run first and second class carriages with the third-class carriages. *Metropolitan Ry., In re*, 8 Ry. & Can. Traff. Cas. 32.

Powers of Board of Trade.]—The power conferred on the board of trade by 7 & 8 Vict. c. 85, s. 8, of dispensing with "any of the conditions hereinbefore required with regard to the conveyance of passengers," does not authorise the board of trade to dispense with either of the above-mentioned requisites. *North London Ry.* v. *Att-Gen.*, supra.

The 7 & 8 Vict. c. 85, exempts from the duty imposed by the 5 & 6 Vict. c. 79, upon passenger traffic, the receipts of any company in respect of passengers conveyed by the trains at one penny a mile, required by that act to be run by every company, upon conditions subject to the approval of the board of trade. A company ran cheap trains over a line, but could not comply with one of these conditions, and the board withdrew its approval:—Held, that such cheap trains were not within the exemption. *G. W. Ry.* v. *Att.-Gen.*, 35 L. J., Ex. 123; L. R. 1 H. L. 1; 12 Jur. (N.S.) 417; 14 L. T. 33; 14 W. R. 519.

On Sums charged to cover Duty.]—By s. 2 of 5 & 6 Vict. c. 79, and the schedule to that act, a duty at the rate of 5 per cent. is made payable upon all sums received or charged for the hire, fare or conveyance of passengers conveyed for hire upon any railway. The defendants, by a local act, were prohibited from charging to their passengers more than certain specified sums per mile, which sums were to include all expenses incidental to their conveyance, except government duty. The defendants, in addition to the sum charged by them to their passengers for conveyance, charged to and received from such passengers a further sum at the rate of 5 per cent. on the former, to cover the government duty. The crown claimed duty on the latter sum as well as on the former:—Held, that the crown was entitled to duty on the whole amount received from the passengers, even though such amount should exceed the maximum charge for conveyance fixed by the local act. *Att.-Gen.* v. *L. & N. W. Ry.*, 50 L. J., Q. B. 170; 6 Q. B. D. 216; 44 L. T. 236; 29 W. R. 346; 45 J. P. 390—C. A.

On Sums charged for Sleeping Accommodation.]—The defendants attached to certain of their night trains sleeping carriages for the accommodation of such of their first-class passengers as might choose to avail themselves of it. For the use of these carriages such passengers were charged an extra sum in addition to the ordinary first-class fare. In addition to couches with pillows, sheets and blankets, each carriage contained a lavatory, water-closet, and other con-

veniences. Passengers using such carriage were not disturbed during the night by demands for their tickets; and if they arrived at their destination in the middle of the night the carriage was put into a siding, and the passengers allowed to remain in their beds until the morning. A special servant was employed to wait upon them, call them in the morning, and bring them hot water. The crown claimed duty upon the sums charged to passengers for the accommodation provided in the sleeping carriages:—Held, that such accommodation was incidental to the conveyance of the passengers, and that the crown was entitled to the duty claimed. *Ib.*

By what Company Payable—Working Agreement.]—The Midland was entitled, upon payment of a percentage, to use a loop line belonging to the Great Western, for the purpose of traffic originating in or extending to their own line, and they exercised their powers by their own trains and servants, but the moneys paid at the stations on the loop line were collected by the clerks and servants of the Great Western:—Held, that the Great Western was bound to keep the accounts, and pay the duty required by 5 & 6 Vict. c. 79. *G. W. Ry.* v. *Att.-Gen.*, 35 L. J., Ex. 123; L. R. 1 H. L. 1; 12 Jur. (N.S.) 417; 14 L. T. 33; 14 W. R. 519.

F. ARBITRATION.

Agreement to refer Disputes—Action in High Court—Jurisdiction.]—Where there is an agreement between railway companies to refer their disputes to arbitration under the provisions of the Railway Companies Arbitration Act, 1859, the true effect of ss. 4 and 26 of that act is to make it obligatory upon the court, if either of the companies insists on it, to make an order to refer the disputes in accordance with the agreement; but these sections do not deprive the court of jurisdiction to deal with the matter and adjudicate upon any dispute of the companies if neither of the companies insist on their right to have the dispute referred to arbitration under the agreement. *L., C. & D. Ry.* v. *S. E. Ry.*, 58 L. J., Ch. 75; 40 Ch. D. 100; 60 L. T. 370; 37 W. R. 65—C. A.

Where an action has been brought by one railway company against another in respect of a dispute between them, and the court has tried and adjudicated on the matter without either of the companies insisting on the point that the matter ought to be referred to arbitration, though the point had been raised by one of the companies in their defence, it is too late for the unsuccessful company to raise, at the hearing of an appeal, the point that the dispute should be referred to arbitration under the provisions of the Railway Companies Arbitration Act, 1859. *Ib.*

An agreement to refer under the Railway Companies Arbitration Act, 1859, if insisted on, ousts the jurisdiction of the court. *Watford and Rickmansworth Ry.* v. *L. & N. W. Ry.*, 38 L. J., Ch. 449; L. R. 8 Eq. 231; 21 L. T. 81; 17 W. R. 814.

Two railway companies entered into an agreement for making a line, by which they agreed that "in every case in which any difference should arise touching anything done or omitted in pursuance of the agreement, or touching its incidents or consequences, or touching any breach or nonfulfilment of the agreement, it should be referred to arbitration according to the provisions of the Railway Companies Arbitration Act, 1859." Differences subsequently arose between the companies, and one of them filed a bill in equity against the other for an account, when the other company insisted on the agreement to refer:—Held, that though the account was of such a complicated nature as to render it a proper subject of a suit in equity, yet that the court was bound to give effect to the agreement to refer under the Railway Companies Arbitration Act, 1859, s. 26, and could not entertain the suit. *Ib.*

Failure to appoint Arbitrator—Injunction.]—By an agreement of the 26th of February, 1866, and afterwards confirmed by act of parliament, the plaintiff company agreed to construct a line of railway between certain termini, and the defendant company agreed to work it, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified; and it was agreed that all differences under the agreement should be determined by a standing arbitrator to be named by the companies in January in each year, or failing such nomination, by the board of trade on the application of either company in February in each year; and that all such clauses of the acts of parliament for the time being in force in regard to railways as should relate to the settlement of disputes by arbitration should, so far as applicable, and except as therein otherwise provided, be deemed incorporated with the agreement, and that the agreement should continue for 999 years from its date. The plaintiff company constructed the line, and the defendant company entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the plaintiff's line by other lines belonging to the defendant company, and a bill was filed to restrain the defendant company from so doing:—Held, first, that inasmuch as no standing arbitrator had been appointed in accordance with the agreement, the jurisdiction of the court was not ousted; and, secondly, that the case was one in which the court could interfere by injunction. *Wolverhampton and Walsall Ry.*, v. *L. & N. W. Ry.*, 43 L. J., Ch. 131; L. R. 16 Eq. 433.

Agreement with Ultra Vires Clauses—Injunction.]—Where an agreement made between two railway companies under their common seals contains clauses which are beyond the powers of the directors of one of the companies, and clauses for referring to arbitration all disputes arising under the agreement, a court of equity will, at the suit of a shareholder of that company, restrain both companies from proceeding to arbitration in respect of alleged breaches of those clauses. *Maunsell* v. *Midland Great Western Ry.*, 1 Hem. & M. 130; 32 L. J., Ch. 513; 9 Jur. (N.S.) 660; 8 L. T. 826; 11 W. R. 768.

But no such injunction will be granted at the suit of a shareholder of the other company on the ground that the stipulations of any such clause are beyond the powers of the directors of the company in which the plaintiff is not a shareholder. *Ib.*

Right to bring Action.]—On an amalgamation of railway companies under an act of parliament, some of the shareholders filed a bill for the purpose of determining the principle upon which the accounts were to be taken:—Held,

that the question being merely one of account as between two classes of shareholders for the determination of which the act of parliament had provided sufficient machinery by means of arbitration, the court would not interfere, and the bill was dismissed with costs. *Yool* v. *G. W. Ry.*, 39 L. J., Ch. 562; 22 L. T. 781; 18 W. R. 825.

Traffic Facilities.]—An agreement between two railway companies by which one had a right to run over the other's lines, contained a clause referring all matter in difference between the parties to arbitration. The lessor company gave the lessee company notice that they should consider the agreement at an end after a fixed day; the lessees took no heed of the notice and continued running their trains:—Held, that the matter came within the terms of the agreement for reference to arbitration, and must accordingly be referred. *Llanelly Ry.* v. *L. & N. W. Ry.*, 20 W. R. 898. Affirmed, 45 L. J., Ch. 539; L. R. 7 H. L. 550; 32 L. T. 575; 23 W. R. 927.

—— **Through Rates—"Connected with."**]—The special act of the C. W. Railway provided that the L. & N. W. Railway, the G. W. Railway and other companies (seven in all) should afford all proper and sufficient facilities, including through rates, to traffic passing to, from, or over the C. W. Railway, from or to any railway of the seven companies on any railway connected with them, and that the terms and conditions, pecuniary or otherwise, on which the traffic facilities should be respectively afforded, and the amount and apportionment of the through rates should failing agreement, be determined by arbitration in manner provided by the Regulation of Railways Act, 1873:—Held, that such special act requires facilities to be afforded to all traffic passing over the C. W. Railway which either comes from or is destined to some point upon and which during its whole course passes uninterruptedly over railways belonging to one or more of the seven companies, or connected for purposes of management or working with one or more of the said seven companies; that the said special act does not grant through rates absolutely; that the sufficiency of through rates existing at any time and the propriety of granting others are among the matters which, failing agreement, are required by the special act to be referred to arbitration; and that the words "connected with," in the said special act, mean connected for the purposes of management or working, and not merely physically connected. *G. W. Ry.* v. *Central Wales Ry.*, 5 Ry. & Can. Traff. Cas. 1.

—— **Authority of Arbitrators — Defective Arrangement.**]—The Eastern Counties Railway Company were proprietors of a line between London and Colchester, at which place it joined the Eastern Union Railway, incorporated by act of parliament, and differences having arisen between the companies as to the interchange and transmission of traffic from one of the lines to the other, it was enacted that if either company should so require, then within fourteen days after a notice in writing by the company so requiring it, the other should refer to arbitration, to determine what arrangement should be made by the two companies, or either of them, for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals and goods, to be conveyed from the Eastern Union Railway upon and along the Eastern Counties Railway between London and Colchester, and from the Eastern Counties Railway between London and Colchester upon and along the Eastern Union Railway, to determine the conditions on which such use, conveyance and accommodation should be offered, and generally to determine all matters incident to the arrangements, or which might be necessary or expedient for giving effect to the same. Arbitrators were appointed, who awarded, first, that the Eastern Counties Railway Company should, for the conveyance and accommodation of passengers to be conveyed from the Eastern Union Railway upon and along the Eastern Counties Railway line, run every day (except Sundays) an express train from the junction at Colchester to London, such train to leave Colchester at 10 a.m. and to arrive at London at 11.30 a.m.; secondly, that the Eastern Counties Railway Company should, for the conveyance and accommodation of passengers to be conveyed upon and along the Eastern Union line, run an express train from London to Colchester, and should cause such train to depart every day (Sundays excepted) from London at 7.45 p.m., and to arrive at Colchester at 9.15 p.m., and should by such train convey all such passengers as should offer themselves; thirdly, for affording proper facilities and convenience for the conveyance and accommodation of passengers to be conveyed from the Eastern Union line upon and along the Eastern Counties line between London and Colchester, that the Eastern Counties Railway Company should use and employ for the conveyance of the same passengers and passengers' luggage on their line all such carriages and vans as should have been employed for the conveyance of the same passengers and passengers' luggage on the Eastern Union line, and which should be tendered to them and be ready for their use at Colchester five minutes at least before the departure of their trains:—Held, that all the matters awarded upon were within the authority of the arbitrators; that if the speed directed were dangerous, it should have been set up as an answer to the award, and that the arrangement was not defective, because not limited in point of time, as either party might at any time, by a notice, require a fresh arbitration. *Eastern Union Ry.* v. *Eastern Counties Ry.*, 2 El. & Bl. 530; 22 L. J., Q. B. 371.

Jurisdiction of Railway Commission.]—*See* infra.

G. RAILWAY COMMISSION.

I. Reasonable Facilities for Traffic.

Order to reopen closed Station — Right of Railway Company to close Line or Stations.]—The railway commissioners have no jurisdiction to order a railway company to rebuild and reopen for passenger traffic a station which the company has closed and pulled down, the reasonable facilities for traffic which, by s. 2 of the Railway and Canal Traffic Act, 1854, a railway company is required to afford, having no application to stations that are not in use. *Winsford Local Board* v. *Cheshire Lines Committee* (24 Q. B. D. 456) overruled. *Darlaston Local Board* v. *L. & N. W. Ry.*, 63 L. J., Q. B. 826; [1894] 2 Q. B. 694; 9 R. 712; 71 L. T. 461; 43 W. R. 29; 8 Ry. & Can. Traff. Cas. 216—C. A.

Per Lord Esher, M.R. and A. L. Smith, L.JJ.:

Unless a railway company is required by its act to keep open its line and stations, it is entitled to close any part of its line or any of its stations whenever it desires to do so. Per Kay, L.J.: Even if the duty to afford "reasonable" facilities applied to a station which had ceased to be used, that duty could not require the reopening of a station which had been closed in consequence of the railway company finding that its continuance involved a heavy loss. *Ib.*

Order on Company to resume Abandoned Traffic.]—A railway company discontinued the carriage of passenger traffic over a branch line, a section of their railway system, alleging that they were unable to work such traffic otherwise than at a loss:—Held, that since the railway and Canal Traffic Act, 1854, such action on the part of the company was subject to the control of the railway commission court, which consequently had jurisdiction to entertain an application for an order enjoining the railway company to afford reasonable facilities for receiving and forwarding passenger traffic. *Winsford Local Board* v. *Cheshire Lines Committee*, 59 L. J., Q. B. 372; 24 Q. B. D. 456; 62 L. T. 268; 38 W. R. 511; 7 Ry. & Can. Traff. Cas. 72.

Structural Alterations to Station.]—The railway commissioners, to whom has been transferred the jurisdiction of the Court of Common Pleas under the Railway and Canal Traffic Act, 1854, have under that act jurisdiction to hear and determine a complaint against a railway company of not, according to its powers, affording all reasonable facilities for receiving, forwarding, and delivering passengers and other traffic at and from any of its stations which are used by the company for such passengers or other traffic; and although the commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing its obligation to afford such facilities, according to its powers for the receiving, forwarding and delivering of the traffic, yet they have jurisdiction to order such facilities, even if their doing so would necessitate the making by the company of some structural alteration of such station. *S. E. Ry.* v. *Railway Commissioners*, 50 L. J., Q. B. 201; 6 Q. B. D. 586; 44 L. T. 203; 45 J. P. 388.

Passenger Traffic—Line used only for Mineral and Goods Traffic.]—Where as a necessary incident of opening a line for passenger traffic the structural alterations involved would be so large as to be beyond the jurisdiction of the commissioners to order, an order for facilities for passenger traffic will not be made. *Glamorganshire County Council* v. *G. W. Ry.*, 8 Ry. & Can. Traff. Cas. 196.

Where an application to the commissioners seeks to compel a railway company to give facilities for a particular class of traffic on a branch line which is part of a larger railway system, and on any part of that larger system that particular class of traffic is carried, it is not an answer going to jurisdiction for the railway company to say that they have never carried that particular class of traffic on that branch line. *Ib.*

Charge for Water-closets at Stations.]—The mere fact that railway companies make a charge to their passengers for the use of water-closets at their stations is not, in the absence of undue preference, a breach of their obligations under s. 2 of the Railway and Canal Traffic Act, 1854, to "afford all reasonable facilities for the receiving and forwarding and delivering of (passenger) traffic"; and the railway commissioners have no jurisdiction to enjoin railway companies to provide free water-closets and desist from making a charge for the use of them. *G. W. Ry.* v. *Railway Commissioners, Brown, In re* (7 Q.B. D.182) followed. *West Ham Corporation* v. *G. E. Ry.*, 64 L. J., Q. B. 340; 72 L. T. 395; 9 Ry. & Can. Traff. Cas. 7.

Place of Shelter.]—Semble, it is a good ground of complaint that there is no place of shelter provided at the junction, for passengers on the branch line waiting the arrival of trains; the public being entitled in this respect to reasonable accommodation. *Caterham Ry., In re*, 1 C. B. (N.S.) 410; 26 L. J., C. P. 161.

Number and Time of Trains.]—To induce the court to interfere on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line does not stop at the junction, or stop at convenient times, it must be distinctly shewn that sufficient accommodation is not afforded to meet the fair requirements of the public. *Ib.*

Tickets.]—It is no ground of complaint that the company working the main line refuses to grant third-class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated. *Ib.*

The court refused to grant a rule for an injunction against the Eastern Counties Railway Company to compel them to issue season tickets between Colchester and London, on the same terms as they issued them between Harwich and London, upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. *Jones* v. *Eastern Counties Ry.*, 3 C. B. (N.S.) 718.

Through Traffic—Order on Two Companies.]—The railway commissioners made an order, under the Regulation of Railways Act, 1873, requiring the London, Chatham and Dover and South-Eastern Railway companies to make arrangements and to afford facilities for the transference of traffic from the line of one company to the other; to arrange the arrivals of their trains at a junction in a particular manner, and directing the former company to run trains over a disused branch line; and, upon non-compliance with the order, made a further order imposing penalties upon both companies for their disobedience:—Held, that the first order was invalid, and that a prohibition must be granted to restrain the commissioners from enforcing it; for, assuming that they had jurisdiction to require each company separately to give facilities according to its powers, they were not entitled to order two companies to act jointly in doing what neither could do separately. *Toomer* v. *L., C. & D. Ry.*, 47 L. J., Ex. 276; 2 Ex. D. 450; 37 L. T. 161; 26 W. R. 31.

—— **Public Convenience.**]—To justify the interference of the court to enforce the running of through trains on a continuous line of railways, it must be shewn that public convenience requires it, and that it can reasonably be done.

Barret v. *G. N. Ry.*, 1 C. B. (N.S.) 423 ; 26 L. J., C. P. 83.

The court will not interfere, at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route, no additional cost, or serious loss of time, being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation. *Ib.*

—— **Through Rates for Goods—Reasonable Route—Through Booking.**]—Any one of the public intending to send traffic over the railways of two or more railway companies forming together a continuous route, may, under s. 2 of the Railway and Canal Traffic Act, 1854, require the companies to combine to carry his traffic at a single booking and for a single payment as an accommodation reasonable to be granted to him. If there are grounds for the court allowing something claimed as a proper facility for using railways, an objection grounded on its inconvenient consequences to railway companies by reason of arrangements made by themselves will not suffice for not allowing it. *Didcot, Newbury and Southampton Ry.* v. *G. W. Ry. and L. & S. W. Ry.*, 9 Ry. & Can. Traff. Cas. 210. See *S. C.*, in C. A., infra.

An order by the railway commissioners for through booking is not a matter of right. Through booking is a facility within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854, and s. 25 of the Railway and Canal Traffic Act, 1888, and upon an application for an order for through booking the commissioners must have regard to the considerations mentioned in those sections. Per Lord Esher, M.R., and Rigby, L.J. :—An order of the railway commissioners for through booking necessarily involves an order for a through rate, although the through rate is only the sum of the local rates of the several lines over which the traffic passes. *Didcot, Newbury and Southampton Ry.* v. *G. W. Ry. and L. & S. W. Ry.*, 66 L J., Q. B. 33 ; [1897] 1 Q. B. 33 ; 75 L. T. 401 ; 45 W. R. 282—C. A.

—— **Application by Company with no Rolling Stock.**]—The Central Wales Company applied to the railway commissioners for an order under s. 11 of the Regulation of Railways Act, 1876, allowing through rates in respect of the traffic in certain goods between Chester and Haverfordwest, the route claimed being from Chester, over lines owned or worked by the London and North Western Railway Company, and over the applicants' own line, which was worked by the same company under an agreement with the applicants, and thence to Haverfordwest over the Great Western Company's line, which was worked and owned exclusively by that company, and vice versâ from Haverfordwest to Chester. The applicants had no rolling stock, and did not work their railway, but maintained and managed their line, and collected, forwarded, and delivered their own traffic, the whole of the staff at their stations being employed and paid by them, and subject to their orders :—Held, that the traffic was "through traffic to and from" the applicants' railway, and that the applicants were a railway company entitled to request a through rate in respect of such traffic, within the meaning of s. 11, and therefore that the railway commissioners had jurisdiction to make the order. *Central Wales Ry.* v. *G. W. Ry.*, 52 L. J., Q. B. 211 ; 10 Q. B. D. 231 ; 48 L. T. 234, 315 ; 31 W. R. 321 ; 4 Ry. & Can. Traff. Cas. 110.

—— **Construction of Agreement.**]—A clause in an agreement made between certain railway companies provided that the M. company and the L. company should agree upon through rates for coal and other traffic from and to the collieries, to and from all places on the system of the M. company and C. L. committee, and that these through rates should be viâ a reasonable and convenient junction or junctions to be agreed upon or to be settled by arbitration :—Held, that the reasonable and convenient junctions contemplated by this clause were not confined to the particular line with which the agreement was principally conversant, but extended to all convenient junctions, wherever situate, on the M. company's system ; but, semble that, whatever might be the effect of the clause, it would not prevent either of the companies, parties to it, from applying for through rates under s. 11 of the Regulation of Railways Act, 1873, and that such through rates might be granted by any convenient routes, whether such routes were or not contemplated by the agreement. *Manchester, Sheffield and Lincolnshire Ry.* v. *L. & N. W. Ry.*, 6 Ry. & Can. Traff. Cas. 1.

—— **Two Stations—Connection with Port.**]—A railway company had a passenger station at N., close to the port of N., but all goods and cattle had to be taken nearly a mile along a road between their goods station and the port for shipment :—Held that the company by not connecting their passenger station with the port had not contravened the provisions of s. 2 of the Railway and Canal Traffic Act, 1854, in not affording reasonable facilities for merchandise and cattle traffic. *Newry Navigation Co.* v. *G. N. Ry.*, 7 Ry. & Can. Traff. Cas. 176.

—— **Stations Connected—Section unused.**]—Two railways ran trains to A., and each had a station there ; the stations were less than a mile apart, and were connected by a line belonging to one of such companies, but no passengers were conveyed on the line between the stations :—Held, that the two companies must afford all due and reasonable facilities for forwarding passenger traffic over the connecting line, and must make mutual arrangements to carry such order into effect, and submit a scheme to the court for approval. *Maidstone Corporation* v. *S. E. Ry.*, 7 Ry. & Can. Traff. Cas. 99.

—— **Passenger Traffic — Covered Footpath between Two Stations.**]—Two railway companies ran trains to M., and each had a station there. The stations were half a mile apart, and were connected by a line of railway belonging to one of such companies and which was used for goods only. On an application to the court for an order enjoining the two companies (i.) to afford to the public the advantages which ought to be derived by means of the continuous lines at and through M. of the two companies between stations on their respective railways and to provide through passenger trains and through booking of passengers over such continuous lines, (ii.) to modify and arrange the times of arrival and departure of trains belonging to each of the two companies respectively, at and from M., so as to allow passengers travelling by trains of the one company to avail themselves of the

other company's trains without delay or inconvenience and without change of carriage :—The court held that an order for reasonable facilities, without specifying what they were, must issue, and intimated that no case had been made out of public necessity which would justify the court in requiring the companies to work a through service of trains, or even of carriages, from the one system to the other, and further intimated that if the two companies complied with such order by making a good covered footpath between the two stations, and by providing the necessary porterage to accommodate persons with luggage desiring to pass from the one to the other, and by establishing through booking, they would amply meet the necessities of the existing traffic. *Sussex County Council* v. *L., B. & S. C. Ry.*, 8 Ry. & Can. Traff. Cas. 17.

—— **Interchange of Traffic—Continuous Line of Railway.**]—The D. railway company, by means of a loop line and junction with the M. railway company, formed a continuous line of railway communication, connecting towns and places on the D. railway with places in the south of Ireland situated on the G. S. railway company's lines. Although the junction had been passed by the board of trade as safe for passenger traffic the M. railway company refused to exchange traffic there or allow it to be used, on the ground that such junction was unsafe for passenger traffic, and also that trains coming over the loop line and junction would unreasonably interfere with their own traffic. The court held that the D. railway company were entitled to a general order for facilities, as it was proved that traffic forwarded by the loop line would not be an unreasonable interference with the M. railway company's traffic at that particular place. This loop line and junction being likely to be of public service and benefit, and having been made under statutory powers and sanctioned by the board of trade, the court refused to presume against the security of the line. *Dublin, Wicklow, and Wexford Ry.* v. *Midland Great Western Ry.*, 8 Ry. & Can. Traff. Cas. 39.

—— **Merchandise Traffic—Forwarding Traffic—Continuous Line of Railway.**]—A steampacket company had their wharf connected by a horse tramway with a branch of the M. railway company's railway. The S. railway company had running powers over the M. company's railway to a junction with such branch. An arrangement was made for carrying the traffic inwards and outwards between the S. company's railway and the steampacket company's wharf by the S. company bringing the wagons to the junction with the M. company's branch line, where the wagons were detached and shunted and delivered to the M. company, who hauled them by horse power along their line and the tramway and delivered them at the steampacket company's wharf. This arrangement continued for ten years without complaints from anyone. At the end of that period the M. Railway company notified the steampacket company that they could not continue such interchange of the traffic. The steampacket company applied for an order that the M. railway company afford them all reasonable facilities for the receiving and forwarding and delivering of through traffic, and that the existing arrangements and facilities should be declared to be reasonable. The M. railway company made no offer of other facilities of equal value in place of those they sought to withdraw, and it was proved that the traffic could be exchanged at the point of junction with ease and safety :—Held, that the aforesaid arrangement was a due and reasonable facility for dealing with the traffic, and that the facilities should continue to be afforded. *City of Dublin Steam Packet Co.* v. *Midland Great Western Ry.*, 8 Ry. & Can. Traff. Cas. 1.

—— **Passenger Traffic — Continuous Line — Application by Owning against Working Company.**]—Where an agreement between two railway companies does not provide for the carrying of through passenger and coaching traffic, the commissioners have jurisdiction to entertain an application under s. 2 of the Railway and Canal Traffic Act, 1854, for an order to afford due and reasonable facilities for such traffic. That the applicants for such an order are the owning railway company, and the defendants the working railway company, does not of itself prevent such an application under the Railway and Canal Traffic Acts being entertained. *Solway Junction Ry.* v. *Caledonian Ry.*, 8 Ry. & Can. Traff. Cas. 177.

Rates and Charges.]—*See* infra.

2. Rates and Charges.

Restraining Excessive Charges.]—The mere fact that railway companies make charges for the conveyance of passengers in excess of those authorised by their special acts, but without any undue preference, is not a breach of their obligation under the Railway and Canal Traffic Act, 1854, s. 2, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles." And the railway commissioners have no jurisdiction to grant an injunction to restrain the making of such excessive charges. *G. W. Ry.* v. *Railway Commissioners, Brown, In re*, 50 L. J., Q. B. 483 ; 7 Q. B. D. 182 ; 45 L. T. 206 ; 29 W. R. 901 ; 46 J. P. 35—C. A.

Semble, per Brett, L.J., and Cotton, L.J., that if the overcharges were of such an amount and of such a nature that they had the effect, or it could be presumed that they were made with the intention, of preventing the use by passengers of particular trains and stations, the commissioners might have jurisdiction to entertain a complaint in respect of them as being a refusal of "facilities" within the meaning of the Railway and Canal Traffic Act, 1854, s. 2. *Ib.*

The words in s. 2 of the Railway and Canal Traffic Act, "every railway company shall afford all due and reasonable facilities for the receiving and forwarding of traffic," do not refer to the fares charged for passenger traffic—per Bramwell, L.J. *Ib.*

The mere refusal by a railway company to receive and forward the traffic of persons in general except upon prepayment of charges somewhat in excess of the maximum authorised rates is not a denial of "reasonable facilities," nor subjecting the senders of such traffic to "undue or unreasonable prejudice or disadvantage" within the meaning of the Railway and Canal Traffic Act, 1854, s. 2, or the Regulation

of Railways Act, 1873, and the railway commissioners have no jurisdiction under those acts to restrain a railway company from making such charges, and cannot give themselves jurisdiction by finding as a fact that the demand of prepayment of such charges is a denial of "reasonable facilities" or subjecting persons or their traffic to "undue or unreasonable prejudice or disadvantage" within s. 2 of the act of 1854. *Reg.* v. *Distington Iron Co.*, 58 L. J., Q. B. 233; 22 Q. B. D. 642; 60 L. T. 606; 37 W. R. 446; 6 Ry. & Can. Traff. Cas. 108; 53 J. P. 533.

Inequality of Dues—Railway and Dock Company.]—The duties imposed on railway companies by the Railway and Canal Traffic Act, 1854, s. 2, are confined to traffic; therefore, the railway commissioners have no jurisdiction to determine complaints against a railway and dock company for inequality of dues levied in respect of a dock forming a distinct part of their undertaking, although such company be also owners of other docks not distinct from but connected with their railway. *East and West India Dock Co.* v. *Shaw, Savill & Co.*, 57 L. J., Ch. 1038; 39 Ch. D. 524; 60 L. T. 142; 6 Ry. & Can. Traff. Cas. 94.

Increase of Rates—Unreasonableness of.]—Upon a complaint under the Railway and Canal Traffic Act, 1894, s. 1, that a railway company had, since 1st January, 1893, unreasonably increased their rates for coal for shipment from the applicants' colliery to the Tyne Dock and Sunderland by an addition of 5*d.* to the rate per ton:—Held, that the increase was not unreasonable, the railway company having proved that the cost of working the applicants' traffic had increased by certain detailed items. *Charlaw and Sacriston Collieries Co.* v. *N. E. Ry.*, 9 Ry. & Can. Traff. Cas. 140.

—— **Jurisdiction—Traders' Complaint—Cartage Charges outside Terminal Station—Increase since Given Date.**]—The decision of a dispute between traders and a railway company relating to the increase of charges for cartage outside a terminal station since December 31, 1892, is by s. 1 of the Railway and Canal Traffic Act, 1894, within the jurisdiction of the railway commissioners, and is not confined by the 5th section of the schedule of the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, to the decision of an arbitrator appointed by the board of trade. *Mansion House Association* v. *L. & N. W. Ry.*, 65 L. J., Q. B. 209; [1896] 1 Q. B. 273; 74 L. T. 463; 9 Ry. & Can. Traff. Cas. 174.

—— **By Railway Companies jointly—Joinder of Respondents.**]—Where a complaint is made under the 1st section of the Railway and Canal Traffic Act, 1894, that a rate increased by a railway company jointly with other railway companies since the 31st of December, 1892, is unreasonable, the complainant must join all the railway companies concerned as respondents to the complaint. *Mapperley Colliery Co.* v. *Midland Ry.*, 65 L. J., Q. B. 272; 9 Ry. & Can. Traff. Cas. 147.

—— **Rates Raised since December 31, 1892—Presumption of Reasonableness—Justification of Increase.**]—The Railway and Canal Traffic Act, 1894, s. 1, applies retrospectively to increase of rates since the last day of December, 1892. On January 1, 1893, a railway company raised their rate for the carriage of coal, but not to the maximum. Prior to the passing of the act of 1894 all rates below the maxima for their class were presumed to be reasonable:—Held that s. 1, in the case of rates raised after the last day of December, 1892, removed that presumption, and cast upon railway companies the onus of shewing that the increase was reasonable, but did not limit their justification of the increase to circumstances arising after the date named in the act. The presumption that the old rate was high enough might be rebutted by shewing that the expense of performing the service had increased. *Rickett, Smith & Co.* v. *Midland Ry.*, 65 L. J., Q. B. 274; [1896] 1 Q. B. 260; 9 Ry. & Can. Traff. Cas. 107.

—— **Complaint by Traders' Association—Rates Unreasonably Increased.**]—A complaint may be made to the railway commissioners by a traders' association within s. 7 of the Railway and Canal Traffic Act, 1888, without proof that there has been any complaint to the association by any particular traders, or that the association represents individuals who are aggrieved. *Mansion House Association* v. *G. W. Ry.*, 64 L. J., Q. B. 434; [1895] 2 Q. B. 141; 14 R. 429; 72 L. T. 523; 9 Ry. & Can. Traff. Cas. 58—C. A.

Such an association may complain, under s. 1 of the Railway and Canal Traffic Act, 1894, that a railway company has unreasonably increased its rates, although it cannot be liable to pay to the company, under sub-s. 4 of that section, any sum in respect of the rates complained of, that sub-section not applying to a complaint by an association which is proceeding under s. 7 of the act of 1888, and is not itself aggrieved by the increased charges. *Ib.*

—— **Particulars—Names of Traders Represented by Applicants.**]—Upon a complaint made by a traders' association, certified under s. 7 of the act of 1888, to the railway commissioners that the rates in respect of general classes of goods have been unreasonably increased by a railway company, the association will not be ordered to give particulars as to the names of the traders whom it represents, or in respect of what particular articles the rates are alleged by it to have been unreasonably increased. *Ib.*

Unequal Rates—Differential Rates—Interests of "the public."]—The public referred to in s. 27 of the Railway and Canal Traffic Act, 1888, is the public of the locality or district affected, and any considerable proportion of the population in general, as opposed to an individual or association of individuals, will satisfy the description. *Liverpool Corn Traders' Association* v. *G. W. Ry.*, 8 Ry. & Can. Traff. Cas. 114—C. A.

—— **Leave to appear—Not "in opposition."**]—An application by the Gloucester Chamber of Commerce under s. 7 of the Railway and Canal Traffic Act, 1888, asking leave to appear at the hearing of the case, was refused because they were not prepared to say whether it was "in opposition" or not that they desired to appear. *Ib.*

Altering Tolls fixed by Statute—Absence of Party interested.]—Under an act in 1846 the B. canal company were authorised to charge certain tolls, rates and dues for goods traffic in respect of the canals and other works of the company, and were prohibited from making an

order to reduce, advance or otherwise vary all or any of such tolls, rates or dues, without the consent of a railway company, who guaranteed that, if the income of the canal company in any year was insufficient to pay a dividend of 4*l.* per cent. on the capital of the canal company, the railway company would make up the deficiency. The B. canal company was one link in a chain of canals owned by various companies, and forming a continuous line of navigation between two points. In pursuance of an application made to them by one of those companies, the railway commissioners, under the Regulation of Railways Act, 1873, s. 11, made an order allowing through rates for goods traffic between those two points, the effect of which would be to reduce the tolls of the B. canal company below the maximum allowed by the act of 1846, and below the amounts theretofore charged by the company. The railway company were not represented before the commissioners, and did not consent to the order or to any variation of the tolls:—Held, that the order was made without jurisdiction, and must be restrained by prohibition. By Kelly, C.B., because the commissioners could not make an order affecting the liability of the railway company under their guarantee without at least hearing them. By Pollock, B., and Hawkins, J., because the consent of the railway company had not been obtained, and the Regulation of Railways Act, 1873, gave the commissioners no power without such consent to reduce the tolls, rates or dues as authorised by the act of 1846. *Warwick Canal Co.* v. *Birmingham Canal Co.*, 48 L. J., Ex. 550; 5 Ex. D. 1; 40 L. T. 846.

Dissection of Rates—Charge for Conveyance only—Sufficiency of Account.]—A railway company making a single charge to a trader for conveyance of traffic within the maximum rate is bound, in answer to an application by the trader under s. 33, sub-s. 3, of the Railway and Canal Traffic Act, 1888, to render an account distinguishing the charge for conveyance from other charges, if any; but if, in the return of such an account, the railway company make a formal statement that the whole charge is for conveyance, and no charge is shewn for any other services, that is a sufficient answer to the application. *New Union Mill Co.* v. *G. W. Ry.*, 65 L. J., Q. B. 493; [1896] 2 Q. B. 290; 74 L. T. 791; 9 Ry. & Can. Traff. Cas. 152.

—— **Customers' Sidings forming no part of Station.**]—The power to dissect rates contained in s. 14 of the Regulation of Railways Act, 1873, does not apply to sidings and junctions belonging to customers that form no part of a station belonging to a railway, and the court has no jurisdiction under s. 34 of the Railway and Canal Traffic Act, 1888, to order dissection of rates in books kept at the stations nearest these sidings and junctions in accordance with the last-mentioned section. *Pelsall Coal Co.* v. *L. & N. W. Ry.*, 7 Ry. & Can. Traff. Cas. 36.

—— **Booking to Foreign Station—Through Rates—Quoting a Rate.**]—Where a railway makes a practice of regularly accepting goods of their customers on definite terms to be conveyed from a station on their own system to a station on a foreign system, they are to be held to "book" to such foreign station; and cannot evade their duties and liabilities, under s. 14 of the Regulation of Railways Act, 1873, by calling such acceptance of the traffic "quoting a rate" to such foreign station. The commission court have power, under this section, to order the division by the booking company of through rates for the information of customers, where the booking company has the information necessary for such division. *Pelsall Coal Co.* v. *L. & N. W. Ry.*, 23 Q. B. D. 536; 61 L. T. 257; 7 Ry. & Can. Traff. Cas. 1.

—— **"Persons Interested" — Competitive Rates—Practice.**]—Any person who makes out by proper evidence that the rates which he seeks to have divided are really and substantially competitive rates with his own is a "person interested" within the meaning of s. 14, and is entitled to have such rates divided for his information. Applicants claiming to be persons interested and to have the information afforded to them, must make out their interest, by proper and legal evidence, before the court will make an order for such information. *Ib.*

—— **"Person Interested"—Private Branch Railway.**]—The applicant, the owner of a branch railway communicating with the defendants' line, collected and loaded goods upon trucks, and then handed over such trucks to the defendants at the junction with their line; she also received from the defendants, at the junction, traffic for delivery at the other end of the line:—Held, that the applicant was "a person interested" within the meaning of s. 14 of the Regulation of Railways Act, 1873, and that she was entitled to an order requiring the defendants to distinguish the rates in such books as they were by statute required to keep. *Tomlinson* v. *L. & N. W. Ry.*, 63 L. T. 86; 7 Ry. & Can. Traff. Cas. 22.

Terminal Accommodation—Siding Rent—Reasonableness of Charge—Liability as Carriers Ceasing.]—Sect. 5, sub-s. 4, of the Railway Rates Confirmation Acts, 1891 and 1892, gives railway companies power to impose a charge of a reasonable sum by way of addition to the tonnage rate for (inter alia) the use or occupation of any accommodation for such period as may be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery. The coal traffic on a certain railway was conveyed in waggons belonging to the traders themselves, and the practice was for the railway company to allow the waggons, on their arrival with coal at the terminal station, to remain on the company's sidings for an indefinite time until the consignees had discharged the coal from the waggons, and no charge was made for siding rent beyond the conveyance rate and the station terminal. Owing to the increase of traffic the company, under the above section, imposed a new charge for siding rent of 6*d.* a day per waggon for each day the waggon continued on the sidings after the expiration of four days:—Held, that four days was a sufficient time during which the obligation of the company as carriers should continue; that, as the statute gave the company power to make a charge for accommodation after their duty as carriers had ended, the charge for siding rent was not a direct or indirect increase of any rate or charge within the meaning of s. 1 of the Railway and Canal Traffic Act, 1894, and that the company therefore were not

called upon to justify the same; but that the reasonableness of the amount of such charge in any individual case was a matter, not for the court, but for an arbitrator appointed by the board of trade. *Manchester and Northern Counties Federation* v. *Lancashire and Yorkshire Ry.*, 76 L. T. 786.

Detention of Waggons under Load—Charge for Accommodation after Conveyance.]—Sect. 5 of the schedule to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, enacts that the company may charge, in addition to the tonnage rate, a reasonable sum for certain services rendered to a trader at his request or for his convenience, including (inter alia) the detention of trucks, or the use and occupation of any accommodation before or after conveyance, beyond such period as shall be reasonably necessary for enabling the consignee to take delivery thereof, and services rendered in connection with such use and occupation; and further, that any difference arising under such section shall be determined by an arbitrator to be appointed by the board of trade at the instance of either party. The railway commissioners having been appointed to determine a difference which had arisen between the Midland Railway Co. and S.:—Held, that the sum of 6*d.* per day per waggon was a reasonable sum to be charged by the Midland Railway Co. to S. for the use and occupation of any accommodation by waggons under load after four days, exclusive of the day of their arrival, and for services rendered by the railway company in respect of such use and occupation. *Midland Ry.* v. *Sills*, 9 Ry. & Can. Traff. Cas. 161.

Rebate on Sidings' Rates—Station Accommodation and Terminal Services.]—Sect. 4 of the Railway and Canal Traffic Act, 1894 (which provides for a rebate being allowed by a railway company in respect of merchandise received or delivered by the company at any siding or branch railway not belonging to the company), gives a rebate in proportion to the extent the railway company do not provide station accommodation or perform terminal services, and the jurisdiction of the railway commissioners is not ousted on proof of the fact that the terminal service, e.g. covering, is performed by the railway company. *Pidcock* v. *Manchester, Sheffield and Lincolnshire Ry.*, 9 Ry. & Can. Traff. Cas. 45.

The Birmingham Corporation had coal consigned to them and delivered by the railway company at (1) the corporation's private siding at Saltley, (2) the railway company's station at Lawley street. The rates charged by the company to the applicants for the carriage of coal to the Saltley siding were the same as the rates charged for the carriage of coal from the same points of departure to Lawley street station. Upon an application to determine what was a just and reasonable rebate to be made from the rates charged by the company for the carriage of coal to the Saltley siding:—Held, that the fact that the company performed for the applicants various services at Saltley siding for which they were entitled to charge under s. 5 of the schedule to the Railway Rates and Charges Order Confirmation Acts, 1891 and 1892, might be used by the company if not as a defence as a set-off to a claim for a rebate under s. 4 of the Railway and Canal Traffic Act, 1894; and that it having been proved that the value of the services received by the applicants at the Saltley siding were at least as great as the value of the services received at Lawley street station, the rates might fairly be equal in both cases. *Birmingham Corporation* v. *Midland Ry.*, 9 Ry. & Can. Traff. Cas. 165.

Voluntary Rate.]—At the request of the applicants the Midland Railway Co. made arrangements for the transit of grain traffic at a certain rate "without rebate" over its own line and the North Western Railway Co.'s line to the junction with the applicants' sidings. The applicants applied under s. 4 of the Railway and Canal Traffic Act, 1894, for a rebate from the rate charged for their traffic so delivered, in respect that the railway companies did not provide station accommodation or perform terminal services:—Held (1) that the applicants were not entitled to the benefit of s. 4, as their traffic was carried over the lines of the two railway companies at a voluntary rate, a rate, therefore, which, if the applicants accepted it at all, they must accept on the conditions offered; (2) that as by the terms of the contract the applicants' traffic was not to be delivered at or near the Midland Co.'s terminal station, but at a siding off the Midland Co.'s system altogether, where they charged no one for station accommodation or terminal services, the commissioners had no jurisdiction to deal with the case under s. 4. *Watson, Todd & Co.* v. *Midland Ry. and L. & N. W. Ry.*, 9 Ry. & Can. Traff. Cas. 90—C. A.

3. Arbitration by.

Jurisdiction.]—Before the H. railway company was formed, B., purporting to act on its behalf, entered into an agreement with two other companies for the working of the H. railway. When the H. company was formed and obtained its private act, the following section was contained in it: "The heads of agreement, bearing date April 29, 1865, between B. on behalf of the H. company; C. on behalf of the Midland Railway Company; and Y. on behalf of the Great Western Railway Company; which heads of agreement are set forth in schedule 1 to this act, are hereby confirmed and made binding on the said companies respectively." By clause 18 of the agreement in the schedule, "all differences between the three companies, or any two of them, and all questions as to the carrying into effect of the provisions of this arrangement, shall be determined by arbitration under the Railway Companies Arbitration Act, 1859." By s. 8 of the Regulation of Railways Act, 1873, it is provided that "where any difference between railway companies . . . is, under the provisions of any general or special act, . . . required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the railway commissioners, be referred to the commissioners for their decision in lieu of being referred to arbitration." The H. company applied to the commissioners for an order enjoining the Great Western and Midland Railway companies to work the H. line, and the Great Western Company objected that the H. company had not constructed certain platforms:—Held, by A. L. Smith, J. (Grove, J., dubitante), that the provision of the agreement requiring all differences to be referred to arbitration was not, although made binding by the act, a provision

of any general or special act, within s. 8 of the act of 1873, and that the railway commissioners had, therefore, no jurisdiction. *G. W. Ry.* v. *Halesowen Ry.*, 52 L. J., Q. B. 473; 48 L. T. 710; 4 Ry. & Can. Traff. Cas. 224.

By clause 1 of the agreement, "the H. company agree, at their own expense, to make and complete the railways, stations, buildings and works by this act authorised, including a terminal station at H., with the necessary conveniences thereto, and proper sidings at the junction with the Midland Railway for the convenient interchange of traffic in passengers and goods, to the satisfaction of the respective engineers of the three abovenamed companies; or, in case of their difference, to the satisfaction of an engineer to be appointed by the board of trade." By clause 2, "from and after the time when the railways are so completed, the Midland Company and the Great Western Company, at all times, at their own joint expense and risk, shall work the H. line":—Held, that the question as to the necessity for the platforms was within clause 1, and that, as the application of the H. company did not, and could not, allege that the works had been completed to the satisfaction of the engineers, clause 18 of the agreement did not apply, that, on that ground, the railway commissioners had no jurisdiction, and that the H. company should be prohibited from proceeding further with the application. *Ib.*

Two railway companies were empowered by a special act to enter into a working agreement, but no provision was made respecting arbitration. The agreement made under this act contained a clause providing that any difference between the companies should be determined by arbitration, in accordance with the provisions of the Railway Arbitration Act, 1859. Difference having arisen, one of the companies called upon the railway commissioners to decide the differences under s. 8 of the Regulation of Railways Act, 1873. The other company accordingly issued a writ for an injunction against the first company, which was amended by making the railway commissioners parties, and asking for a prohibition:—Held, that the railway commissioners had no jurisdiction to undertake the arbitration, and prohibition was issued accordingly. *Stokes Bay Railway and Pier Co.* v. *L. & S. W. R.* (2 Ry. & Can. Traff. Cas. 143) and *Portpatrick Ry.* v. *Caledonian Ry.* (3 Ry. & Can. Traff. Cas. 189) disapproved. *G. W. Ry.* v. *Waterford and Limerick Ry.*, 50 L. J., Ch. 513; 17 Ch. D. 493; 44 L. T. 723; 29 W. R. 826—C. A.

The clause in s. 8 of the Regulation of Railways Act, 1873, which enables one party to apply for the arbitration of the railway commissioners, "where any difference between railway companies is, under the provisions of any general or special act, required or authorised to be referred to arbitration," does not apply to all cases in which the agreement under which the difference has arisen has been made under the provisions of a general or special act, but only to cases in which the specific difference has been required or authorised by a general or special act to be referred to arbitration. *Ib.*

An agreement was entered into between two railway companies, one of the clauses of which provided that all questions in difference arising out of the agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859. A private act of parliament was subsequently passed, in which the agreement was set out verbatim as a schedule, and it was provided by the act that the scheduled agreement should be "confirmed and made binding" upon the parties thereto. Differences having arisen, one of the companies applied to the railway commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. The other company having obtained a rule nisi for a prohibition, on the ground that without their consent the railway commissioners had no jurisdiction to entertain the application:—Held, that the right to refer differences to arbitration was derived from the agreement itself; that the difference was not "required or authorised to be referred to arbitration under the provisions of any general or special act" within the meaning of s. 8 of the Regulation of Railways Act, 1873, and that the railway commissioners had no jurisdiction to undertake the arbitration. *Reg.* v. *Midland Ry.* or *G. W. Ry.*, 56 L. J., Q. B., 585; 19 Q. B. D. 540; 57 L. T. 619; 36 W. R. 270; 5 Ry. & Can. Traff. Cas. 267; 51 J. P. 550.

Gauge — Setting aside Award.]—A railway company, in accordance with the provisions of an act of parliament, altered the gauge of its line, "on the terms of its being paid an equitable portion of the expense thereof, such expense and proportions to be borne by the several companies whose interest would be advanced by such alteration"; and it was enacted that the plaintiffs should pay to the defendants such proportion of the expense as should be agreed upon between the parties; or, in case of their differing, as might be determined by the award of the railway commissioners. The several companies not being able to agree, the question was referred to the commissioners, and an inquiry was by them instituted, at which no person on behalf of the plaintiffs attended, and at which it appeared from the evidence that no notice was formally given them to attend, but at which the expenses of the alteration were divided and apportioned among the several companies. Notice of the award by the commissioners was sent to the plaintiffs, and their portion of the expenses demanded, but, not being paid, an action was commenced. The plaintiffs impugned the fairness of the award, inasmuch as the sum demanded was the proportion of the expense for seventy-one miles instead of for four only. On a bill by the plaintiffs to set aside the award, and to restrain the action:—Held, that the authority of the commissioners to make the award having been conferred upon them by act of parliament, the court had no jurisdiction by way of appeal to set it aside; and as the plaintiffs had subsequently had recourse to, and had memorialised the commissioners, the bill must be dismissed with costs. *Newry and Enniskillen Ry.* v. *Ulster Ry.*, 2 Jur. (N.S.) 936; 4 W. R. 781.

4. Practice.

Power to state Special Case.]—On the hearing of an application made under the regulation of Railways Act, 1873, s. 15, the railway commissioners have power to state a special case for the opinion of the High Court. *Hall* v. *L., B. & S. C. Ry.*, 15 Q. B. D. 505; 53 L. T. 345; 5 Ry. & Can. Traff. Cas. 28.

Appeal to Court of Appeal on Case stated.]—There is no appeal to the Court of Appeal from

the decision of a divisional court upon a case stated by the railway commissioners under s. 26 of the Regulation of Railways Act, 1873, even though leave to appeal has been given. Sect. 45 of the Judicature Act, 1873, does not apply to appeals from the railway commissioners. *Hall* v. *L., B. & S. C. Ry.*, 55 L. J., Q. B. 328; 17 Q. B. D. 230; 54 L. T. 713; 34 W. R. 558; 5 Ry. & Can. Traff. Cas. 28—C. A.

Discretion as to Costs.]—The railway commissioners have no jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant. *Foster* v. *G. W. Ry.*, 51 L. J., Q. B. 233; 8 Q. B. D. 515; 46 L. T. 74; 30 W. R. 398; 4 Ry. & Can. Traff. Cas. 58—C. A.

Sect. 2 of the Railway and Canal Traffic Act, 1894, enacts that "in proceedings before the railway and canal commissioners, other than disputes between two or more companies, the commissioners shall not have power to award costs on either side, unless they are of opinion that either the claim or the defence has been frivolous and vexatious":—Held, that this section dealt only with the costs of the case itself and did not take away the commissioners' power under s. 19 of the Railway and Canal Traffic Act, 1888, to deal with the costs of and incidental to other proceedings such as interlocutory applications. *Rickett, Smith & Co.* v. *Midland Ry.*, 9 Ry. & Can. Traff. Cas. 107.

Costs of Appeal.]—On an appeal from a decision of the railway commissioners in a dispute other than between two or more companies, the Court of Appeal has power to give the costs of the appeal to the successful party, notwithstanding s. 2 of the Railway and Canal Traffic Act, 1894. *Mansion House Association* v. *G. W. Ry.*, 64 L. J., Q. B. 434; [1895] 2 Q. B. 141; 14 R. 429; 72 L. T. 523; 9 Ry. & Can. Traff. Cas. 58—C. A.

Costs—Exchange of Traffic—Bonus Payable.]—Upon an application to determine the amount of bonus to be paid for traffic carried over the applicants' railway, the applicants made exorbitant claims, and put forward tables of figures full of fallacies and inaccuracies, the court ordered them though successful to pay half the defendants' costs on the ground that they had unduly protracted the inquiry. *Taff Vale Ry.* v. *Barry Dock*, 7 Ry. & Can. Traff. Cas. 41.

Some Matters within and some without Jurisdiction.]—In a declaration in prohibition by a railway company against the railway commissioners it appeared that a complaint, under the Railway and Canal Traffic Act, 1854, had been made to the commissioners against the company, and that the commissioners proposed to order certain things to be done by the company in respect of such complaint, and that the company denied the jurisdiction of the commissioners to hear and determine the complaint or any part of it, and prayed for a writ to prohibit the commissioners "from further proceeding in any way touching the premises before them." The court being of opinion that the commissioners had jurisdiction over the general matter of the complaint, and that they had jurisdiction to order some of the things they proposed ordering, though not to order the others:—Held (Brett, L.J., dissenting), that a general demurrer by the commissioners to the whole declaration should be allowed. *S. E. Ry.* v. *Railway Commissioners*, 50 L. J., Q. B. 201; 6 Q. B. D. 586; 44 L. T. 203; 45 J. P. 388.

Prohibition.]—If the railway commissioners acted beyond their powers, prohibition would lie, notwithstanding the power of the court of common pleas over railways under the Railway and Canal Traffic Act, 1854, was transferred to such commissioners by the Regulation of Railways Act, 1873. *Ib.*

Mandamus—Special Case—Question of Fact.]—Upon an application for a mandamus to the railway commissioners to state a case raising certain points of law for the consideration of the high court, where it appears from the evidence that it was possible to arrive at the conclusions contained in their judgment, the court will not interfere. *Rhymney Iron Co.* v. *Rhymney Ry.*, 6 Ry. & Can. Traff. Cas. 89—C. A. Affirming 53 J. P. 309.

Previous Decisions of Railway Commission.]—The decisions of the railway commission since its commencement are binding on the court. *Didcot, Newbury, and Southampton Ry.* v. *G. W. Ry. and L. & S. W. Ry.*, 9 Ry. & Can. Traff. Cas. 210.

5. Other Matters.

Jurisdiction to revise Working Agreement in Public Interest.]—See *Huddersfield Corporation* v. *G. N. Ry.*, ante, col. 1497.

Undue Preference.]—*See* Carriers.

H. Mines and Minerals—*See* Mines and Minerals.

I. Parliamentary Deposit—*See* Parliament.

J. Abandonment, Arrangement, Winding-up, and Execution.

1. Abandonment.

Branch Undertaking—Return of Deposit—General Assets.]—A railway company in 1873 obtained an act of parliament authorising them to construct a branch line, the parliamentary deposit being paid by B., who was the principal proprietor in the company, and the act containing the usual provisions for return of the deposit, if, as happened, the requirements of the act were not complied with. In 1875, a receiver of the branch undertaking was appointed, and in 1876, an act was obtained extending the time for completion of the line to May, 1881. In 1880, an act was obtained for the abandonment of the undertaking, providing that rights to compensation should not be affected thereby, and that, subject to such rights, and the protection of the company's creditors, the court might order the deposit money to be repaid to the persons named in the parliamentary warrant. There were no creditors' claims in respect of the branch undertaking, but the costs of the act of 1876 and the abandonment act were owing to B., who had paid them, and the general creditors of the

company had large claims. On the application of B., as representing the persons named in the warrant, for the payment to him of the deposit money: — Held, that the deposit money had become part of the general assets of the company, and must be applied for the benefit of the general creditors. *Manchester and Milford Ry., In re*, 45 L. T. 129.

Distribution of Parliamentary Deposit.]—*See* PARLIAMENT.

Costs of Depositor's Petition.] — A railway having been abandoned under the Railways Abandonment Act, the costs of a petition by the depositor for the transfer out to him of the bulk of the deposit moneys were ordered to be paid out of the general assets of the company. *Laugharne Ry., In re*, L. R. 12 Eq. 454; 19 W. R. 1108.

Costs of Solicitors and Parliamentary Agents.] — Claims in respect of expenses incurred by parliamentary agents in getting the bill of a projected railway company passed through parliament, and for moneys advanced by the intending contractor for the same purpose, are debts which have been incurred on account of the promotion of the company; and the court, under the discretion given by the Railways Abandonment Act, 1869, s. 5, will not hold it reasonable, as between such creditors and the surety to the bond, that their debts should be paid out of the bond, which, by the warrant for the abandonment of the railway, has been directed to be applied as part of the assets of the company. *Brampton and Longtown Ry., In re*, 39 L. J., Ch. 681; L. R. 10 Eq. 613; 23 L. T. 356; 18 W. R. 994.

A board of trade warrant of abandonment of a railway, under the Abandonment of Railways Act, 1850, and the Railway Companies Act, 1867, was made with a condition that moneys deposited in the court of chancery as security should be applied as part of the assets of the company:— Held, that the solicitor and parliamentary agent, not being promoters of the company, were entitled to be paid thereout their costs and charges for obtaining the act. *Kensington Station Act, In re*, L. R. 20 Eq. 197; 32 L. T. 183; 23 W. R. 463.

A solicitor was employed in the promotion of a railway and in obtaining the act for its incorporation. He was then appointed solicitor of the company, and was employed in obtaining two other acts by which the scheme was amended and fresh powers granted. The undertaking proved abortive, and the railway was never constructed. A warrant of the board of trade was obtained under the Railways Abandonment Act, 1869, for the abandonment of the railway, which contained the usual clause that the bond which had been given for the completion of the railway should be assets of the company:—Held, that the costs of the solicitor incurred in getting up the company, and, after its incorporation, in obtaining the subsequent acts, were costs incurred on account of the promotion of the company within s. 5 of the Railways Abandonment Act, 1869, and ought not to be paid out of the bond. *Barry Ry., In re*, 46 L. J., Ch. 206; 4 Ch. D. 315; 36 L. T. 125; 25 W. R. 201—C. A.

Proof of Claims.] — G., having entered into a provisional contract for the construction of a railway, expended considerable sums of money for the use of the company, in payment of the costs of promoting one of the special acts of the company, of office rent, stationery, &c. No resolutions of the board of directors authorising the payments appeared in the minute books, but the secretary and some of the directors were at the time aware that such expenses were being defrayed by G. The railway was afterwards abandoned, and an order was made for the winding-up of the company:—Held, that the sums paid by G. constituted a liability on the part of the company, and that a claim by his assignees for the amount should be allowed. *Dublin and Rathcoole Ry., In re, Stevens, Ex parte*, 1 L. R., Ir. 98.

A claim for sums paid by G. to the secretary of the company, but not proved to have been applied for the company's benefit, was disallowed. *Ib.*

In order to obtain from the Board of Trade an extension of the time limited by the act for completing the line, G. executed a bond to the crown in 40,000*l.* The company subsequently obtained a further act, allowing an additional extension of time for the completion of the railway, but containing a clause saving the liability of G. on foot of the bond. By the warrant of abandonment it was provided that the sum due on foot of the bond should be applied as assets of the company, and the bond was assigned by the lords commissioners of the treasury to the official liquidator. G.'s claim against the company had been previously assigned to T. & Co. for valuable consideration:—Held, that the official liquidator could not set off against the claim of T. & Co. the amount due on foot of the bond. *Ib.*

Form of Order.]—In a warrant of abandonment of a railway issued by the board of trade on condition that the money deposited as security for the completion of the railway or the securities in which the same was invested should be applied as part of the assets of the company, it is not necessary, under the Railways Abandonment Act, 1869, s. 5, to save the rights of a party who has advanced the deposit. His rights may be asserted and allowed in the administration of the assets of the company under the winding-up order. *Waterford, Lismore, and Fermoy Ry., In re*, Ir. R. 4 Eq. 490; 19 W. R. 145.

Indemnity—Mode of Cancelling Bond.]—The plaintiff gave a bond to the crown conditioned to be void if a certain railway was completed within a given time, and the defendants undertook to indemnify the plaintiff against all liability which he might incur in giving such bond. The railway was not completed, and the plaintiff, under the Railway Companies Act, 1867, which was passed after the giving of the bond, applied to the board of trade to authorise the abandonment of the railway and to cancel the bond, which was ordered upon condition that the money secured by it should be applied as assets of the company. The company was accordingly wound up, and the plaintiff paid, under an order of the court, a part of the money secured by the bond, which was then cancelled. The plaintiff brought an action to recover the amount so paid from the defendants on their undertaking to indemnify. On demurrer to the statement of claim:—Held, that the payment made by the plaintiff to obtain the cancelling of the bond was a liability incurred by him in giving the

bond, for which the defendants were liable to indemnify him, although the Railway Companies Act, 1867, enabling the plaintiff to take proceedings to cancel the bond, was not passed when the indemnity was given. *Webster* v. *Petre*, 4 Ex. D. 127; 27 W. R. 662.

Winding-up—What Company.]—A company, by its special act, was authorised to construct docks and a railway. The railway was only about half a mile long, and for the purpose of connecting the docks with the London and South-Western Railway, and the special act prescribed the fares for the railway. On a petition to wind up the company:—Held, that the company was not a railway company within the exception contained in the Companies Act, 1862, s. 199. *Exmouth Docks Co., In re*, 43 L. J., Ch. 110; L. R. 17 Eq. 181; 29 L. T. 573; 22 W. R. 104.

—— **Who may Petition.**]—A creditor of a railway company whose works have been abandoned by warrant of the board of trade, under 13 & 14 Vict. c. 83, cannot petition for an order to wind up the company. *North Kent Extension Ry., In re*, L. R. 8 Eq. 356; 20 L. T. 867; 17 W. R. 789.

—— **Jurisdiction of Court.**]—A warrant of abandonment of a railway was issued by the board of trade on condition that the money deposited as security for the completion of the railway or the securities in which the same was invested should be applied as part of the assets of the company:—Held, that the court had jurisdiction to make an order for winding-up the company without the consent of a party who had advanced the deposit on a security from the railway company. *Waterford, Lismore, and Fermoy Ry., In re*, Ir. R. 4 Eq. 490; 19 W. R. 145.

See also COMPANY (WINDING-UP).

2. SCHEME OF ARRANGEMENT.

Assent of Shareholders.] — A petition was presented for the confirmation of a scheme of arrangement between a railway company and their creditors, which had been assented to by all the preference and ordinary shareholders present at an extraordinary general meeting. The special act of the company enacted that all preference shares should confer the like right of voting at meetings as ordinary shares:—Held, that the special act did not qualify the enactments of the Railway Companies Act, 1867, and that the assent of the preference shareholders must be given in writing. *Cambrian Ry., In re*, 24 L. T. 417; 19 W. R. 871.

A company was incorporated with a capital of 72,000*l.* divided into 7,200 ordinary shares of 10*l.* each. Under a power contained in the company's special act, 4,960 shares had been split into preferred and deferred half shares. The holder of any two halves was entitled in respect thereof to such right of voting and other advantages as were incident to one entire share, but two half shares did not become one entire share. Upon a petition being presented under s. 16 of the act of 1867 for the confirmation by the court of a scheme of arrangement:—Held, that the holders of the preferred half shares could not be treated as a class of preference shareholders within s. 12 of the act of 1867 whose assent was required to the scheme of arrangement, but that any rights of priority belonging to the holders of the preferred half shares as between themselves and the holders of the deferred half shares would be protected by the provisions of s. 17 of the act of 1867. *Brighton and Dyke Ry., In re*, 59 L. J., Ch. 329; 44 Ch. D. 28; 62 L. T. 353; 38 W. R. 321—C. A.

—— **Rights "prejudicially affected."**]—The assent of the statutory majority of a class to a scheme of arrangement under the Railway Companies Act, 1867, cannot be dispensed with under s. 15, if any existing right of that class is prejudicially affected, it being for them and not for the court to consider whether the scheme gives them such benefits that their rights on the whole are not prejudicially affected. *Neath and Brecon Ry., In re*, [1892] 1 Ch. 349; 66 L. T. 40; 40 W. R. 289—C. A. Affirming 61 L. J., Ch. 172.

Who bound by—Debenture Holders.]—After a scheme of arrangement by a railway company with its creditors has been assented to, in writing, by three-fourths in value of the debenture holders, although dissenting debenture-holders are entitled to appear and oppose the scheme, the scheme is binding upon the minority, unless it can be shewn that the vote of the majority was obtained by fraud. *East and West Junction Ry., In re*, 38 L. J., Ch. 522; L. R. 8 Eq. 87; 21 L. T. 86.

A debenture-holder, although he has obtained judgment and issued execution against a railway company before the filing of a scheme of arrangement under the Railway Companies Act, 1867, still remains a debenture-holder for the purposes, and is therefore bound by the scheme when assented to by three-fourths in value of the holders of the company's debentures, and after inrolment of the scheme will be restrained from taking any further steps to enforce his judgment. *Potteries, Shrewsbury, and North Wales Ry.* v. *Minor*, 40 L. J., Ch. 685; L. R. 6 Ch. 621; 25 L. T. 522; 19 W. R. 883.

When at a duly convened meeting of the debenture-holders of a company in a ruined condition, a scheme for the reconstruction of the company was assented to by an overwhelming majority, the court held the will of the majority to be binding on the minority. *Tunis Rys., In re*, 30 L. T. 512; 22 W. R. 639. Affirmed 31 L. T. 264.

Unpaid vendors of land sold to the company, and debenture-holders of the company, do not, by accepting debenture stock under the provisions of a scheme, lose any priority which they previously had over an elegit creditor, who is not bound by the scheme. *Stevens* v. *Mid Hants Ry.*, 42 L. J., Ch. 694; L. R. 8 Ch. 1064; 29 L. T. 318; 21 W. R. 858.

—— **Creditors.**]—A scheme of arrangement is not binding upon outside creditors who have not assented thereto. *Bristol and North Somerset Ry., In re*, 37 L. J., Ch. 851; L. R. 6 Eq. 448; 16 W. R. 1112.

Whenever confirmation of such a scheme prejudicially affecting the interests of outside creditors is sought, the court, before confirming it, will require the written assent thereto of all the outside creditors. *Ib.*

A scheme of arrangement under the Railway Companies Act, 1867, is not, by s. 18, made binding upon unpaid landowners or general

creditors of the company, but only on persons who have assented thereto, or are members of classes which, under the previous sections of the act, have become bound by the assent of the requisite majorities. *Cambrian Ry., In re*, 37 L. J., Ch. 409; L. R. 3 Ch. 278; 18 L. T. 522; 16 W. R. 346.

An outside creditor is not bound by a scheme of arrangement filed by a railway company under the Railway Companies Act, 1867, and cannot derive any indirect benefit from it; his rights are entirely unaffected by it. *Stevens* v. *Mid Hants Ry.*, 42 L. J., Ch. 694; L. R. 8 Ch. 1064; 29 L. T. 318; 21 W. R. 858.

Parties who have recovered a judgment against a railway company, and converted it into a statutory mortgage under 13 & 14 Vict. c. 29, are not bound by a scheme of arrangement under the Railway Companies Act, 1867, to which they have not assented. *Stephens* v. *Cork and Kinsale Junction Ry.*, Ir. R. 6 Eq. 604.

Confirmation by Court.]—When, upon a petition for the confirmation of a scheme of arrangement between a railway company and its creditors, some of the outside creditors appeared and opposed the scheme, the court, on its appearing that their opposition was reasonable, and based on a due regard to their own interests, dismissed the petition. *Somerset and Dorset Ry., In re*, 21 L. T. 656; 18 W. R. 332.

When a scheme under the Railway Companies Act, 1867, provided for the borrowing of large sums of money, and that the entire authorised loan capital should be applied, first, in completing and stocking the line, and then to all lawful purposes of the company, and did not contain any special provisions for the payment of or arrangement with creditors, the court refused to confirm it as a scheme of arrangement with creditors. *Letterkenny Ry., In re*, Ir. R. 4 Eq. 538.

A scheme of arrangement under the Railway Companies Act, 1867, provided that, upon the allotment of certain debenture stock to the creditors, all their debts and claims should be deemed to be satisfied and their securities given up, to which almost all the outside creditors gave their assent; and as none of them opposed the petition to confirm the scheme, the court made an order confirming it, upon the company giving their personal security to make no allotment of the debenture stock to any of the outside creditors who had not given their assent. *West Cork Ry., In re*, Ir. R. 7 Eq. 96.

The court cannot sanction a scheme under the Railway Companies Act, 1867, giving to the holders of debenture stock the right to vote like shareholders. *Stafford and Uttoxeter Ry., In re*, 41 L. J., Ch. 777; 20 W. R. 921.

Confirmation by the court of a scheme under the Railway Companies Act, 1867, enabling a railway company to create and issue debenture stock to an amount in excess of its powers under its acts of parliament, and providing for payment of creditors in such stock, the preliminaries prescribed by the act having been complied with, and nine-tenths in value of the creditors appearing and assenting to the scheme. *Teign Valley Ry., In re*, 17 L. T. 201.

A company was authorised to make, and had made, a railway through the principal part of its undertaking, which consisted of its docks and the works connected therewith; and, being unable to pay its debts, a scheme of arrangement between the company and its creditors was prepared under the Railway Companies Act, 1867. The scheme was prefaced, as required by that act, by a declaration, under the seal of the company, that it was unable to pay its debts, and contained various provisions designed to enable it to ultimately discharge its obligations. Contractors who had constructed certain docks for the company, and who claimed to be creditors of the company for a large amount, but who held no security for their debt, opposed the confirmation of the scheme. Other unsecured creditors likewise opposed:—Held, that the scheme was a reasonable and honest one, and that as the scheme did not in any way exceed the powers afforded by the statute, nor deprive the creditors of any legal rights which they possessed, but was likely to benefit all persons concerned, the secured and the unsecured creditors as well as the shareholders, no sufficient objections to it had been established, and that therefore the scheme ought to be confirmed. *East and West India Dock Co., In re*, 44 Ch. D. 38; 62 L. T. 239; 38 W. R. 516—C. A.

A scheme which would convert mortgages of a railway company into irredeemable debenture stock is within the scope of the Railway Companies Act, 1867; and the court has jurisdiction to confirm such a scheme, if assented to by the majority of the mortgagees required by the act, and the court is satisfied that it would be beneficial to the company. *Irish N. W. Ry., In re*, Ir. R. 3 Eq. 190.

A petition was presented by a railway company asking that the scheme of arrangement between the company and its creditors might be confirmed by the order of the court. Another railway company had agreed to purchase the undertaking of the petitioning company, and a bill was prepared to be presented in the session of 1893 to carry the sale into effect:—Held, that the court ought not, on behalf of unsecured creditors, to approve a scheme on the hypothesis that a bill before parliament would pass into law; that the petition must, therefore, stand over, with liberty to apply. *Eastern and Midlands Ry., In re*, 67 L. T. 711.

When at a duly convened meeting of the debenture-holders of a company in a ruined condition, a scheme for the reconstruction of the company was assented to by an overwhelming majority, the court held the will of the majority to be binding on the minority. *Tunis Rys., In re*, 30 L. T. 512; 22 W. R. 639. Affirmed 31 L. T. 264.

Effect of—Restraining Proceedings against Company.]—Sects. 7 and 9 of the Railway Companies Act, 1867, apply only to the time between the filing of a scheme of arrangement and its inrolment, and after inrolment the court has no jurisdiction without a bill being filed to restrain an action against the company. *Potteries, Shrewsbury, and North Wales Ry., In re*, 39 L. J., Ch. 273; L. R. 5 Ch. 67; 22 L. T. 53; 18 W. R. 155.

The court has, however, jurisdiction under ss. 7, 9, to restrain proceedings by creditors or unpaid landowners during the maturing of the scheme. *Cambrian Ry., In re*, 37 L. J., Ch. 409; L. R. 3 Ch. 278; 18 L. T. 522; 16 W. R. 346.

The court will not restrain proceedings by a creditor or unpaid landowner, unless the scheme makes reasonable provision for the payment of the claims of creditors and landowners. *Ib.*

Notwithstanding s. 17 of the 30 & 31 Vict. c. 127, a scheme filed under that act, but not confirmed within three months, will, until the application for confirmation has been heard, be considered as still pending so far as regards the protection by interim order against creditors afforded by s. 7. *Robertson* v. *Wrexham, Mold and Connah's Quay Ry.*, 17 W. R. 137.

But that protection will not be afforded against a suit for specific performance before decree by an unpaid landowner, except upon the terms of the company submitting to a decree in the suit. *Ib.*

Where a scheme of arrangement has been filed under the Railway Companies Act, 1867, the circumstance that one of the judgment creditors of the company has before the filing of the scheme served notice of motion for equitable execution is not a ground upon which the court will give such creditor any exceptional position when making an order against judgment creditors for stay of proceedings. *Devas* v. *East and West India Dock Co.*, 58 L. J., Ch. 522; 61 L. T. 217.

Amending Scheme.]—A railway company constituted by the amalgamation of various other railway companies had filed a scheme for the future management and carrying on of the company. Leave was given by the court to amend the original scheme so filed. *Cambrian Ry., In re*, 18 L. T. 530.

Inrolment of Order.]—When a scheme of arrangement between a railway company and its creditors had been confirmed, inrolment of the confirmation order was restrained on the application of outside creditors who had, within thirty days from the date of the order, set down a motion for leave to file a petition for a rehearing. *Devon and Somerset Ry., In re*, L. R. 6 Eq. 615.

3. Judgment against.

a. Registration of.

A judgment may be registered as a mortgage against an incorporated railway company, under the 13 & 14 Vict. c. 29. *Bagnall, Ex parte, Bagnalstown and Wexford Ry., In re*, 13 L. T. 63.

Where, in an affidavit to register judgment as a mortgage, the company is described as a railway company, it is unnecessary further to set forth the trade of the company, inasmuch as the description "railway company" clearly imports that the trade of the company is that of a common carrier. *Ib.*

b. Sale of Surplus Lands.

Order when Made.]—A writ of execution having been sued out on a judgment debt against a railway company, upon petition, the court ordered inquiries and a sale of the company's lands in default of payment of this debt. *Hull and Hornsea Ry., In re*, 35 L. J., Ch. 838; L. R. 2 Eq. 262; 14 L. T. 855; 14 W. R. 758.

Upon the petition of a judgment creditor of a railway company, under 27 & 28 Vict. c. 112, praying for the sale of surplus lands of the company, the court will not make an immediate order for sale, but will direct inquiries. *Gardner* v. *L. C. & D. Ry.*, L. R. 2 Ch. 385; 15 L. T. 644; 15 W. R. 324.

The court will not make an order for immediate sale, unless it sees with certainty that the property in question is saleable. *Ib.*

Nature of the inquiries directed. *Ib.*

Form of order on petition by a judgment creditor for sale of superfluous lands of a railway company under 27 & 28 Vict. c. 112, s. 4. *Ib.*

A judgment dated in April, 1867, was obtained for 30,000*l.* against a railway company, and an elegit issued in June. In November the company filed a scheme of arrangement, and in January, 1868, an order for sale was made under the writ. In July, 1868, the scheme was dismissed, and a petition presented by the creditors for an inquiry whether the lands in respect of which the elegit had been issued were surplus lands, upon which ground the company opposed the claim:—Order made for the inquiry as in *Gardner* v. *L. C. & D. Ry.* (L. R. 2 Ch. 385). *Bristol and North Somerset Ry., In re*, 20 L. T. 70.

Upon the petition of a judgment creditor of a railway company an order was made, without directing inquiries, for a sale of surplus land of the company, not required for the undertaking and not used for building purposes, which had been delivered in execution to the petitioner under an elegit, the registry of which was still in force. The company was ordered to execute a proper conveyance. *Calne Ry., In re*, L. R. 9 Eq. 658.

An existing railway company was authorised to make an extension line by an act which enacted that the capital might be raised by an issue of new shares, to be called extension shares, and that the works authorised by it should, for financial purposes, form a separate undertaking, and that the capital and new shares created under its powers should constitute a separate capital; and that the profits of the extension line applicable to dividend should be wholly applied in payment of dividend on the extension shares; and that the extension shareholders should not be entitled to dividends out of any other profits of the company, and that the company might raise by mortgage any additional sums not exceeding 28,000*l.*, but not till all the extension capital had been subscribed for and half of it paid up; and that the money raised by new shares or mortgage should be applied only for the purposes of the extension act. A contractor, to whom the company was indebted in respect of the construction of the original line, obtained judgment against the company, extended certain surplus lands acquired under the powers of the extension act, and then applied to the court for a sale:—Held, that the creditor was entitled to an order for sale, for that, whatever might be the rights of the different classes of shareholders inter se, the lands were lands of the company, liable to be sold for payment of any judgment debts of the company. *Ogilvie, In re*, 41 L. J., Ch. 336; L. R. 7 Ch. 174.

Priority—Debenture-holders.]—Sect. 23 of the Railway Companies Act, 1867, does not give to creditors of a railway company in respect of mortgages, bonds or debenture-stock, any lien or charge which they did not possess before the act, so as to entitle them to payment in priority out of the proceeds of surplus lands of the company, which have been sold on the application of the judgment creditors of the company. *Hull, Barnsley, and West Riding Ry., In re*, 58 L. J., Ch. 205; 40 Ch. D. 119; 59 L. T. 877; 37 W. R. 145—C. A.

c. Receiver.

i. *Under* 30 & 31 *Vict. c.* 127, *s.* 4.

In what Cases Appointed.]—A railway company which has never commenced to acquire the lands, or construct the railways authorised by their act, is not an "undertaking" within the meaning of s. 4 of the Railway Companies Act, 1867, of which a receiver can be appointed under that section. *Birmingham and Lichfield Junction Ry., In re*, 50 L. J., Ch. 594; 18 Ch. D. 155; 45 L. T. 164; 29 W. R. 908.

A receiver would be properly appointed under s. 4 when the railway is a leased line or, under a working arrangement with another company, merely receives the rent and the tolls. *Manchester and Milford Ry., In re, Cambrian Ry., Ex parte*, infra.

In 1879 a railway company, whose line was partially completed, gave their secretary (the petitioner) a certificate of indebtedness, and an undertaking to pay a certain sum with interest, upon which he recovered judgment and issued execution. The amount was due for services partly rendered prior to the passing of the Railway Companies Act, 1867. It appeared that the company was in considerable financial difficulties, and that there were judgment creditors to a large amount prior to that of the petitioner. The portion of the line open (about eight miles) was being worked by another company at a remuneration of 60 per cent. of the gross earnings. The court, on the application of the petitioner, granted a receiver over the portion of the line open for traffic, with liberty to extend him over any part of the line which might thereafter be opened. *Southern Ry., In re, Quinton, Ex parte*, 5 L. R., Ir. 165.

When a petition was presented under s. 4 of the act of 1867 by a judgment creditor for the appointment of a receiver of the tolls of a railway company, and it appeared that the line had not been used by the company, although a portion of it had been occupied and maintained by another company, without payment of compensation; that the contract on which the judgment was recovered had been entered into previously to the passing of the act:—Held, that the railway had not been opened for public traffic within the meaning of the act; and that as the judgment had been recovered upon a contract entered into before the passing of the act it could have no effect. *Beddgelert Ry., In re*, 24 L. T. 122; 19 W. R. 427.

—— **Railway ancillary to Dock.**]—A company formed by act of parliament for the purpose of making a dock was afterwards authorised, by an act of parliament obtained by a railway company, to make a short piece of railway over its own land connected with the line of the railway company, and to work it for through traffic:—Held (Lopes, L.J., doubting), that the dock company was a company "constituted by act of parliament for the purpose of making a railway," and so was a railway company within the meaning of the Railway Companies Act, 1867; that a receiver and manager could therefore be appointed on the application of a judgment creditor; and that the receiver and manager must be appointed of the whole undertaking of the company, and not merely of the railway belonging to it. *East and West India Dock Co., In re*, 57 L. J., Ch. 1053; Ch. D. 576; 59 L. T. 237; 36 W. R. 849—C. A.

—— **Discretion of the Court.**]—In exercising the jurisdiction afforded by s. 4 of the Railway Companies Act, 1867, relative to the appointment of a receiver and manager of a railway company at the instance of judgment creditors, the court, whilst not assisting in anything of a speculative nature with regard to the future, should take a fair broad view of the present position and exigencies of the company, and act for the general benefit of all the creditors. But in exercising such jurisdiction the court is not to consider itself fettered by any contract or arrangement which may have previously been entered into between the railway company and any person, although in the exercise of its discretion the court will have regard thereto. *Hull, Barnsley, and West Riding Ry., In re*, 57 L. T. 82.

On a petition for a receiver by a judgment creditor of the company, it appeared that the baronial guarantee fund was dedicated to the payment of the dividend on the share capital, and was not general assets of the company for payment of its debts; and, it being satisfactorily shewn that the undertaking was worked at a loss, the application for a receiver was refused. *Waterford, Dungarvan, and Lismore Ry., In re, Finlayson, Ex parte*, 5 L. R., Ir. 584—C. A.

—— **Matter of Right—"If necessary."**]—Under the Railway Companies Act, 1867, s. 4, whenever a judgment creditor of a railway company is unpaid, the appointment of a receiver, or if necessary a manager, is a matter of right, and amounts to a sort of equitable execution. The words "if necessary" point to the necessity of carrying on the business, and whenever a railway company is carrying on business in the ordinary way and conducting its own traffic, a manager is necessary within the meaning of the act, and such manager should be appointed by the court. *Manchester and Milford Ry., In re, Cambrian Ry., Ex parte*, 49 L. J., Ch. 365; 14 Ch. D. 645; 42 L. T. 714—C. A.

Who Appointed, and by whom.]—As a general rule, under s. 4 of the act of 1867, the directors or some of them would be appointed managers where they were acting fairly, and the order will generally be made without prejudice to any application by the directors to propose themselves or some of their number as managers. *Manchester and Milford Ry., In re, Cambrian Ry., Ex parte*, supra.

Evidence in support of Application.] — The only evidence requisite in support of a petition by a judgment creditor for a manager under s. 4 of the Railway Companies Act, 1867, is an affidavit verifying the fact that he is a judgment creditor, that his judgment debt is unpaid, and that the company is a going concern conducting its own business. *Manchester and Milford Ry., In re, Cambrian Ry., Ex parte*, supra.

Service of Petition.] — When a petition was presented by a judgment creditor for the appointment of a receiver of the tolls of a railway company, and it appeared that the service of the petition had been effected at a house which had formerly been, but was no longer, the office of the company, and on a person who had acted as, but who was not properly constituted, the secretary:—Held, that service of the petition was insufficient. *Beddgelert Ry., In re*, 24 L. T. 122; 19 W. R. 427.

Who may be Heard.]—A receiver and manager of the company's undertaking having been appointed, on the petition of a judgment creditor, the rolling stock contractors brought in a claim for the balance of rent due to them. It was contended, on behalf of the debenture-stock holders, that the agreement was not a bonâ fide hire-and-purchase agreement, but was in fact a borrowing by the railway company :—Held, that a debenture-stock holder, attending the proceedings, was entitled to be heard on the question of the legality of a claim against the assets of the company on which he depended for payment of his interest. *Eastern and Midlands Ry., In re*, 65 L. T. 668.

Priority.]—A judgment creditor of a railway company obtained an order for a receiver and manager under s. 4 of the Railway Companies Act, 1867. After this, another judgment creditor applied for a similar order, which was made without prejudice to the former order :—Held, on appeal, that a judgment creditor gains no priority by obtaining a receivership order, that when a receivership order has been made and is in force, another judgment creditor gains no benefit whatever by obtaining a similar order, and that such subsequent order ought not to be made. The second order was therefore discharged. *Mersey Ry., In re*, 57 L. J., Ch. 283 ; 37 Ch. D. 610 ; 58 L. T. 745 ; 36 W. R. 372—C. A. See *Navan and Kingscourt Ry., In re*, infra.

—— **Unpaid Capital—Execution.**]—The appointment of a receiver of the undertaking of a railway company under s. 4 of the Railway Companies Act, 1867, does not affect the right of a judgment creditor to issue execution against unpaid capital under s. 36 of the Companies Clauses Act, 1845. Unpaid capital is not receivable by a receiver appointed under s. 4 of the Railway Companies Act, 1867. *West Lancashire Ry., In re*, 63 L. T. 56.

Powers of.]—Semble, the powers of a receiver appointed under s. 4 of the Railway Companies Act, 1867, do not extend to getting in unpaid calls. *Birmingham and Lichfield Junction Ry., In re*, 50 L. J., Ch. 594 ; 18 Ch. D. 155 ; 45 L. T. 164 ; 29 W. R. 908.

In order to make "due provision" for the working expenses of the company required by the section, the court will assume control over the management of the railway and the power of seeing that the money spent is applied to the proper management of the railway. *Manchester and Milford Ry., In re, Cambrian Ry., Ex parte*, 49 L. J., Ch. 365 ; 14 Ch. D. 645 ; 42 L. T. 714—C. A.

When a receiver and manager of the undertaking of a railway company has been appointed by the court, under s. 4 of the Railway Companies Act, 1867, the powers of management remain the same as before ; but instead of being exercised by the officers of the company they are assumed into the hands of the court, and are exercised by the receiver and manager as the servant or officer of the court. *Eastern and Midlands Ry., In re*, 66 L. T. 153.

"Working Expenses"—"Proper Outgoings."]—The expense of the promotion of a bill in Parliament to empower a railway company to work its trains by electricity instead of by steam does not come within the "working expenses" or "other proper outgoings in respect of the undertaking," within s. 4 of the Railways Companies Act, 1867 ; and money in the hands of a receiver and manager appointed under that section cannot be applied for such a purpose. *Mersey Ry., In re*, 64 L. J., Ch. 623 ; 72 L. T. 535.

A railway company sold its rolling stock to a waggon company for a sum of money, and the waggon company let the rolling stock back to the railway company at a rent, on payment of which for a term the railway company was to become repossessed of the rolling stock, the rent being equal to the purchase money and interest. The Court of Appeal decided that the transaction was a bonâ fide sale and re-hiring, and not a sham transaction as a cloak for borrowing. (See *Yorkshire Waggon Co.* v. *Maclure*, 21 Ch. D. 309.) A receiver of the railway company's undertaking having been appointed under s. 4 of the Railway Companies Act, certain moneys which represented rent of some of the rolling stock let by the railway company to another company, and proceeds of sale of other rolling stock, were paid to the receiver. Debenture holders, who had become such after the date of the above-mentioned agreement of sale and re-hiring, and also the waggon company, claimed the money :—Held, that, although by s. 23 of the act "all money borrowed . . . by a company on . . . debenture stock . . . shall have priority . . . debenture stock . . . shall have priority . . . over all claims on account of any debts . . . or engagements" (except as in the section specified), that section was subject to s. 4, by which moneys received by a receiver under the act were not payable to creditors until after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking ; and that the rent of the rolling stock was a "working expense," and a "proper outgoing," and entitled to priority over the claim of the debenture holders. *Cornwall Minerals Ry., In re*, 48 L. T. 41.

When a receiver of the undertaking of a railway company has been appointed in pursuance of s. 4 of the Railway Companies Act, 1867, the moneys received by him must be applied first in providing for the "working expenses" of the railway, even if by the company's special act a fixed dividend on shares and the interest on debentures, forming the capital raised for a particular undertaking of the company, are charged on the gross receipts of that undertaking. *Eastern and Midlands Ry., In re*, 45 Ch. D. 367 ; 63 L. T. 604—C. A.

When a railway company has purchased rolling stock on the terms of paying for it by a series of instalments at fixed times, the stock not becoming the property of the company until the complete payment of all the instalments, and the vendor having the right to seize the stock on default in payment of any one instalment, the "working expenses" include such instalments as they become due, and also overdue instalments. *Ib.*

By virtue of a special act of a company a certain loop line was constituted a "separate undertaking," and the capital raised for the purpose of constructing the loop line was constituted "separate capital." A receiver having been appointed under s. 4 of the Railway Companies Act, 1867 :—Held, upon the construction of the special act as a whole, that the dividend upon, and interest in respect of, the separate capital were not "working expenses" or "proper outgoings" within the meaning of s. 4, and were to be postponed to working expenses. *Ib.*

The E. Co. recovered judgment against the N. & K. Railway for the sum of 2,881*l.* for rails supplied to make the line. The N. & K. Railway, being unable to meet their engagements, and indebted inter alia upon mortgages prior to the judgment to the extent of 37,900*l.*, filed a scheme of arrangement in the English Court of Chancery, and obtained power to issue debenture stock to the amount of 70,000*l.* to pay off their debts, viz., 20,000*l.* A. stock and 50,000*l.* B. stock, which were declared by the scheme to be respectively first and second charges on the undertaking of the N. & K. Railway. The E. Co. appeared on the settlement of the scheme, and had it altered (article 3) so as to provide for payment of one-third of their debt out of the A. stock, they undertaking not to proceed for the balance until one month after the completion of the line, or six months after the confirmation of the scheme; and by the order confirming the scheme it was declared that it did not prejudice outside creditors, save so far as the rights of judgment creditors were affected by article 3 so amended. The debenture stock was then issued. The E. Co., not having been paid, filed a bill to compel payment, and the suit was compromised. P., another judgment creditor of the railway, commenced proceedings for a receiver. Upon a reference to settle priorities:—Held (1), that the claim of the E. Co. came under the head of "debts" of the company, and not under the head of "working expenses" or "other proper outgoings" within s. 4 of the Railway Companies Act, 1867; and (2) that the effect of the E. Co.'s assent to the scheme implied from their intervention, was to postpone their claim to the A. and B. debenture stocks. The claimant company having appealed, the court were equally divided, and the judgment therefore stood. *Navan and Kingscourt Ry., In re, Price, Ex parte*, 17 L. R., Ir. 398—C. A.

ii. *In Other Cases.*

Charge on Tolls.]—Where there were several judgments against a railway company, the tolls of which were wholly inadequate to meet the debts of the company, the judgment creditors held entitled to a charge on the tolls, and one of the judgment creditors was appointed receiver. A sale of the lands was refused, but inquiries were directed as to the best means of making the railway profitable. *Furness* v. *Caterham Ry.*, 27 L. J., Ch. 771; 4 Jur. (N.S.) 1213.

Statutory bondholders of a railway company are not entitled to an equitable charge on the tolls and traffic receipts of the company, or to have a receiver appointed over such tolls and receipts for the purpose of paying their demands. *Imperial Mercantile Credit Association* v. *Newry and Armagh Ry.*, Ir. R. 2 Eq. 524; 16 W. R. 1070.

A judgment creditor of a railway company to whom the company's land (including the line) has been delivered under an elegit is entitled to a receiver of the tolls and earnings, and is not accountable as a mortgagee in possession if he has not obtained beneficial possession. *Kingston* v. *Cowbridge Ry.*, 41 L. J., Ch. 152.

By whom Appointed.]—Sect. 33 of the special act empowered bond creditors and mortgagees of a company to enforce the payment of the arrears of principal and interest by the appointment of a receiver:—Held, that having regard to ss. 53 & 54 of the Companies Clauses Act, 1845, the receiver indicated in s. 33 of the special act was the receiver to be appointed by two justices under ss. 53 and 54 of the former act. *Russell* v. *East Anglian Ry.*, 2 Mac. & G. 125; 20 L. J., Ch. 257; 15 Jur. 935.

Expenditure of Moneys.]—When a receiver is appointed over a railway, the court has jurisdiction to control expenditure in the management and repairs of the railway, though the directors individually are not parties to the suit. *Belfast and County Down Ry.* v. *Belfast, Holywood and Bangor Ry.*, Ir. R. 3 Eq. 581.

The remuneration of directors is a proper expenditure, and should be allowed, though the company is insolvent. *Ib.*

Repairs and improvements of the line and stations, wire fencing, gas fittings and the like, are expenses properly paid out of revenue, if there is no capital immediately available for such purposes. *Ib.*

A receiver was appointed over the tolls, &c., of a railway company, and certain parties recovered damages in an action against the company for injuries suffered by a collision. On an application in the suit, in which the receiver was appointed, an order was made that he should pay such damages as part of the working expenses, &c., of the half year in which the accident occurred. *Thurgood, Ex parte*, 18 L. T. 18.

d. Leave to Issue Execution.

Railway Companies Act, 1867.]—Sects. 7 and 9 of the Railway Companies Act, 1867, apply only to the time between the filing of a scheme of arrangement and its inrolment, and after inrolment a judgment creditor does not require the leave of the court to issue execution. *Potteries, Shrewsbury and North Wales Ry., In re*, 39 L. J., Ch. 273; L. R. 5 Ch. 67; 22 L. T. 53; 18 W. R. 155.

Sects. 7 and 9 are co-extensive, and after the enrolment of the scheme there is no right to come to the court under s. 9 for leave to make process available against the property of the company. *Ib.*

After publication in the "Gazette" of notice of the filing of a scheme of arrangement by a railway company, creditors of the company will not be allowed, without first obtaining leave of the court, to issue execution upon a scire facias against shareholders of the company; the amount of capital remaining to be paid, in respect of which the scire facias has been obtained, being property of the company. *Devon and Somerset Ry., In re*, 37 L. J., Ch. 914; L. R. 6 Eq. 610; 18 L. T. 631; 17 W. R. 133.

When a railway company has filed a scheme under the Railway Companies Act, 1867, which has been sanctioned by one branch of the court, a motion for leave to issue execution must be made in that branch of the court by which the scheme was sanctioned. *Christ Church (Dean)* v. *East and West Junction Ry.*, 17 W. R. 819.

In other Cases.]—The Cambrian Railway Company's Act, 1868, restrains the commencement or continuance of actions and suits against the company by creditors except with leave of the court. The court will not in general give leave unless it is shewn that the company has money applicable to the payment and refuses to pay. *Parry, In re*, 22 L. T. 116; 18 W. R. 416.

Upon an application under the Companies Clauses Act, s. 36, for leave to issue execution against shareholders of a company which had been ordered to pay a sum of money and failed to do so, the court will give the shareholders an opportunity of questioning the validity of the order;

but is not bound to do so by directing a scire facias to issue. *Healey* v. *Chichester and Midhurst Ry.*, 39 L. J., Ch. 387; L. R. 9 Eq. 148; 21 L. T. 811; 18 W. R. 270.

The company having raised large sums of money by bond and on mortgage, and being also considerably indebted on simple contract, agreed with one of their simple contract creditors to suffer judgment to be entered up against the company at a future day. After this agreement, various negotiations took place between the bond and other creditors of the company, and the company, with the view of postponing on certain terms the enforcement of all claims, as well by specialty as simple contract, against the company for seven years: these terms were accepted by the great majority of the creditors, but rejected by the simple contract creditor. After such rejection, but before the period for issuing execution had arrived, a bill was filed by one of the bond creditors against the company and its other specialty creditors for the enforcement of his alleged equitable lien, and for the appointment of a receiver. The receiver was appointed by the consent of all parties to the suit, and entered into the possession of all the chattels of the company. The simple contract creditor then sued out execution against the company:—Held, on the petition of the simple contract creditor, that, inasmuch as the order appointing a receiver was obtained by a surprise on the court, and did not rest on an equity which could be maintained, and would not have been made if all the circumstances of the case had been brought before the court, the simple contract creditor ought to be allowed to levy upon the goods and chattels of the company notwithstanding the order. *Russell* v. *East Anglian Ry.*, 3 Macn. & G. 125; 6 Railw. Cas. 501; 20 L. J., Ch. 257; 15 Jur. 935.

J. M.

RAPE.

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I. POOR-RATES AND RATES IN GENERAL.

A. MAKING RATE.

1. VALUATION LIST.

Time for Taking and Depositing.]—J. and P. were the occupiers of rateable property situate in a parish within the limits of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). Upon the 27th of September, the overseers made and deposited a valuation list, in which the property was assessed at certain amounts. The list was transmitted to the assessment committee on the 18th of October. On the 7th of December the assessment committee met, when J. and P. objected to the amounts at which their property was assessed, and these were reduced by the committee; after the meeting of the assessment committee no special sessions were held to which J. and P. could have appealed, but they appealed to the assessment sessions, who confirmed the list:—Held, that delay in making, depositing, transmitting and approving the valuation list within the times prescribed by s. 42 of the Metropolis (Valuation) Act, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative. *Reg.* v. *Ingall*, 46 L. J., M. C. 113; 2 Q. B. D. 199; 35 L. T. 552; 25 W. R. 57.

Power to Amend—Notice of Objection.]—Under the Union Assessment Committee Amendment Act, 1864, 27 & 28 Vict. c. 39, s. 1—which enables the assessment committee to hear objections against a valuation list approved by the committee, and to amend such list, "after notice given at any time in the manner prescribed by 25 & 26 Vict. c. 103, with respect to objections"—an amendment of the list is valid, although no notice of the meeting of the committee was given to the overseers of the parish to which the list relates as required by 25 & 26 Vict. c. 103, s. 19. *Reg.* v. *Langriville Overseers* or *Copping Syke Overseers*, 54 L. J., Q. B. 124; 14 Q. B. D. 83; 52 L. T. 253; 33 W. R. 213; 49 J. P. 54.

Objection—Who may Appear—Agent of Objector.]—An assessment committee has no right to refuse to hear a surveyor who has been sent by a ratepayer to appear as his agent before the committee in support of an objection to a valuation list. *Reg.* v. *St. Mary Abbot's*, 60 L. J., M. C. 52; [1891] 1 Q. B. 378; 64 L. T. 240; 39 W. R. 278; 55 J. P. 502—C. A.

Re-deposit after Alteration.]—The valuation list of a parish under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), must, when altered by the committee, be deposited for inspection, and if not so deposited, it is invalid, together with any contribution order based upon it. *Reg.* v. *Chorlton Union*, 42 L. J., M. C. 34; L. R. 8 Q. B. 5.

It is the duty of the overseers to deposit the valuation list, after alteration by the assessment committee, in the place where the rate-books are kept, and to give due notice thereof in the same manner as in the case of the original deposit of the valuation list. *Reg.* v. *Chorlton-on-Medlock*, 35 L. J., M. C. 56; 12 L. T. 581; 13 W. R. 925.

—— **After Appeal.**]—Notice of appeal against a poor-rate having been given to the assessment committee under 27 & 28 Vict. c. 39, s. 1, they amended the valuation list, and gave notice to the overseers, but the list was not re-deposited as required by 25 & 26 Vict. c. 103, s. 21:—Held, that it was not necessary to re-deposit the list. *Reg.* v. *Edmonds*, 43 L. J., M. C. 156; L. R. 9 Q. B. 598; 31 L. T. 237; 22 W. R. 944.

A contribution order, based on the list as so altered, having been brought up by certiorari and a rule obtained to quash it on behalf of a ratepayer, whose rating was but inappreciably affected by the alterations; no recognizances having been entered into; the court discharged the rule with costs, as a vexatious abuse of the process of the court. *Ib.*

Time for Signing.]—The 32 & 33 Vict. c. 67, s. 42, is directory and not imperative, and non-compliance with its directions as to dates does not make a valuation list void, which was in fact signed and approved in time to be discussed and adjudicated upon, on the hearing of appeals against it at the general assessment sessions, and in such cases the justices cannot, under s. 35, order another list to be made. *Reg.* v. *Ingall*, 46 L. J., M. C. 113; 2 Q. B. D. 199; 35 L. T. 552; 25 W. R. 57.

Approval before Expiration of Statutory Period—Validity.]—The effect of s. 18 of the Union Assessment Committee Act, 1862, is to render void any valuation list which has been approved by the assessment committee before the expiration of twenty-eight days after public notice of the deposit of such list by the overseers, and also any rate made in conformity with such list, and that effect is not taken away by s. 1 of the Union Assessment Committee Amendment Act, 1864. *Reigate Union* v. *S. E. Ry.*, 63 L. J., M. C. 65; [1894] 1 Q. B. 411; 70 L. T. 353; 42 W. R. 585; 58 J. P. 264.

Contents of—Mode of Valuation.]—Valuers employed by an assessment committee under 27 & 28 Vict. c. 39, s. 4, to value a farm, furnished a valuation list giving the estimated acreage of each of the several fields comprising the farm, but not the gross estimated rental or the rateable value of each or any of the fields separately, but giving these two last-named amounts in lump sums in the proper columns at the end of the several items comprising the entire farm:—Held, that such a list was sufficient, and in conformity with the requirements of the act of parliament, and that it was unnecessary to give the value of each individual field of the farm separately. *Rawlence* v. *Hursley Union*, 47 L. J., M. C. 31; 3 Ex. D. 44; 37 L. T. 503; 26 W. R. 81.

—— **Gross and Rateable Value.**]—In making out the valuation list under the above act, the gross value and rateable value, as defined by s. 4, of each hereditament, must be inserted, without reference to any privilege of being assessed on an exceptional principle of valuation. *Reg.* v. *Foundling Hospital (Governors)*, 41 L. J., M. C. 41; L. R. 7 Q. B. 83; 25 L. T. 562; 20 W. R. 92.

Houses not Let or Occupied.]—Houses finished and fit for occupation, but not let or occupied, which had been omitted in the valuation list

made by the overseers under 25 & 26 Vict. c. 103, s. 14, are rateable hereditaments, and ought to be inserted in the valuation list by the assessment committee. *Reg.* v. *Malden Overseers*, 10 B. & S. 323 ; 38 L. J., M. C. 125 ; L. R. 4 Q. B. 326.

Expenses—Making and Copying.]—An assessment committee required the overseers of one of their townships to make out and copy a valuation list under 25 and 26 Vict. c. 103, s. 26. The board of overseers passed a resolution that its clerks and collectors had no time to do the work required, and that certain persons should be employed for the purpose. The overseers obtained a resolution of the vestry that the expense of this employment, which had then been defrayed, should be charged upon the poor-rates. The poor law auditor disallowed this charge, on the ground that the overseer's ordinary clerks and collectors ought to have done the work themselves :—Held, that by 27 & 28 Vict. c. 39, s. 7, when a vestry consents to such a charge, even after the expense has been defrayed, the auditor has no power to disallow it. *Reg.* v. *Chorlton-upon-Medlock Overseers*, 45 L. J., M. C. 33 ; 1 Q. B. D. 62 ; 33 L. T. 526 ; 24 W. R. 110.

—— **When Vestry Clerk Employed.**] — The duties of a vestry clerk under the Vestry Clerks Act (13 & 14 Vict. c. 57), s. 7, do not include that of preparing a valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67) ; but the overseers may employ the vestry clerk to prepare such list, and if they do so, may charge his reasonable remuneration therefor, not limiting it to his actual disbursements, upon the poor-rate under the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 7. *Reg.* v. *Cumberlege*, 46 L. J., M. C. 214 ; 2 Q. B. D. 366 ; 36 L. T. 700 ; 25 W. R. 605.

—— **Survey and Valuation.**]—A charge was made on the poor-rates for the expenses of a survey and valuation of the parish made under 6 & 7 Will. 4, c. 96, s. 3. In the bond creating the charge were inserted provisions for paying off not less than one-fifth of the sum charged, with interest in each succeeding year, till the whole was repaid :—Held, that the charge under 6 & 7 Will. 4, c. 96, s. 2, was a charge on the rates generally, and might be enforced against the rates in years subsequently to the five years next after the making of the charge. *Reg.* v. *Hurstbourne Tarrant Overseers*, El. Bl. & El. 246 ; 27 L. J., M. C. 214 ; 4 Jur. (N.S.) 783 ; 6 W. R. 521.

—— **Valuer Appointed by Committee.**]—The assessment committee of a union acting under 25 & 26 Vict. c. 103, s. 14, directed the overseers of a township within the union to send in a valuation list within three months. Before the expiration of that time the committee appointed a valuer for themselves. Subsequently the overseers sent in their valuation, which the committee rejected as unsatisfactory. The valuer then made his valuation, which exceeded by one-sixth that of the overseers :—Held, first, that the power of the overseers to make the valuation was superseded by the appointment of the valuer by the committee. *Reg.* v. *Richmond*, 6 B. & S. 541 ; 34 L. J., M. C. 186.

Held, secondly, that the parish was not liable for the expense of the valuation made by the committee either as costs or as compensation. *Ib.*

General District Rate, Basis of.] — General district rates made under 21 & 22 Vict. c. 98, s. 55, are not required to be based on the poor-rate. where, in the opinion of the local board, the poor-law valuation list is an unfit criterion for making them. *N. E. Ry.* v. *Scarborough Local Board*, 38 L. J., M. C. 65 ; L. R. 4 Q. B. 163 ; 17 W. R. 574.

2. Rate.

a. By Whom Made.

De facto Vestrymen.]—A poor-rate, which is lawfully made in other respects, is not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen de facto and not de jure. *Scadding* v. *Lorant*, 3 H. L. Cas. 418.

Commissioners.]—The 54 Geo. 3, c. 4, s. 16, authorising the levying of a gaol rate, directed that the overseers of each parish should levy it in the same way as the poor-rate :—Held, that where the power to levy the poor-rate in a particular parish was in certain commissioners, they were the proper persons to make the gaol rate, and not the overseers. *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 314 ; 5 L. J. (O.S.) M. C. 106.

b. How Made.

"Made," Meaning of.]—A poor-rate was not made until it was signed by the overseers, according to 6 & 7 Will. 4, c. 96 (Parochial Assessment Act). *Ainsworth* v. *Creeke*, 38 L. J., C. P. 58 ; L. R. 4 C. P. 476 ; 19 L. T. 824 ; 17 W. R. 229 ; 1 Hopw. & C. 141.

The word "made" in 30 & 31 Vict. c. 102 (Representation of the People Act, 1867), s. 3, par. 3, is to be construed as completely made ; and therefore where a poor-rate, purporting to be made on the 18th July, 1867, was allowed by the justices on the 4th September, 1867, and published on the 8th September, 1867 :—Held, that it was not made during the time of occupation of a claimant seeking to qualify for the twelve months succeeding July 31, 1868. *Jones* v. *Bubb*, 38 L. J., C. P. 57 ; L. R. 4 C. P. 468 ; 19 L. T. 483 ; 17 W. R. 205 ; 1 Hopw. & C. 128.

Time for Making.]—A poor-rate need not be made monthly. *Rex* v. *St. George Overseers*, 2 W. Bl. 694.

Mandamus to Make Rate.]—An overseer may sue out a writ of mandamus, commanding the churchwardens and overseers to make a poor-rate, and the writ need not state in express terms that a poor-rate was necessary. *Rex* v. *Edlaston Overseers*, 1 N. & P. 20 ; 2 H. & W. 429 ; 6 L. J., M. C. 36. S. P., *Rex* v. *Gadsby*, 1 N. & P. 572.

The rule for a mandamus, to concur in making a rate, is absolute in the first instance. *Ib.*

Where it appears that the parish officers are without funds for the relief of the poor, and that for want of the concurrence of some of the officers a rate cannot be made, the court will order a peremptory mandamus in the first instance commanding them to make a rate. *Rex.* v. *Soham Overseers*, 8 L. J. (O.S.) M. C. 73.

—— **Retrospective Rate.**]—At the time when the parish of B. was by a provisional order separated from the local government district of

M., the special district rates of that district were mortgaged for the unexpired period of twenty-three years to secure the repayment of a debt which had previously been incurred by the local board of the district of M. The statute 24 & 25 Vict. c. 39, which confirmed the provisional order, apportioned the amount which the parish of B. should contribute towards the payment of such debt, and provided that the overseers of that parish should raise the annual instalments required to pay off the sum the parish of B. was to contribute in the name and as part of the rates levied within such parish for the relief of the poor. In July, 1883, the local board of M. paid off the last instalment of principal and interest due under the mortgage, and on the 25th March demanded from the overseers of the parish of B. payment of the amount due from the parish since the 13th January, 1879, up to which date the parish had duly contributed in accordance with 24 & 25 Vict. c. 39. The demand not having been complied with, an application was made for a mandamus to compel the overseers to levy a rate in order to pay the amount in arrear:—Held, that the obligation imposed by the statute on the parish of B. was that they should pay their proportion of the debt annually, and that the effect of granting the mandamus would be to enforce the levy of retrospective rates, and the court therefore discharged the rule. *Reg.* v. *Beddington Overseers*, 48 J. P. 486.

—— **Payment of Debts Act, 1859—Prosecution of Action with due Diligence.**]—An action was brought by an engineer, within the time limited by s. 1 of the Payment of Debts Act, 1859, for services rendered to the defendants, who were a rural sanitary authority acting under the Public Health Act, 1875. After issue joined the plaintiff took out a summons to refer the matter to arbitration; this summons was opposed by the defendants, and was dismissed. The plaintiff then allowed two assizes at Leeds (where the action was to be tried) to pass without giving notice of trial; the defendants then took out a summons to dismiss the action for want of prosecution, after which the plaintiff gave notice of trial for the assizes then coming on. At the trial, the learned judge, with the consent of the parties, ordered the matter to be referred to an arbitrator, who found for the plaintiff for a certain sum. In an action for a mandamus to the defendants to levy a rate to satisfy the award:—Held, granting the mandamus, that, as the action was a proper one to be referred to arbitration, and as the plaintiff had taken out a summons to refer, which the defendants opposed, the plaintiff had not, under the circumstances, failed to prosecute the proceedings in the action "with due diligence" within the meaning of s. 4 of the Poor Law Boards (Payment of Debts) Act, 1859. *Rhodes* v. *Pateley Bridge Union*, 51 L. T. 235; 48 J. P. 168.

Concurrent Rates.]—A rate may be made and levied, although there is another rate existing at the time, which was made on a former day for the same purpose, but is not wholly collected; but concurrently existing rates are illegal if made for the same period of time. *Reg.* v. *Best*, 2 B. C. Rep. 90; 2 New Sess. Cas. 655; 16 L. J., M. C. 102.

A concurrent rate, made for the same period as a former subsisting rate, is illegal. *Reg.* v. *Fordham*, 3 P. & D. 95; 11 A. & E. 73; 9 L. J., M. C. 3.

Special Bargain in lieu of Rate—Validity—Serjeants' Inn.]—Disputes having arisen between Serjeants' Inn and the parish of St. Dunstan as to whether or not the inn was part of that parish and liable to the parochial burthens there, it was agreed, under the sanction of a private act of William 4, that the inn should pay the parish 80*l.* a year, and that the parish should accept that sum as "a full satisfaction and discharge of all poor-rates from time to time due or claimed to be due in respect of the inn":—Held, that this special bargain was not repealed or affected by the Representation of the People Act, 1867 (30 & 31 Vict. c. 107), s. 7, or the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27. or by any of the intermediate general acts for the regulation of parishes or the assessment or collection of poor-rates therein. *Thorpe* v. *Adams*, 40 L. J., M. C. 52; L. R. 6 C. P. 125; 23 L. T. 810; 19 W. R. 352.

Composition—Resolution Distinct from Assessment.]—When the local authority under 18 & 19 Vict. c. 121, had determined to convert a certain ditch into a sewer, and had under s. 22 assessed all premises then using the same for the purpose of sewage to certain annual payments, and had upon the same day passed a resolution enabling the parties liable to compound for such payments, which resolution was entered in the rate-book, and appended to the notice of assessment, from which also it was sworn to be distinct:—Held, that the resolution formed no part of the assessment, and that the assessment was not bad because it did not provide for the case of houses and premises thereafter using the sewers. *Reg.* v. *Middlesex JJ.*, 4 W. R. 562.

Application to have Name inserted—To whom made.]—By a local act, the management of a parish and the relief of the poor were intrusted to trustees, but the vestry was to make the poor-rates, and a collector was to collect them. The overseers had nothing to do with making the rates or their application:—Held, that the overseersers were not the proper parties to whom a person who wished to have his name inserted on a poor-rate should make application for that purpose. *Reg.* v. *Islington Overseers*, 3 B. & S. 46; 32 L. J., M. C. 257; 9 Jur. (N.S.) 155; 8 L. T. 331; 11 W. R. 760.

"Rated," Meaning of.]—By a local act no person shall be qualified to be elected a commissioner under the act, unless at the time of his being elected he shall be rated in the rate made for the relief of the poor of a township. E.'s name was not in the last rate made previously to the declaration at the time it was allowed, but he came into occupation of premises after the rate was made, and his name was inserted, in the rate-book, under 17 Geo. 2, c. 38, s. 12, before the day of election:—Held, that he was not rated within the meaning of the local act, and therefore was not qualified. *Reg.* v. *Eddowes*, 1 El. & El. 330; 28 L. J., Q. B. 84; 5 Jur. (N.S.) 469; 7 W. R. 63.

Authority to Rate—Construction of Statutes.]—Whenever it is sought to impose a rate, the burthen lies on those seeking to enforce it to shew that the words used by the legislature are clear and unambiguous in order to charge the

subject. *Ingram* v. *Drinkwater*, 44 L. J., P. C. 83 ; 32 L. T. 746—P. C.

Acts in order to infringe upon the legal rights of the subject, and especially to impose a tax, must be expressed in language clear beyond all reasonable doubt. *Shaw* v. *Ruddin*, 9 Ir. C. L. R. 214. S. P., *Reg.* v. *Mallow Union*, 12 Ir. C. L. R. 35.

Notice of Meeting—Private Act—Trustees.]—An act enabling the building of a bridge, and making a rate on landowners for that purpose, enacted that certain persons by name, and all others deriving 100*l.* a year out of the lands liable to be affected, should be trustees ; and the trustees were to have notice by circular of all meetings ; but the interpretation clause said that trustees meant those acting by virtue of the act :—Held, that a person qualified to be a trustee, yet not having been named in the act, nor having acted by virtue of it, was not entitled to require notice. *Kerr* v. *Wilkie*, 6 Jur. (N.S.) 383 ; 1 L. T. 501 ; 8 W. R. 286—H. L.

Held, also, that where notice of a meeting had been properly given, there was no necessity for notice of its bonâ fide adjournment. *Ib.*

c. For what Purpose.

Retrospective Rate.]—It is a principle of rating, that the rate shall not be imposed to reimburse for past expenses, but the rule is subject to necessary exceptions. *Reg.* v. *Read*, 13 Q. B. 524 ; 4 New Sess. Cas. 7 ; 18 L. J., M. C. 164 ; 13 Jur. 789.

A rate cannot be made to repay money borrowed to repair and rebuild a workhouse. *Rex* v. *Wavell*, 1 Dougl. 116.

There is no rule of law which prohibits a retrospective rate. *Harrison* v. *Stickney*, 2 H. L. Cas. 108.

In every case of rating the question is, whether the act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective. *Ib.*

Where a body of persons is by statute constituted trustees for certain public purposes, and powers are conferred on them to levy rates upon the district to a limited amount, they are authorised, if not expressly prohibited, to apply the rates of any year in the payment of debts properly incurred in a previous year in the execution of their trust. Secus, if their power of rating is unlimited in amount. *Att.-Gen.* v. *Church*, 2 Hem. & M. 697 ; 4 N. R. 89.

Bill in Parliament.]—A court of equity will not allow money raised for poor-rates, under a local act, to be applied in payment of the expenses of a bill in parliament promoted by the guardians, but rejected. *Att.-Gen.* v. *Southampton*, 17 Sim. 6 ; 18 L. J., Ch. 393 ; 13 Jur. 669.

The jurisdiction of the court is not taken away by the power given to the poor-law commissioners, by 11 & 12 Vict. c. 91, of remitting lawful disallowances. *Ib.*

Costs of Opposing Bill.]—A bill before parliament provided for the punctual payment of interest on the share capital of the undertaking, for which authority was sought by declaring that the overseers of the parish in which such undertaking was situated should when required so to do raise as part of the poor-rate money for the payment of such interest. The overseers opposed the bill, which was rejected by a committee of the house of lords. On an application for a writ of certiorari to bring up and quash the certificate of the district auditor allowing the taxed costs of such opposition :—Held, that the overseers were entitled to charge the costs of the opposition on the poor-rate. *Reg.* v. *White* or *Sibley*, *Ex parte*, 54 L. J., M. C. 128 ; 14 Q. B. D. 358 ; 52 L. T. 116 ; 33 W. R. 248 ; 49 J. P. 294—C. A.

Borrowing Powers—Rate made to Pay Interest.]—Where trustees under a local act were authorised to borrow, by annuity, or at common interest, a sum not exceeding 30,000*l.* for the purpose of building a chapel, and the moneys so borrowed, and the interest, were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act ; and the trustees, in fact, borrowed 32,636*l.*, and made a rate to pay the interest of that sum :—Held, that the trustees had exceeded their power, as the act only empowered them to borrow a specific sum, and as the rate was made to pay the interest due upon the whole sum borrowed, it was bad in toto, although the defect did not appear on the face of it. *Richter* v. *Hughes*, 3 D. & R. 788 ; 2 B. & C. 499 ; 2 L. J. (O.S.) K. B. 61 ; 26 R. R. 424.

It is in the power of the vestry to borrow on the security of any particular rate ; but they cannot pledge any other rate as a security, that is, they cannot borrow in aid of one rate on the security of another. *Att.-Gen.* v. *Daniel*, 9 L. J., Ch. 394 ; 4 Jur. 790.

A vestry have no power to apply the produce of one class of rates to objects for which they are empowered to raise another class of rates ; and they have no power to make good the deficiencies of any one of the rates out of the produce of the other rates. *Ib.*

Repayment of Money Borrowed.]—By an act of parliament, commissioners were appointed, who were to expend money in improving a town ; they were authorised to levy rates on the town and to borrow money on the security of the rates, giving bonds for the money so borrowed, of which 100*l.* at the least should be chosen by lot, and paid off every year. Interest on the bonds had been duly paid, and except in two years, 100*l.* had been paid off every year, but above 15,000*l.* remained on the security of the bonds :—Held, that holders of bonds to the amount of 800*l.* were not entitled to immediate payment out of the rates or to a receiver of the rates. *Preston* v. *Great Yarmouth Corporation*, 41 L. J., Ch. 310 ; 26 L. T. 235. Affirmed, 41 L. J., Ch. 760 ; L. R. 7 Ch. 655 ; 27 L. T. 87 ; 20 W. R. 875.

Commissioners were authorised by act of parliament to raise money for parish purposes, and to secure it by debenture or assignment of the rates. They gave a debenture for 1,000*l.* to A., who was treasurer, and also a commissioner. A. advanced nothing at the time, but he subsequently advanced the amount, and from that time only he received interest. By subsequent receipts of rates the balance was turned, and A. had funds in hand :—Held, that the transaction was not invalid, and that A. was entitled to charge full interest on his debenture until he had been formally paid off. *Fletcher* v. *Gibbon*, 23 Beav. 212.

—— **By Order of Court of Chancery.**]—Creditors who had advanced money to corporation established for maintenance of poor of a certain

district:—Held, entitled to compel assessment of rates sufficient, after maintenance of poor, to pay principal and interest of their debts. *Jones* v. *Montgomery (Parishes of)*, 3 Swan. 203.

An order of vestry is made for building a workhouse in a parish, and that in case any one will lay down the money, the parish shall repay; equity will decree a parish rate to be made to reimburse the party who lays down this money. *Blackbourne* v. *Webster*, 2 P. Wms. 632.

Amount Limited.] — Where commissioners with power to raise money resolved that it was necessary to raise a sum not exceeding 1,300*l.*:—Held, that the fair import of the resolution was, that such was the smallest sum necessary, and that it was sufficiently certain. *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 314; 5 L. J. (O.S.) M. C. 106.

Where the commissioners made at the same time two rates, one for the poor and the other for the highways, and it appeared that the first, if the whole had been collected, would have exceeded the sum required, held good, as the act did not require separate rates for the poor and the highways, and the entire sum directed to be raised would not exceed the sum required:—Held, also, good, because it was impossible ever to collect the whole of the rate, and the sum actually collected was less than that required. *Ib.*

By a local act a town council was empowered, for certain purposes therein specified, to make rates, "provided that the amount to be levied for all and any of the purposes shall not in any year exceed 1*d.* in the pound upon the rateable value of the property within the borough liable to such rate":—Held, that such deficiencies as might arise in levying the rate, by reason of insolvency of occupiers and other causes, were not to be cast upon the general body of ratepayers, by charging them in excess of the rate of 1*d.* in the pound. *Brown, Ex parte, Liverpool Corporation, In re*, 31 L. J., M. C. 108; 8 Jur. (N.S.) 642; 6 L. T. 241.

By a local act for improvement of a town, commissioners were invested with all the powers, provisions and authorities, and were to be in the receipt and possession of all compositions, rates, &c., granted by 13 Geo. 3, c. 78; and the surveyors to be appointed by the commissioners were to have the same powers of demanding, collecting and recovering payment of such compositions, &c., as under that act. The surveyors of the highways within the ambit of the act were, on a day to be appointed by the commissioners, to produce to them their accounts, and to pay over all balances in their hands to the treasurer of the commissioners, and thenceforward their office was to be determined. The commissioners were empowered, in order to raise money for carrying the purposes of the act into execution, to lay one or more rates once in every year, or oftener, if necessary, on all houses, shops, &c., within the town, so as such rates should not exceed 8*d.* in the pound in a year on their yearly value. By a subsequent act, reciting that the commissioners had borrowed considerable sums of money on the rates, and that they were inadequate to the purposes of the act, the power of rating houses, shops, &c., was extended from 8*d.* to 1*s.* in the pound in the year:—Held, that the commissioners had no power, in case the rates so levied proved insufficient for the purpose of the act, to levy a subsidiary rate by application to be made to the justices by the surveyor under 13 Geo. 3, c. 78, s. 45. *Higgins* v. *Green*, 10 M. & W. 703; 12 L. J., M. C. 27.

Damages Recovered against Parish Officers—Local Act.] — Parish officers having received information that a person was a pauper lunatic, likely to do mischief, caused an order to be left with A. B., who lived at his house, and appeared to have the care of him, for his removal to the workhouse. A. B. soon afterwards, assisted by other persons, took him forcibly to the workhouse in a strait waistcoat. He remained in the workhouse about a week, at the expiration of which he was brought before a magistrate and discharged. He then brought an action for an assault and false imprisonment, and an action of trespass against the parish officers, and in one of them recovered 400*l.* damages, which, upon a motion for a new trial, was reduced by consent to 200*l.*, no new trial being granted. The other action was not tried. The trustees of the parish having, under a local act, authority to manage the parish accounts, and to superintend the treatment of the poor, charged the damages and costs incurred in these actions against the poor-rates of the parish. The rates so charged were subsequently allowed in open vestry, and the charges paid out of them. Upon an information filed against the trustees for the purpose of compelling them personally to refund the money so paid as for a breach of trust, the court dismissed the information, being satisfied, upon the evidence before it, without regard to the proceedings at law, that the parish officers had not participated in the forcible removal of the lunatic, and had in other respects acted reasonably, though perhaps not strictly according to law, in the discharge of their duty: consequently, that they were entitled to be allowed the payment so made, either under the 26th section of the local act, which provided that all costs and expenses to be incurred by the trustees or any persons employed by them in prosecuting or defending any action touching the execution of the act should be defrayed out of the money arising by virtue of the act, or the general law applicable to overseers and their accounts. *Att.-Gen.* v. *Pearson*, 2 Colly. 581; 10 Jur. 651.

Paving — District Rate — Local Act.]—By a local act of Geo. 3, commissioners were appointed for paving the footways and cleansing, lighting and watching the streets in the town of Monmouth, and were authorised once in every year to rate and assess any sum not exceeding 1*s.* in the pound upon or in respect of all houses, &c., ... being within the limits of the town of Monmouth, and the persons paying such rates were exempted from all charges and expenses of paving, lighting, watching, cleansing or fencing off any part or parts of the footways and cross-paths of the town and borough. By the Public Health Act, 1872, the borough of Monmouth (within which was the town of Monmouth) was created an urban sanitary district, and the mayor, aldermen and burgesses of the borough, acting by the town council, were the urban sanitary authority for such district. By s. 16, all expenses incurred or payable by an urban sanitary authority under the sanitary act shall . . . . be defrayed . . . . in the case of the council of a borough out of the borough fund or borough rate. By the Sanitary Law Amendment Act, 1874, all the powers and duties of

the commissioners under the Local Paving Act relating to any objects or purposes of the sanitary acts were transferred to the council. By the Public Health Act, 1874, s. 144, every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise and be subject to all the powers, authorities, duties and liabilities of surveyors of highways. By s. 207, all expenses incurred or payable by any urban authority in the execution of this act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this act. The town council, as the urban sanitary authority for the borough of Monmouth, made a general borough rate to meet expenditure, which included the paving, lighting and cleansing of the town. A ratepayer, who occupied a house within the borough, but outside the town of Monmouth, appealed on the ground that the rate was made in part for raising money towards defraying the expenses of carrying the Monmouth Paving Act into execution:—Held, that the rate was invalid. *Monmouth Corporation* v. *Monmouth Overseers*, 38 L. T. 612.

d. Allowance and Publication.

Necessity of.]—A rate is not a complete and valid rate until allowance and publication. *Bushell* v. *Luckett*, 2 C. B. 111.

Allowance by Justices—Jurisdiction.]—The allowance of a poor-rate by the justices is purely a ministerial act; and if the rate is good on the face of it, they cannot inquire into its validity. *Reg.* v. *Godolphin (Lord)*, 1 D. & L. 830; 1 New Sess. Cas. 1; 13 L. J., M. C. 57; 8 Jur. 574. S. P., *Reg.* v. *Yarborough (Earl)*, 12 A. & E. 416; 3 P. & D. 491; 9 L. J., M. C. 62.

Where a poor-rate had been made by the overseers of a parish alone, there being also two churchwardens who had not been sworn in, and the justices had refused to allow it, as not being made by the majority of the parish officers, a mandamus to the justices to sign and allow the rate was granted. *Ib.*

A mandamus to justices to allow a poor-rate is absolute in the first instance. *Ib.*

A poor-rate which has not been allowed by two justices is a nullity, although there has been no appeal against the rate. *Fox* v. *Davies*, 2 Lutw. Reg. Cas. 97; 6 C. B. 11; 18 L. J., C. P. 48.

In allowing a rate two justices may act separately. *Rex* v. *Hamstall Ridware*, 3 Term Rep. 380. And see *Wootton* v. *Harvey*, 6 East, 75.

—— **Notice of.**]—The notice of allowance need not be signed, and therefore a notice signed only by an overseer and an assistant overseer is good. *Burnley* v. *Methley Overseers*, 1 El. & El. 789; 28 L. J., M. C. 152; 5 Jur. (N.S.) 914; 7 W. R. 422.

Publication—Notice of.]—Notice of a publication of a poor-rate need not state that the rate has been allowed. *Paynter* v. *Reg.*, 10 Q. B. 908; 16 L. J., M. C. 136; 11 Jur. 973—Ex. Ch.

In Church—Next Sunday.]—If a poor-rate was not published in the church on the Sunday next after it was allowed under 17 Geo. 2, c. 3, s. 1, it was a nullity. *Rex* v. *Newcomb*, 4 Term Rep. 368; 2 R. R. 414.

Notice of the allowance of a rate affixed, the next Sunday after allowance, to the door of the only church of the parish, previously to the commencement of the usual afternoon service, and after the conclusion of the usual morning service, is a sufficient publication. *Burnley* v. *Methley Overseers*, 1 El. & El. 789; 28 L. J., M. C. 152; 5 Jur. (N.S.) 914; 7 W. R. 422.

—— **On what Doors and Buildings.**]—It is not necessary to publish a poor-rate on all the doors of any church or chapel, nor on the door of a church or a chapel in which divine service has ceased to be performed, nor on the door of any building, not being a church or chapel, in which divine service is performed. *Ormerod* v. *Chadwick*, 16 M. & W. 367; 2 New Sess. Cas. 697; 16 L. J., M. C. 143.

It is a sufficient publication, if a copy of it is affixed before divine service on the Sunday next after its allowance, on the principal or most usual door of all the churches or chapels of the Established Church within the parish in which divine service is performed. *Ib.*

In the same place a room was hired for a school-house, in which divine service was regularly celebrated on Sundays, according to the rites of the Church of England:—Held, that it was not necessary to affix any notice on the door of the school. *Ib.*

It is sufficient if the notice is affixed to the principal door of the church. *Ib.*

—— **Where District has its own Church.**]—Where a rate is made for a district within a parish, which district has its own church, and maintains its own poor; the rate is sufficiently published, if notice of it is affixed on the door of such church, although there are chapelries within the parish, having their own respective chapels, all which belong to some vicarage, with the church. *Reg.* v. *Marriott*, 12 A. & E. 779; 4 P. & D. 440.

The notice need not be affixed at such chapels; nor at the church of a neighbouring parish in the same town, though the churches nearly adjoin each other, belong to the same vicarage, and are used indiscriminately by the same persons, the one being sometimes frequented by the congregation of the other while that is closed; and although many persons have rateable property in both parishes. *Ib.*

—— **Where more than one Established Church.**]—By 3 & 4 Will. 4, c. 90, for lighting and watching parishes, the overseers are required to proceed in the same manner for the purpose of collecting, raising and levying the rate under that act as for levying money for the relief of the poor. A lighting and watching rate was made for the township of Clitheroe, and written notice of it was affixed to the door of the church of St. Michael, in the township, which was stated to be the only place where rates had theretofore been published. At the time of the publication of the rate, there were two other churches of the Established Church in the township of Clitheroe, on the doors of which no notice of rate was affixed:—Held, that the publication of the rate was insufficient. *Reg.* v. *Whipp*, 4 Q. B. 141; 3 G. & D. 372; 12 L. J., M. C. 64; 7 Jur. 194.

—— **Where no Church or Chapel.**]—By 17 Geo. 2, c. 3, s. 1, public notice of every rate for the relief of the poor shall be given in the parish

church the next Sunday after the allowance of the rate by the justices, "and no rate shall be esteemed or reputed valid and sufficient so as to collect or raise the same unless such notice shall have been given"; and by 7 Will. 4 & 1 Vict. c. 45, a written notice, to be affixed on the doors of all the churches or chapels in the parish, is substituted for any notice theretofore by any law or statute given in churches or chapels. By 20 Vict. c. 19, s. 1, every extra-parochial place wherein no rate is levied for the relief of the poor shall for all purposes of assessment to the poor-rate and the relief of the poor "be deemed a parish." The overseers of a parish which, before the passing of 20 Vict. c. 19, was an extra-parochial place, made a rate for the relief of the poor, but did not publish any notice of the rate within the parish, in which there was no church or chapel:—Held, that the rate could not be collected. *Reg.* v. *Dyott*, 51 L. J., M. C. 104; 9 Q. B. D. 47; 30 W. R. 799; 47 J. P. 54. *But see now* 45 & 46 Vict. c. 20, s. 4.

e. In what Parishes and Places.

Parish, what is.]—By 20 Vict. c. 19, s. 1, after the 31st December, 1857, every place entered separately in the report of the registrar-general on the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, be deemed a parish. In the report, "Thornbury with Netherwood" was entered as one place, with the following note: "Netherwood, deemed extra-parochial, maintains its own poor, but pays church rate to Thornbury parish":—Held, that Netherwood was not a "place entered separately," and therefore was not to be deemed a parish for the purpose of the poor-rate. *Reg.* v. *Mytton*, 2 El. & El. 557; 29 L. J., M. C. 109; 6 Jur. (N.S.) 341; 2 L. T. 12; 8 W. R. 275.

Pier below Low Water-mark.] — *See* post, PIERS AND HARBOURS, col. 1647.

Accuracy of Locality.]—W. appealed against a poor-rate by which he was rated in the parish of H., as occupier of land to an amount named and of a value named. The sessions affirmed the rate, subject to a case which stated that W. did occupy that quantity of land in H., and that it was of the value stated; but that he also occupied land in the adjacent parish of C.; and that it was not known which portion of the land was in H., and which in C., though the quantity occupied in each was known, and the value was rightly assessed whichever portion was in H.:—Held, that the rate should stand, the sessions not being bound to determine the particular portion which was within H. *Reg.* v. *Woods*, El. Bl. & El. 481; 27 L. J., M. C. 289; 4 Jur. (N.S.) 1233; 6 W. R. 595.

Usage — Extra-parochial Place.] — When a parish has for several hundred years acquiesced in the notion that a particular place is extra-parochial, a very strong case should be made out before a jury can be called upon to find that such place is within the parish. *King* v. *Butterworth*, 2 Car. & P. 391.

—— Two Parishes treated as One.]—The parish of M. has for all secular purposes since 43 Eliz. been treated as one parish. In fact, it consists of two distinct rectories and advowsons, and for all ecclesiastical purposes it constitutes two distinct parishes:—Held, that a rate for the relief of the poor of M., treating it as one parish, is good, such long usage being conclusive as to M. being before and at the passing of 43 Eliz. one parish by reputation. *Reg.* v. *Mablethorpe*, 2 W. R. 533.

The hamlet of T. had for a hundred years past, and for anything that appeared to the contrary before that time, been rated to the poor and highway rates of the adjacent township of H., which maintained its own poor and highways separately, and together with another township formed the parish of H. On the other hand, the lands in T., from the earliest period, were titheable to the adjacent parish of K., as being situate in that parish, and the occupiers were rated to and paid church rates in that parish, and also Easter and other ecclesiastical dues, and never paid tithes, &c., to H.:—Held, that there was no ground for disturbing the long-established usage of rating T. to the poor-rates of H., as it was impossible to say that this usage could not have had a legal origin from the tithes having been severed from T. and conferred upon the parish of K., while T. itself was associated with H. as one township for rating purposes according to 13 & 14 Car. 2, c. 12. *Reg.* v. *Watson*, 9 B. & S. 219; 37 L. J., M. C. 153; 18 L. T. 556; 16 W. R. 977.

Allotments under Inclosure Act.]—An inclosure act gave power to the commissioners to award in what townships the allotments should be assessed to the rates and taxes. They awarded that certain allotments, which before were within the district of H., were within the township of C.:—Held, that they did not thereby become ratable in C. *Fenton* v. *Boyle*, 1 Taunt. 344. And see *S. C.*, 2 Bos. & P. (N.R.) 399.

On the inclosure of a waste in the parish of A., on which the landowners of B. had a right of common appurtenant, the allotments given in lieu of that right shall be assessed in the parish of A. *Kempe* v. *Spence*, 2 W. Bl. 1244.

Subdivision of Parish.]—The inhabitants of a part of a parish entered in 1714 into an agreement with the rest of the parish to maintain their own poor, and ever afterwards did so, and from that time the part was treated as distinct from the parish. In 1753 separate overseers were appointed, and from that time the part by a distinct name appealed and resisted appeals against orders of removal, and made and received such orders, and among them orders to and from the parish of which it had been a part. In 1775 and afterwards poor-rates were made and allowed, and in 1800 a constable was appointed:—Held, that these facts did not shew a legal separation from the original parish so as to entitle the part to obtain a rate in aid upon another, not the original parish. *Rex* v. *East Church (Inhabitants)*, 8 L. J. (O.S.) M. C. 76.

In Aid of different Parish.]—An order of justices for assessing contribution to the poor-rates, in aid of a parish situate in a liberty, upon a place also within the same, is warranted by 43 Eliz. c. 2, s. 3, when that is a division of country equivalent to a hundred. *Rex* v. *Milland*, 1 Burr. 576; 2 Ld. Ken. 267.

An order for taxing one parish in aid of

another, under 43 Eliz. c. 2, s. 3, is valid. *Rex* v. *St. Helen, Worcester*, 2 East, 417.

—— **Jurisdiction.**]—County justices cannot rate a parish within their jurisdiction in aid of another parish, lying within a borough, which has an exclusive jurisdiction. *Rex* v. *Holbeche*, 4 Term Rep. 778.

f. Form.

The words "of no force," &c., in 6 & 7 Will. 4, c. 96, s. 2, apply solely to default in signing the declaration, and where default in following the form given in the columns has not been made a ground of appeal by the statute, the sessions have no power to quash a rate for such default. *Reg.* v. *Fordham*, 3 P. & D. 95; 11 A. & E. 73; 9 L. J., M. C. 3; 4 Jur. 218.

The poor law commissioners have no power to require compliance with a schedule varying from or more full than that in the statute. *Ib.*

A poor-rate is not invalid because the declaration at its foot is not in the very words of the form given by the schedule to the statute. *Paynter* v. *Reg.*, 10 Q. B. 908; 16 L. J., M. C. 136; 11 Jur. 973—Ex. Ch.

A rate, without giving a specification of the property, for which each individual is rated, is bad. *Rex* v. *Aire and Calder Navigation*, 4 D. & R. 253; 2 B. & C. 713; 26 R. R. 535.

The amount to be inserted in the column headed "rateable value," of the valuation under 25 & 26 Vict. c. 103, is the true rateable value of the property, independently of whether such property is subject to the provisions of the Small Tenements Act, 13 & 14 Vict. c. 99, or not. *Sunderland-near-Sea Overseers* v. *Sunderland Union*, 18 C. B. (N.S.) 531; 34 L. J., M. C. 121; 11 Jur. (N.S.) 688; 13 L. T. 239; 13 W. R. 943.

A rate made in fact for the relief of the poor, but which does not shew by intrinsic evidence, either by the heading or by something in the body of the rate, for what purpose it is made, is void, and the court discharged a rule in lieu of a mandamus to order justices to issue their distress warrant to levy such a rate. *Reg.* v. *Eastern Counties Ry.*, 5 El. & Bl. 974; 25 L. J., M. C. 49; 2 Jur. (N.S.) 161; 4 W. R. 261.

Rule calling upon justices to issue their warrant against the goods of a railway company for the amount assessed upon them for the relief of the poor, by two rates. It appeared that one was headed, "Parish of M., May 24, 1855"; the other was properly headed, but the property rated was described as "land, &c.":—Held, that the first rate was void independently of the 6 & 7 Will. 4, c. 96, but the second was irregular only. *Ib.*

g. On Whom made.

Resident Inhabitants.]—"Inhabitant or other," in 43 Eliz. c. 2, s. 1, means resident inhabitant or other inhabitants. *Rex* v. *North Curry*, 7 D. & R. 424; 4 B. & C. 953; 4 L. J. (O.S.) K. B. 65.

—— **Partners.**]—Only one of several partners resided in a parish:—Held, that he must be rated in respect of his share only of the partnership property. *Rex* v. *Gosse*, 7 B. & C. 236; 9 D. & R. 759; 5 L. J. (O.S.) M. C. 97.

A poor-rate in which the overseers omit a class of inhabitants on account of poverty is not void. *Reg.* v. *Check*, 11 Jur. 86.

When Nature of Rate Limited.]—Under a local act improvement commissioners were appointed, with power to make rates. It enacted, "that no person shall be rated in pursuance of this act on account of any arable, meadow, or pasture land exceeding two acres . . . or the farmhouses, and buildings used exclusively for farming purposes." The commissioners became an urban sanitary authority under the Sanitary Act, 1873. By s. 43 of that act, any limit imposed on, or in respect of any rate, by any local act of parliament, shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes:—Held, that the word "limit" did not apply to the exemption in the local act, so as to authorise the commissioners to impose a rate for expenses incurred for sanitary purposes, on a person on account of land exceeding two acres. *Walton Improvement Commissioners* v. *Walford*, 44 L. J., Q. B. 74; L. R. 10 Q. B. 180; 31 L. T. 825; 23 W. R. 292.

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses or any part thereof to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require:—Held, that a precept which required the rate to be levied as regards such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground in the proportion of one-fourth part only of the nett annual value of such land, was good, although the classes of land so mentioned in the precept did not lie together or form any particular division marked out by metes and bounds, but were scattered through the parish. *Reg.* v. *L. B. & S. C. Ry.*, 48 L. J., M. C. 116; 4 Q. B. D. 389; 40 L. T. 716; 27 W. R. 783. Affirmed, 49 L. J., M. C. 32; 5 Q. B. D. 89; 41 L. T. 577; 28 W. R. 288—C. A.

B. PERSONS AND PROPERTY LIABLE.

1. Owners and Occupiers in General.

a. Liability.

Of Occupier.]—The poor-rate is not a tax upon the land, but a personal charge in respect of the land. *Rowls* v. *Gells*, Cowp. 452; 1 Dougl. 304.

And the occupier is rateable by whatever tenure he holds. *Bute (Lord)* v. *Grindall*, 1 Term Rep. 343; 2 H. Bl. 265; 1 R. R. 220. S. P., *Rex* v. *Bell*, 7 Term Rep. 598.

Occupation by Servants or Agents.]—The residence in a lighthouse by a servant of the owner, at an annual salary to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the lighthouse. *Rex* v. *Tynemouth*, 12 East, 46; 11 R. R. 328.

The mere fact of an employer's paying the

rent and taxes of his clerk, does not make the occupation of his clerk the occupation of his master; if the clerk is responsible to the landlord, he is, except under special circumstances, the occupier, and as such, liable to be rated. *Reg.* v. *Lynn*, 3 N. & P. 411; 8 A. & E. 370; 1 W. W. & H. 366; 7 L. J., M. C., 85; 2 Jur. 541.

S. was a collier, and resided in a house belonging to his employers, for which he paid no rent; he was not entitled to any notice to quit, and the occupation of the house would cease at the time when his service ceased. His employers had several houses, and they filled these up with their workmen in their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; these got the same wages as all other workmen, but no allowance for rent. If there were not sufficient houses an allowance was made to the married men to assist them in paying their rent. If a house was vacant the owners would call upon a married man to go into it: if he did not go his allowance would cease. It was not absolutely necessary for a workman to live in one of the houses to perform his work. The employers of S. did not compound for their rates under 32 & 33 Vict. c. 41, but paid upon the full amount, and were rated to the poor as occupiers of the houses. The overseers of the township in which S.'s house was situate were summoned before justices for that they had negligently omitted to enter the name of S. in the occupier's column of the rate-book, contrary to 32 & 33 Vict. c. 41, s. 19:—Held, first, that the occupation by S. was not that of a servant, but that of a tenant. *Smith* v. *Seghill Overseers*, 44 L. J., M. C. 114; L. R. 10 Q. B. 422; 32 L. T. 859; 23 W. R. 745.

Held, secondly, that 32 & 33 Vict. c. 41, s. 19, was not confined to the cases mentioned in ss. 3 and 4, but was of general application, and that S. was entitled to have his name entered in the occupier's column of the rate-book. *Ib.*

One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual:—Held, that he was liable to be rated as occupier of the whole house. *Rex* v. *Aberystwith*, 10 East, 354.

—— **Caretaker.**]—Y. had been put into a dwelling-house, No. 157, Plymouth Grove, in the township of Chorlton, by his own master, who was one of the joint owners of the house, and in whose employment Y. had been for some time previously. At the time the dwelling-house was empty, and Y. was put into it with his wife and children, for the purpose of taking care of it while it was so empty. Y. was not otherwise in the employment of the said owners, and, except the benefit of living rent free with his wife and children in two rooms of the said dwelling-house, he received no remuneration for his services in taking care of the same. A. had been for some years previously in the employment of the joint owners of the dwelling-house, No. 163, Plymouth Grove. His duties were to look after and attend to any houses in the neighbourhood of Plymouth Grove belonging to the said owners, which might from time to time be vacant, to prevent trespass being committed thereon, to look after the gardens, and to show unlet houses to persons coming to see the same. The dwelling-house, No. 163, Plymouth Grove, being vacant, A. with his wife and children was put into it by the owners, as caretaker, performing the same duties to the owners as before. A. was liable and ready to leave the said house at the command of the owners at any time. Under these circumstances Y. and A. were assessed by the rating authority to the relief of the poor as occupiers of the said houses respectively. Upon appeal to the general quarter sessions of the peace for the city of Manchester, the recorder allowed the appeal, but stated two cases for the opinion of the court:—Held, that Y. and A. were not liable to be rated for the relief of the poor in respect of the said premises, on the ground that the occupation in each case was that of a servant and not that of a tenant. *Yates* or *Almond* v. *Chorlton-upon-Medlock Union*, 48 L. T. 872; 47 J. P. 630.

H. was owner of a house of seventeen rooms and premises usually of 83*l.* rateable value, but the house being advertised to be let for two years, he put into it G., as a caretaker, giving him 2*s.* 6*d.* per week, and the rooms, which G. and his family occupied rent free. G. was to show the house and was bound to leave at a week's notice:—Held, that H. was the occupier of the house by means of G. as servant, and was properly rated to the poor as such occupier. *Hicks* v. *Dunstable Overseers*, 48 J. P. 326.

—— **Partial Use of Premises by Owner.**]—A house belonging to the respondent was in charge of a caretaker and his wife. The respondent had some furniture in the house, wine in the cellar, and some sacks in the stable, and the garden was cultivated by his gardener, but he himself never slept in the house or had eaten food in it:—Held, that he was in rateable occupation of the premises. *Bursledon Overseers* v. *Clarke*, 61 J. P. 261.

Owner of Vacant Land—Legal Possession.]—The appellant purchased, in 1885, a plot of building land, with the intention of building thereon; but the land was never inclosed, cultivated, used, or let by the appellant. A bill stating that the land was "to let" was affixed to a tree growing on it. The cattle of a neighbour, without the knowledge or permission of the appellant, were in the habit of straying on to the land and eating the grass. The appellant, who had been rated in respect of the plot of land, objected that he could not be so rated, as he was not the occupier. The respondents contended that he was not only the owner of the plot, but also the constructive occupier, so as to render him liable to be rated:—Held, that the appellant was not the occupier within the meaning of 43 Eliz. c. 2, s. 1, and was therefore not liable to be assessed to the poor-rate in respect of the plot of land. *Smith* v. *New Forest Union*, 60 L. T. 927; 53 J. P. 661. Affirmed, 61 L. T. 870; 54 J. P. 324—C. A.

Quære, whether the owner of a farm composed partly of grass land, who, upon the determination of a lease, takes possession of the farm by a servant, who occupies it for the purposes of protection, but without dealing with the land, is liable to be rated to the poor as a party beneficially occupying. *Rex* v. *Buckinghamshire JJ.*, 3 N. & M. 68.

Occupier going out before Rate wholly discharged, and leaving Premises unoccupied.]—An occupier assessed in a poor-rate, but who ceases to occupy before the rate has been wholly discharged, is not relieved by 32 & 33 Vict. c. 41, s. 16, from liability to pay the whole rate, unless some one succeeds or comes into the occupation who is liable to pay a proportionate part of such rate; and semble, that such occupier remains liable to the whole rate until the name of some one liable to be assessed is substituted for his in the rate-book. The Metropolitan Board of Works purchased Putney Bridge of the Fulham Bridge Company, who transferred the bridge to the board under the provisions of an act of parliament, which required the tolls in respect to the bridge to cease, and enacted that the bridge should be open free to the public, and should be maintained by the board, the justices of Surrey paying an annual sum to the board in discharge of the liability of that county to maintain the bridge. Before the transfer the Fulham Bridge Company received tolls for the passage over the bridge, and were duly assessed to the poor-rate in the parish of Putney in respect of the bridge, and at the time of the transfer there remained undischarged a rate for which the bridge company had been so assessed, and which had been made by that parish for a period extending beyond the transfer:—Held, that the board had no beneficial occupation of the bridge in respect of which they were capable of being rated, and that, therefore, as there was no succeeding occupier liable to be rated, the bridge company remained liable for the whole rate. *Hare* v. *Putney Overseers*, 50 L. J., M. C. 81; 7 Q. B. D. 223; 45 L. T. 337; 29 W. R. 721; 46 J. P. 100—C. A.

The 16th section of 32 & 33 Vict. c. 41, relieving the occupier who was in occupation at the time of making the rate, but who has gone out before it was wholly paid, from the rate, except in proportion to the time he has occupied, applies only to the case where there is an incoming occupier, and not where the premises are left unoccupied. *St. Werburgh, Derby, Overseers* v. *Hutchinson*, 49 L. J., M. C. 23; 5 Ex. D. 19; 42 L. T. 153; 28 W. R. 153.

P. was the owner of grass lands, and his tenant quitted on 11th October, 1881. A rate was made on the 25th October, 1881, stating the previous tenant as still occupier. Another rate was made on 25th April, 1882, stating the occupier blank. On 7th July, the land still being unlet, P. entered and cut the grass and stacked the hay, and offered to pay the rate as from 7th July, but the overseers insisted on both rates being paid entire from 11th October, 1881, and entered P.'s name as occupier from that date. The justices found that P. occupied all the time, and issued a distress warrant:—Held, that the occupation commenced from 7th July only, and that the overseers had no power retrospectively to enter P. as occupier before that date. *Pembroke* v. *Wye Overseers*, 47 J. P. 359.

Unoccupied Buildings.]—The defendant, who was owner of certain premises (farms, farm-houses, and outhouses), having evicted the tenants, occupied the land himself, but the buildings remained unoccupied. In the valuation lists a bulk valuation was put upon the lands and buildings comprised in each farm, and the guardians assessed the defendant for each farm as a rateable tenement as "house, offices and lands." The defendant did not appeal against the assessment:—Held, that the defendant was not liable for the portion of the rate attributable to the buildings. *New Ross Union* v. *Byrne*, 30 L. R., Ir. 160.

Disused Mill.] — A cotton mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive:—Held, that the occupiers were rateable for the mill. *Staley* v. *Castleton Overseers*, 5 B. & S. 505; 33 L. J., M. C. 178; 10 Jur. (N.S.) 1147; 10 L. T. 606; 12 W. R. 911.

In March, 1863, the owner of a silk mill gave up his business, with the intention of never resuming it, and the mill had not since been worked, but, with the machinery and other articles and things in it, had been advertised for sale. All the contents of the mill were essential articles and things for a tenant to have in working it for the manufacture of silk. The machinery, some of which was affixed to the floors and ceilings, was in the nature of tenants' fixtures. A man occasionally went to the mill in order to protect the property against trespass or depredation:—Held, that the owner of the mill was rateable for the mill. *Harter* v. *Salford Overseers*, 6 B. & S. 591; 34 L. J., M. C. 206; 11 Jur. (N.S.) 1036; 13 W. R. 861.

M., the lessee of a corn mill, evicted, for non-payment of rent, her sub-tenants, who had been in occupation of the premises, and who had rebuilt the mill and provided new machinery for it. M. was in possession at the time when a rate was struck by the plaintiffs. M. had put a caretaker in charge, who kept the machinery in order, and the premises were advertised to be let by her as a going concern. M. had not used the premises as a mill at any time:—Held, that the court was not bound to hold as matter of law that M. was in immediate use and occupation so as to be liable as rateable occupier. *Midleton Union* v. *M'Donnell*, [1896] 2 Ir. R. 228.

Unoccupied House.]—By 17 Geo. 2, c. 38, s. 12, where any person shall come into or occupy any house, out of which any other person assessed to any poor-rate shall be removed, or which, at the time of making the rate, was empty or unoccupied, every person so removing from, and every person so coming into or occupying the same shall be liable to pay such rate, in proportion to the time that such person occupied the same respectively. A poor-rate for eleven months having been made on the appellant on the 25th of October, 1866, in respect of a house which he was then occupying, he went out of occupation on the 8th of November following; the house remained unoccupied till the 10th of May, 1867, when a new tenant entered:—Held, that the appellant was liable to pay to the rate for the time the house remained unoccupied, as well as for the fourteen days during which he occupied it. *Edwards* v. *Rusholme Overseers*, 38 L. J., M. C. 153; L. R. 4 Q. B. 554; 17 W. R. 821.

Houses newly erected, and not yet occupied, are rateable hereditaments within the Union Assessment Act (25 & 26 Vict. c. 103), and ought to be inserted in the valuation lists. *Reg.* v. *Malden Overseers*, 10 B. & S. 323; 38 L. J., M. C. 125; L. R. 4 Q. B. 326.

A local act of parliament gave a corporation power to levy rates "on the occupiers of all such kinds of property as by the laws in force for the time being are assessable to any rate for the relief of the poor":—Held, that the owners of unoccupied and unfurnished premises were not liable. *Sligo Corporation* v. *Wynne*, Ir. R. 7 C. L. 465.

Furnished House.]—The owner of a house in Dublin furnished it suitably for letting. The house so furnished was occasionally let; but during certain intervals of time remained unlet and unoccupied, except by the furniture which remained in it:—Held, that he was liable to rates in respect of the premises, both while the house was let and while it was so unlet. *Staunton* v. *Powell*, Ir. R. 1 C. L. 182; 15 W. R. 362—Ex. Ch.

Occupation by Poor Tenant—Landlord's Liability.]—A landlord cannot be rated in respect of houses let to tenants who have been excused their rates on account of poverty. *Rex* v. *Hull Dock Co.*, 5 D. & R. 359; 3 B. & C. 516.

Occupation by Liquidator.]—A poor-rate was made upon premises which had been occupied by a joint-stock company, then being wound up by order of the court, and whilst the official liquidator was carrying on the company's business on the premises. In the rate-book the name of the company appeared, and also the name of the liquidator, with the description of "official liquidator." Upon nonpayment of the rate, application was made to a magistrate for a distress warrant upon the liquidator's goods and chattels, but was refused:—Held, upon a rule to compel the magistrate to issue the warrant, that whether or not the liquidator was in form rated as the occupier of the premises, he was not such an occupier as to be liable for the rate in respect of his personal goods and chattels, and that the court would not compel the magistrate to issue his warrant. *Reg.* v. *Curzon*, 46 L. T. 159; 30 W. R. 521; 47 J. P. 37.

Occupation on Default under Agreement.]—An agreement was entered into between the owners of certain limestone quarries and a canal company, whereby the former covenanted to deliver to the latter, yearly, for ever, as much limestone as they should require, in a merchantable state, paying 7*d.* per ton, with a stipulation that if the owners neglected to supply the stone required the company should themselves be at liberty to enter upon the quarries and work them, paying 2*d.* per ton to the owners; and the latter having made default, the company entered upon and worked the quarries on the terms stipulated:—Held, that they were not rateable occupiers of land. *Rex* v. *Trent Navigation Co.*, 6 D. & R. 47; 4 B. & C. 57; 3 L. J. (o.s.) K. B. 140; 28 R. R. 212.

Occupation of Part of a House—Owner.]—If the owner of a house occupies part of it, he is liable to be rated for the whole, unless there is a distinct occupation of the rest by some other person. *Rex* v. *St. Mary-the-Less, Durham*, 4 Term Rep. 477; 16 R. R. 811.

—— **Structural Severance.**]—A house not structurally severed was let partly to one tenant and partly to another, and each had the exclusive occupation of the part let to him. There was a staircase leading from the front door to the upper rooms, and a joint user of the front garden and the back yard, in which was a closet. The tenants were jointly assessed in respect of the whole house, and rated as joint occupiers. The rate was confirmed by the respondents. On a case stated by quarter sessions:—Held, that the tenants could not be rated as joint occupiers, but that each was the occupier of a separate tenement capable of being rated, and each should be rated separately. *Allchurch* v. *Hendon Union*, 61 L. J., M. C. 27; [1891] 2 Q. B. 436; 65 L. T. 450; 40 W. R. 86—C. A.

—— **Series of Chambers or Blocks of Buildings.**]—An association was owner of certain chambers, consisting of seven blocks of buildings, each with an entrance door and a staircase. They contained altogether 117 sets of rooms, structurally divided, each with an outer door on to the staircase, and having no other communication with each other. The street door to each block was kept locked at night, and a porter, who was hired by the association, resided in each block, and had a key of and access to all the sets of rooms in the building for the purpose of a general superintendence, and as the servant of the occupiers. The form of agreement between the association and occupiers contained the usual clauses in the lease of a separate house—such as power to the landlord to enter and paint, and to enter and see repairs carried out:—Held, that each set of rooms ought to be separately placed upon the valuation list of the parish, and each occupier separately rated to the relief of the poor. *Reg.* v. *St. George's Assessment Committee*, 41 L. J., M. C. 30; L. R. 7 Q. B. 90; 25 L. T. 696; 20 W. R. 179.

Small Tenements—Owner rated instead of Occupier—"Sturges Bourne's Act."]—The owner of a house let "on any agreement by which the rent is reserved or made payable at any shorter period than three months," cannot be assessed to the poor-rates instead of the actual occupier under Sturges Bourne's Act (59 Geo. 3, c. 12), s. 19, if the rent is at a rate which amounts to more than 20*l.* by the year. *West Ham Overseers* v. *Iles*, 52 L. J., Q. B. 650; 8 App. Cas. 386; 49 L. T. 205; 31 W. R. 928; 47 J. P. 708—H. L. (E.)

—— **Implied Repeal.**]—The 19th section of 59 Geo. 3, c. 12 (Sturges Bourne's Act), by which, where houses were let at a rent not exceeding 20*l.* nor less than 6*l.* by the year, the inhabitants in any parish in vestry assembled might resolve that the owners, instead of the actual occupiers, should be assessed to the poor-rate, in which case the churchwardens and overseers of the parish were to assess such owners according to the actual rent of such houses, after making a reasonable deduction from the rent not exceeding one-half of the same, is repealed by implication by the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 31). *West Ham* v. *Fourth City Mutual Building Society*, 61 L. J., M. C. 128; [1892] 1 Q. B. 654; 66 L. T. 350; 40 W. R. 446; 56 J. P. 438.

—— **Small Tenements Act, 13 & 14 Vict. c. 99.**]—Six persons each occupied a room in a six-roomed dwelling-house in a parish within a parliamentary borough, and had the use in common of the street-door, passage, staircase, and domestic conveniences: the owner did not occupy any part of the premises, nor retain any control over the tenants, each of whom had the exclusive possession of his own room. At the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the owner was rated in respect of the whole house, instead of the occupiers, by virtue of the Small Tenements Act. After the passing of the Representation of the People Act, the overseers made a rate, in which each of the six occupiers was separately rated:—Held, that the owner of the house was, and not the several occupiers were, rateable: for that the house came within the exception in s. 7. *Stamper* v. *Sunderland-near-the-Sea Overseers*, 37 L. J., M. C. 137; L. R. 3 C. P. 388; 18 L. T. 682; 16 W. R. 1063.

—— **Adoption of the Act.**]—The inhabitants of a parish met in vestry, and drew up the following document: "A meeting was held this day at W., for the purpose of carrying out the provisions in 13 & 14 Vict. c. 99, for the better assessing and collecting the poor-rates upon small tenements situate within the parish, and it was agreed that the same should be carried out in the parish":—Held, a valid order for the adoption of the act. *Barin* v. *Hutchinson*, 31 L. J., M. C. 229; 6 L. T. 504; 10 W. R. 807—Ex. Ch.

—— **Under Poor Rate Assessment and Collection Act.**]—By the Poor Rate Assessment and Collection Act (32 & 33 Vict. c. 41), s. 19, the overseers in making out the poor-rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid:—Held, that this applies only where the owner has entered into "an agreement in writing with the overseers to become liable to them for the poor-rate," according to s. 3, or where there has been an order by the vestry under s. 4, for rating the owner instead of the occupier, and therefore where there has been neither such agreement nor order, an occupier of part of a house, who is jointly rated with the occupiers of the rest of the house for the rateable value of the whole house instead of being only separately rated for the value of the part occupied by him, is not to be deemed duly rated for a borough qualification so as to satisfy the Representation of the People Act, 1867, s. 61, which requires part of a house to be separately rated to the relief of the poor in order to be a dwelling-house within the meaning of that act. *Cross* v. *Alsop*, 40 L. J., C. P. 53; L. R. 6 C. P. 315; 23 L. T. 589; 19 W. R. 131; 1 Hopw. & C. 444.

The vestry of a parish are only entitled, under s. 4 of 32 & 33 Vict. c. 41, to order the owner of a hereditament to be rated to the poor-rate instead of the occupier so long as the rateable value of such hereditament does not exceed the limits specified by s. 3 of that act. *Norwood Churchwardens* v. *Salter*, 61 L. J., M. C. 193; [1892] 2 Q. B. 118; 67 L. T. 376; 56 J. P. 535.

"**Tenements and Hereditaments.**"]—An act for lighting a hamlet enacted that rates should be laid upon all persons who should inhabit, use, occupy or be in possession of or enjoy any messuages, tenements, houses, warehouses, or other buildings, tenements or hereditaments situate or being in such of the streets, or other public passages and places within the hamlet, as should from time to time be lighted by virtue of the act:—Held, that the general words, "tenements and hereditaments," included only things ejusdem generis with those before mentioned, and which were capable of being inhabited and tenanted, and that a water company was not rateable in respect of its pipes laid in the ground under the streets of the hamlet. *Reg.* v. *East London Waterworks Co.*, 17 Q. B. 512; 21 L. J., M. C. 49; 16 Jur. 121.

Exclusive Occupation — Occupation under Supervision of Owners.]—By an agreement between the royal commissioners for the exhibition of 1862 and M., the former agreed, in consideration of certain money, that M. should have the right of selling refreshments while the exhibition was open, on a space of 40,000 square feet at the least of the portion of ground occupied by the exhibition. He was to fit up the space allotted to him with counters and fittings, to provide cellars, and to lay on gas and water. He was to be subject to the by-laws and regulations made by the commissioners for the orderly conduct of the exhibition, and the persons employed therein. Provisions were only to be brought in at specified times; he was to keep the space clean, and to remove the rubbish, &c., every night. All fittings and erections made by him were to become the property of the commissioners on the erection thereof. M. went into occupation under this agreement, and erected fixtures, counters, pipes, &c., and made cellars and drains. He continued to sell refreshments through the whole time the exhibition was open. The keys of the doors opening from the refreshment-rooms into the exhibition buildings were always kept by the police, employed by the commissioners, and the said police usually locked M. and his servants out every evening, and admitted them again in the morning; but during part of the time, he had an entrance from the outside:—Held, that he was not liable to be rated, inasmuch as he had no exclusive occupation of the space so allotted to him. *Reg.* v. *Morrish*, 32 L. J., M. C. 245; 10 Jur. (N.S.) 71; 8 L. T. 697; 11 W. R. 960.

An occupation of land which is at all times subject to the control of the owner is not such an occupation as to render the occupier rateable to the poor. *Reg.* v. *St. Mary Abbot's, Kensington* (12 A. & E. 824), *Allan* v. *Liverpool* (L. R. 9 Q. B. 180), *Inman* v. *Kirkdale* (L. R. 9 Q. B. 180), and *L. & N. W. Ry.* v. *Buckmaster* (L. R. 10 Q. B. 70) followed. *Rochdale Canal Co.* v. *Brewster*, 64 L. J., Q. B. 37; [1894] 2 Q. B. 852; 9 R. 680; 71 L. T. 243; 59 J. P. 132—C. A.

A railway company granted to coal-owners the use of stables (situate within the premises of the railway station, and approachable only through the gates between the station and the public roads) under agreements containing the following terms: "In consideration of the London and North-Western Railway Company permitting us to occupy and use a stable for the accommodation of four horses at or near the C. station of the company, we undertake and agree that we will pay

the railway company the clear monthly rent or sum of 1*l.* 5*s.*, without any deduction. And we undertake and agree, so long as we shall occupy or use the stable, to observe, perform, and be bound by the by-laws, rules, and regulations which shall, for the time being, be issued or prescribed by the railway company for the government and use of their railway station, premises, and conveniences. And we further undertake and agree to give and deliver up possession of the stable at the expiration of one month after a notice in writing for that purpose." The railway company did not, in fact, exercise any control over or use any of the stables during the currency of these agreements; and none of the by-laws, rules, or regulations of the company had reference to them:—Held, that under the circumstances, the railway company was properly rated for these stables as occupiers: for that on the true construction of the agreement, looking at the situation of the stables, it was the intention of the railway company to retain control over the stables, and not to part with the exclusive occupation to the coal-owners. *L. & N. W. Ry.* v. *Buckmaster*, 44 L. J., M. C. 180; L. R. 10 Q. B. 444; 33 L. T. 329; 24 W. R. 16—Ex. Ch.

—— **"Exclusive Rights of using" subject to Revocations—Tunnel and Watercourse.**]—A drainage company was empowered by the act by which it was incorporated to acquire by purchase or otherwise a tunnel and watercourse or an easement through them for the purpose of draining certain mines. In furtherance of the objects of the act, the owner of the tunnel and watercourse by deed granted unto and to the use of the company, its successors and assigns, "all such easements in and through and other and exclusive rights of using (but subject and except and reserving as hereinafter mentioned)" the tunnel and watercourse as might be necessary and convenient for the purposes of the undertaking, the company covenanting to keep the tunnel in repair, and the grantor reserving the right to lead found therein, and to enter the tunnel to work lead mines, &c.:—Held, that the company had the paramount, and the grantor merely a subordinate, interest, and the company were in occupation of the soil of the tunnel and watercourse so as to be rateable in respect of them. *Rex* v. *Chelsea Waterworks Co.* (5 B. & Ad. 156), *Pimlico Tramway Co.* v. *Greenwich Union* (L. R. 9 Q. B. 9), *Lancashire Telephone Co.* v. *Manchester Overseers* (14 Q. B. D. 267) followed. *Holywell Union* v. *Halkyn District Mines Drainage Co.*, 64 L. J., M. C. 113; [1895] A. C. 117; 11 R. 98; 71 L. T. 818; 59 J. P. 566—H. L. (E.)

—— **Right to Dig for Coprolites.**]—It was agreed between A. and B. that A. should forthwith enter upon B.'s land, and there dig for coprolites in a specified manner, and should effectually fence the excavations and complete them by a given time, and should reinstate the land, and then yield and deliver up the land to B. There were no express words giving a right to the exclusive occupation of the land; but the excavations and works contemplated by the agreement required a constant occupation of the land until the coprolites were raised, and the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. B. reserved to himself the right of going upon the land where the excavations were for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the land:—Held, that A. had the right of exclusive occupation of the land, and that he was therefore liable to be rated to the relief of the poor in respect of such occupation. *Roads* v. *Trumpington*, 40 L. J., M. C. 35; L. R. 6 Q. B. 56; 23 L. T. 821.

—— **Where Occupation a shifting one.**]—The owner of land under which there were coprolites granted to a company the exclusive right to dig, raise and carry them away. The company was to pay for this privilege 115*l.* per acre, and was to pay a minimum rent of 1,000*l.* per annum, payable quarterly, whether they worked out sufficient land to cover that rental or not. The land to be worked was taken by them bit by bit as they required it, but they were not entitled to have more than ten acres a year allotted to them, or to use the land for any purpose but that of digging and preparing the coprolites. After digging out the coprolites, more than a year was required to permit the land to dry, after which the subsoil was restored and levelled, the surface soil replaced, and the land again given over by the company to the agricultural tenant. Owing to the time required for this, the company was, at any period of time, in the occupation of ten acres, of which two and a half acres were in process of digging, one acre was occupied by mills, tramways, and other works, and the remainder had been worked out and was in process of drying, but the ten acres so occupied were continually shifting, as the company took land at one place to work, and restored it at another worked out. In this manner they actually worked out ten acres per annum. In an appeal against a poor-rate for the parish where the lands were situated, in which the rates were made quarterly:—Held, that the company was rateable, in each quarterly rate, upon ten acres of land, at the enhanced value, although the occupation was a shifting one, and although the company was never at one time in the profitable occupation of more than three and a half acres. *Reg.* v. *Whaddon Overseers*, 44 L. J., M. C. 73; L. R. 10 Q. B. 230; 32 L. T. 633; 23 W. R. 653.

—— **Licence to Search for Clay.**]—A leave and licence to search for clay in a parish is not a demise of a clay bed, and until a clay pit is made there is no beneficial occupation so as to render the licence rateable. *Reg.* v. *Fayle*, 4 W. R. 460.

—— **Sale of Grass and Right of Grazing.**]—The appellant was the owner of certain land, and such land being unlet, he sold the grass upon it by auction. The conditions of sale described the sale as a sale of grass for a certain time, and set forth certain conditions under which the purchasers were to be entitled to turn cattle in to eat the grass. The conditions also provided that the purchasers should dress the dung, cut the thistles, and leave the fences in good repair. It was a term of the sale that the vendor should pay the rates and taxes. The appellant was rated to the poor-rate in respect of the land in question for a period coincident with part of the period for which the grass was sold. An application having been made to the justices to enforce the

rate against him :—Held, that there was evidence that the appellant was the occupier of the land ; that the effect of the sale of the grass was not to put the purchasers in occupation of the land, but merely to license them to graze their cattle thereon ; and that, consequently, the appellant was liable to be rated. *Mogg* v. *Yatton Overseers*, 50 L. J., M. C. 17 ; 6 Q. B. D. 10 ; 29 W. R. 74 ; 44 J. P. 748 ; 45 J. P. 324.

—— **Barge attached to Posts in a River.**]—The corporation of Oxford was the owner of the soil and bed of the river Isis. A boat club, composed of members of the University of Oxford, was possessed of a barge or house-boat floating on the river, and moored there at a distance of about thirty feet from the bank, by two iron rings fixed to the barge, and passing loosely and movably round two solid fixed posts driven into the bed of the river. These posts were of such a diameter as to allow the rings to pass freely up and down them and to allow the barge to rise and fall with the water of the river. Between the barge and the bank four other posts were driven into the bed of the river, and the club was possessed of a movable frame of boards laid down on the top of these four posts, but not fixed either to them or the bank, so as to form a gangway from the barge to the bank. The posts had remained driven in the bed of the river without the express licence of the corporation for more than twenty years, and no rent had ever been paid by the club in respect of any of the posts. The barge was used as a means of access to boats, and as a dressing-room :—Held, that the club was not rateable as an occupier of the posts and of the barge attached to them. *Grant* v. *Oxford Local Board*, 38 L. J., M. C. 39 ; L. R. 4 Q. B. 9 ; 19 L. T. 378 ; 17 W. R. 76.

—— **Right of Shooting — Occupier.**] — The occupier of land is liable to be rated in respect of his occupation of land, and also of the privilege of sporting over the land so occupied by him whether such privilege be granted to him originally or be acquired by him after he has been in occupation of the land. *Reg.* v. *Williams*, 2 W. R. 410.

—— **Shooting severed from Occupation.**]—Under 37 & 38 Vict. c. 54, s. 6, sub-s. 2, where the owner of land lets the right of sporting over part of the land, which he retains in his own occupation, the lessee may be rated in respect of the right of sporting. *Kenrick* v. *Guilsfield Overseers*, 49 L. J., M. C. 27 ; 5 C. P. D. 41 ; 41 L. T. 624 ; 28 W. R. 372 ; 44 J. P. 202.

—— **Bookstall on Platform.**] — By indenture the South Western Railway Company granted to S. and S. (therein called "the tenants") for seven years "the sole and exclusive licence and privilege to vend, sell, lend, and exhibit for sale and loan, newspapers, books, periodicals, stationery, &c., and such other like articles required for the convenience of passengers by railway, as should be approved by the secretary of the company, at all their stations," &c. ; and also full liberty for the "tenants," subject to the approval of the engineer of the company, to erect and place bookstands, &c., on the platforms for exhibiting and keeping their books, &c., and to post and exhibit advertisements and placards on the station walls ; and also full and free ingress and egress at all reasonable times for the "tenants," their servants and agents, to and from the several stations for the purposes of the grant. The persons employed by S. and S. were to be under the control of the station-master, and liable to immediate removal from the station in case of insobriety or misconduct. S. and S. were to pay the company certain fixed monthly rents, and also a percentage (quarterly) on the gross amounts received by S. and S. for the posting of the advertisements, &c., with a proviso that in case the rent or the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the company in addition to any other remedies, "by distress, as in the case of rent in arrear." And it was provided that the "tenants" should not vend or offer for sale, or exhibit or publish, any books or advertisements or placards of an indecent, immoral, or seditious character, or which should be forbidden by the company ; and should abide by and observe the regulations from time to time made by the company touching the placing on the platforms any of the necessary bookstands ; and the company warranted to the "tenants" "the quiet and peaceable enjoyment and benefit thereby granted for the period and upon the terms and stipulations and in manner aforesaid." S. and S. erected bookstands upon the platforms at W. station, and had the exclusive use of them ; and these bookstands were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress and egress to and from the station, or of access to the bookstands, were exercised by S. and S., or their agents or servants, except under the provisions and for the purposes of the indenture. The company were assessed to the poor-rate for the station generally : —Held, that S. and S. had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstands. *Smith* v. *Lambeth Assessment Committee*, 52 L. J., M. C. 1 ; 10 Q. B. D. 327 ; 48 L. T. 57 ; 47 J. P. 244—C. A. Affirming 31 W. R. 31.

—— **Advertisement Hoardings.**] — When a person, in consideration of a yearly payment, had permission from the owner of land to affix to such land hoardings for advertising purposes, and such hoardings were accordingly affixed, but not in such a way as to necessitate any disturbance of the soil if they were removed, or as to indicate any intention on the part of the owner that there should be a permanent occupation of any part of the land by the person erecting the hoarding : — Held, that such person was not rateable as an occupier of an advertising station, and that his name was therefore wrongly inserted in the supplemental valuation list of a metropolitan parish. *Reg.* v. *St. Pancras Assessment Committee*, 46 L. J., M. C. 243 ; 2 Q. B. D. 581 ; 37 L. T. 126 ; 25 W. R. 827.

—— **Agreement creating Tenancy.**]—By an agreement between an owner of land and an advertising agent the owner agreed to let and the agent to take an advertising station at a yearly rent, the tenancy to commence from completion of erection and continue seven years, and the agent agreed to pay rates and taxes. By another agreement an owner agreed to allow the advertising agent the privilege of erecting an advertising hoarding, the agent to pay a yearly rent, and the owner agreed to allow the agent the further privilege of removing a wall, the agreement to remain in force for three years

and be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he agreed to refund 20*l.* In both agreements the dimensions of the hoardings to be erected were specified. Advertising hoardings supported on posts fixed into the ground were erected. In the first case the structure was used partly by the owner as a shed, and partly by the advertising agent as a hoarding; in the second case exclusively by the agent as a hoarding:—Held, that each of the agreements created a tenancy, and conferred an exclusive occupation, and not merely a licence, and therefore the advertising agent was liable to be rated to the relief of the poor in respect of both hoardings as occupier of advertising stations. *Taylor* v. *Pendleton Overseers*, 56 L. J., M. C. 146; 19 Q. B. D. 288; 57 L. T. 530; 35 W. R. 762; 51 J. P. 613.

—— **Advertising Stations (Rating) Act, 1889.**]—By s. 3 of the Advertising Stations (Rating) Act, 1889: "Where any land is used temporarily or permanently for the exhibition of advertisements, or for the erection of any hoarding, frame, post, wall, or structure used for the exhibition of advertisements but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid." The appellant, a contractor for the erection of buildings upon land vested in the postmaster-general, erected a hoarding round the land, and in pursuance of a clause in the contract permitting the use of the hoarding for advertising purposes, let the hoarding to a firm of advertisement contractors. The hoarding was erected upon the public street under a licence granted by the commissioners of sewers. The appellant's name having been inserted in the poor-rate as the person liable under s. 3 to be rated in respect of the hoarding:—Held, that the hoarding had been erected upon land "not otherwise occupied" within the meaning of s. 3; that the appellant was the person who had permitted the land to be used for the exhibition of advertisements within the meaning of that section; that he must, therefore, be deemed to be in beneficial occupation of the land, and that his name had been properly inserted in the rate. *Chappell* v. *St. Botolph Overseers*, [1892] 1 Q. B. 561; 65 L. T. 581; 40 W. R. 192; 56 J. P. 310.

—— **Rifle Range and Sheds.**] — Under the provisions of a special act of parliament the conservators of Wimbledon Common were to permit the National Rifle Association to occupy from year to year as a rifle shooting ground and place for an encampment for the purposes of the annual rifle meeting any part of a specified area of the common, together with the butts, targets and other conveniences for rifle shooting for the time being thereon. The occupation was not to be for more than seventy-seven consecutive days in each year, which days were not to commence earlier than the 1st of May, and were to terminate not later than the 31st of August. The association was empowered to put up a paling round the part occupied by them, and to erect temporary buildings. Prior to the passing of the special act, the association erected butts for shooting and also a store shed, used for the storage of materials, except during the annual meetings, when it was intended to be used as a workshop for the repairs of targets, &c. By the terms of the act, the association was not to acquire any right in or easement over any part of the common, and was to be deemed to be merely in the enjoyment of a statutory privilege over the common. On the 27th of March, 1872, before the period of occupation in that year commenced, a poor-rate was made for the parish of Wimbledon, in which the association was rated in respect of the area, the butts, and the store shed:—Held, that with respect to the area and the butts there was no such exclusive occupation as to render them liable to a poor-rate, but that with respect to the store shed which was occupied by them for their own purposes throughout the year they were liable. *Mildmay* v. *Wimbledon Overseers*, *Reg.* v. *Surrey JJ.*, 41 L. J., M. C. 133; 27 L. T. 265; 20 W. R. 986.

—— **Market—Payment for Stalls.**]—A poor-rate assessed upon payments made for sittings, for putting up stalls and tables, for the standing of carts in a market place, and for placing baskets on the ground thereof is a rate in respect of the profits of the soil; and is therefore sustainable under the statute of Elizabeth or under a local act which empowers the rating of "all and every the occupiers of lands, houses, and tenements." *Rex* v. *St. Peter of Mancroft, Norwich, Overseers*, 6 L. J. (o.s.) M. C. 69.

—— **Stall in Market—No Right to Definite Portion of Ground.**]—The appellant rented two stalls in Bodmin market year by year at a rent payable weekly. The stalls in question had been put up to auction and were bought by the appellant and used by him on market-days. The stalls thus rented were capable of being removed, and there was no agreement that they should always stand on the same identical spot, though the appellant had a right to retain the same relative position in the row:—Held, that there was no such occupation of the stall as rendered the appellant liable to be rated under 43 Eliz. c. 2, he having acquired only the right to a given stall in a given row, and not the right to place one on any definite portion of ground. *Spear* v. *Bodmin Union*, 49 L. J., M. C. 69; 43 L. T. 127; 44 J. P. 764.

—— **Theatre — Proprietor.**] — A local act enacted that the yearly sum of 250*l.* should be charged upon the houses of the inhabitants of St. Paul's, Covent-garden, except Bedford-house, for the support of the rector, curate, clerk, and sextons. Another local act, repealing the former, enacted, that, in lieu of the sum of 250*l.*, the yearly sum of 520*l.* should be charged upon all houses within the parish of St. Paul; and that such rates and assessments should be paid by the respective occupiers of such houses:—Held, that the word "houses" in these acts, primâ facie meant dwelling-houses; and that the proprietors in possession of Covent-garden Theatre, in which no person slept or resided, and who did not themselves reside within the parish, were not liable to be rated for the same. *Surnam* v. *Darley*, 14 M. & W. 181; 14 L. J., M. C. 145.

—— **Private Box—Lessee.**]—By a local act, poor-rates might be assessed for a parish "upon

all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse or any other buildings, tenements, or hereditaments, or any person or persons who by law is or are chargeable to the relief of the poor" :—Held, that a lessee for a term of years of a private box in Drury Lane theatre was rateable. *Reg.* v. *St. Martin's-le-Grand* or *in-the-Fields*, 2 G. & D. 426; 3 Q. B. 205; 11 L. J., M. C. 112; 6 Jur. 850.

Beneficial Occupation.]—A tenant is rateable for the beneficial occupation of land, although such occupation be not profitable. Therefore, when the maintenance of a sea-wall, fixed on certain lands by act of parliament, amounted to their full rent, the tenant who owned and occupied them (having given no purchase-money on account of this liability) was not exempted from rateability in respect of them. *Reg.* v. *Vange Overseers*, 2 G. & D. 476; 3 Q. B. 242; 11 L. J., M. C. 117; 6 Jur. 893.

—— **Public Park.**]—When a public body, acting under statutory powers, purchases land which it is directed to maintain as a park for the perpetual use thereof by the public for exercise and recreation, and the necessary cost of maintaining the park as a whole for the purposes of the act exceeds any income which can be derived from it in respect of licences for the supply of refreshments or for grazing rights or otherwise, there is no rateable occupation. *Lambeth Overseers* v. *London County Council*, 66 L. J., Q. B. 806; [1897] A. C. 625; 76 L. T. 795; 46 W. R. 79; 61 J. P. 580—H. L. (E.)

—— **Lands held for Public Purposes.**]—To constitute beneficial occupation it is not necessary that it should be such as to yield a pecuniary profit, but the true test is whether it is of value to the occupier. *Reg.* v. *London School Board* (17 Q. B. D. 738) and *Burton-on-Trent Corporation* v. *Eggington Overseers* (24 Q. B. D. 197) approved; and *Owens College* v. *Chorlton-upon-Medlock Overseers* (18 Q. B. D. 403) disapproved. *London County Council* v. *Erith Overseers*, 63 L. J., M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821—H. L. (E.)

—— **Trustees.**]—An act having vested the aftermath of a meadow in trustees for the burgesses and principal householders of a town, freed from all other interests in the same, with power to let the same or any part or parts annually to any person or persons for the best rent, and also to let in pastures for horses, cattle, and sheep to different persons, at such rates and subject to such regulations as the trustees should appoint; or, by writing under their hands and seals to demise the same for a term of years, and that the rents and profits should, after payment of all charges, be divided by the trustees amongst the objects of the trust:—Held, that the trustees not having let the aftermath to any persons for any certain term, or in any certain proportions, but having let it out, as it was called, in pastures at so much a head for horses, cattle, and sheep, to various persons, must themselves be taken to be the occupiers of the land, and were consequently rateable for the same. *Rex* v. *Tewkesbury Corporation*, 13 East, 155.

Where A. demised a messuage to trustees, for the maintenance of a schoolmaster for teaching children residing in a parish, who was to teach without a fee, and expressed his desire "that the parish would exempt the messuage from the payment of all rates," and the parish had had the use of the school for 125 years, and had, up to that date, exempted the property from rates, the messuage being beneficially occupied, and the rent paid to trustees for the use of the schoolmaster:—Held, that the property was rateable; and that, supposing that the devise had been entirely for the benefit of the poor, which it was not, and that the desire expressed by the testator amounted to a condition, it was a condition which the law would not allow. *Reg.* v. *Ellis*, 2 D. (N.S.) 361; 12 L. J., M. C. 20; 7 Jur. 108.

Held, also, that the previous inhabitants of the parish had no power to bind their successors to exempt the property from rates; and that the time during which no rate had been paid did not affect the question. *Ib.*

Trustees cannot rely upon the mere circumstance of their being trustees, and so not entitled to any personal advantage from the property vested in them, for the purpose of shewing that they are not occupiers of lands and houses within a parish, and therefore that they are exempted from being rated to the poor-rate. *Reg.* v. *Birkenhead Docks* (*Trustees*), 2 El. & Bl. 148; 21 L. J., M. C. 209; 17 Jur. 162.

b. Mode of Assessment.

Rateable Value, what is.]—The occupiers of property capable of a beneficial occupation are liable to be rated in respect of its full rateable value, without regard to the amount of benefit which they themselves derive from that occupation. *Reg.* v. *Rhymney Ry.*, 10 B. & S. 198; 38 L. J., M. C. 75; L. R. 4 Q. B. 276; 17 W. R. 530.

In assessing premises the overseers should proceed on the estimate, not of the rent actually paid for the premises by the occupier, but of the rent at which they might reasonably be expected to let from year to year. *Hayward* v. *Brinkworth Overseers*, 10 L. T. 608.

Three farms were let at a certain sum annually. They might, however, reasonably have been expected to let, and might have let, at a larger sum. The overseers assessed their occupiers at the rent actually paid by them:—Held, that they were wrong; that they should have adopted the larger sum, viz. the rent at which the farms might have been reasonably expected to let, as the estimate of the net annual value. *Ib.*

—— **Land held for Public Purposes.**]—In determining the rateable value of land and buildings owned by a public body for the discharge of duties imposed on them by law, the public body must themselves be taken into account as possible tenants, notwithstanding that such body could not under the statutes giving them their powers become tenants of the premises of which they are the owners. *London County Council* v. *Erith Churchwardens*, 63 L. J., M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821—H. L. (E.)

Land held under Statutory Authority for Perpetual Use by the Public for Exercise and Recreation.]—By the London Council (General Powers) Act, 1890, the London County Council were empowered to acquire certain lands, and were directed, when they had acquired them, to

lay them out and maintain them, and every part thereof, as a park, for the perpetual use thereof by the public for exercise and recreation. The council acquired the lands and laid them out and maintained them as a park under the act. The necessary expenses of maintaining the park as a whole for the purposes of the act exceeded any income which could be derived from it so long as it remained devoted to the public use as a park. The council having been assessed to the poor rate, as occupiers of the park, at the rateable value of the lands prior to their having become a public park:—Held, that as there was no duty upon the council to provide a park for the public use, and as there was no finding in the case that the council would have been willing to give anything in excess of a nominal rent for the occupation of the park, and as its maintenance in accordance with the conditions of the statute was only possible at an annual pecuniary loss, the rateable value of the occupation of the park by the council was not greater than a nominal amount. *London County Council* v. *Lambeth Overseers*, 65 L. J., M. C. 148; [1896] 2 Q. B. 25; 74 L. T. 605; 44 W. R. 621; 60 J. P. 470—C. A.

But see *Lambeth Overseers* v. *London County Council*, 66 L. J., Q. B. 806; [1897] A. C. 625; 76 L. T. 795; 46 W. R. 79; 61 J. P. 580—H. L. (E.)

—— **Small Tenements.**]—The amount to be inserted in the column headed "Rateable value" of the valuation (in a parish which has adopted the Small Tenements Rating Act), under 25 & 26 Vict. c. 103, is the true rateable value of the property, independently of whether such property is subject to the provisions of the Small Tenements Act or not. *Sunderland-near-the-Sea Overseers* v. *Sunderland Union*, 18 C. B. (N.S.) 531; 34 L. J., M. C. 121; 11 Jur. (N.S.) 688; 13 L. T. 239; 13 W. R. 943.

Enhanced Value—Brewery and "Tied Houses."]—A. being owner of a brewery, and also of thirty-three public-houses, not all situated in the same township as the brewery, demised to B. the brewery, together with the goodwill and trade of the public-houses, for seventeen years; B. yielding and paying for and in respect of the brewery, 300*l.*, and for and in respect of the goodwill and trade of the public-houses, 150*l.* B. occupied the brewery, and, under the contract contained in this lease, was enabled to compel the lessees of the several public-houses to purchase their beer at the brewery; and it would have been a breach of the contract between B. and A. if their custom had been diverted elsewhere. The public-houses, in consequence of this agreement, fetched less rent than they would have done if the occupiers had been free to get their supplies where they would; and the advantage of their compelled custom to the occupier of the brewery was worth 150*l.* a year:—Held, by Lord Campbell, C.J., and Crompton, J., that he was properly rated of the enhanced value, it being an advantage connected with the occupation, which would be taken into calculation by a tenant in estimating the annual rent; and that it was not material that the origin of this advantage was in a personal contract: Erle, J., dissentiente, and holding that this advantage was not an incident to the occupation, properly to be taken into account in estimating the rent, but a personal contract, transitory with the persons of the contractors, and only accidentally connected with the hereditaments so occupied. *Allison* v. *Monkwearmouth Shore Overseers*, 4 El. & Bl. 13; 23 L. J., M. C. 177; 18 Jur. 1075. *S. C.*, *Reg.* v. *Allison*, 2 C. L. R. 1544; 2 W. R. 592.

In a parish were certain breweries, the occupiers of which were possessed, as owners or lessees, of a number of public-houses known as "tied houses," some of which were in the parish and some in other parishes. These public-houses were let to tenants at a smaller rent than they would have been let at if they had been free public-houses, the tenants being bound by contracts with the landlords to purchase from them all the malt and other liquors consumed in their houses, and so, probably, paying a higher price for their liquors than they would have paid had they been free. In valuing these breweries and public-houses for the purpose of making the valuation list, under 25 & 26 Vict. c. 103, s. 14, the overseers applied to them the same principles of valuation as to the other rateable hereditaments in the parish, pursuant to 6 & 7 Will. 4, c. 96, s. 1. The union assessment committee having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such tied public-houses attached to each brewery, increased the gross estimated rental and the rateable value of such breweries by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for, with the advantages attending the contracts with the tied public-houses. They, however, made no reduction in the valuation list in respect of the several tied public-houses:—Held, that the union assessment committee had done wrong in so increasing the rateable value of the breweries, such rateable value not being affected by these personal contracts with the tenants of the tied public-houses. *Sunderland-near-the-Sea Overseers* v. *Sunderland Union*, 18 C. B. (N.S.) 531; 34 L. J., M. C. 121; 11 Jur. (N.S.) 688; 13 L. T. 239; 13 W. R. 943.

Held, also, that the rateable value of the public-houses was not to be decreased by reason of the burthen cast upon the tenants by their contracts with the brewer landlords. *Ib.*

——**Under the Small Tenements Rating Act.**]—In making out the valuation list in a parish which has adopted the Small Tenements Rating Act (13 & 14 Vict. c. 99), the reduction to be made under 14 & 15 Vict. c. 39, ss. 3 and 4, to the owners of small tenements who are rated instead of the occupiers, should be made, not from the rateable value of the hereditaments assessed, but from the rate in the pound to be levied and collected. *Ib.*

Estimate of Rent—How made—Brickfield.]—On appeal against a poor-rate by an occupier of a brickfield, a case was stated, shewing that he held the land (ten acres) for the purpose of getting from it clay to make bricks, under a lease for seven or fourteen years, or till the earth should be all dug out; that he paid 2*l.* per acre, without reference made to the use of the land, and the royalty of 1*s.* 6*d.* for every 1,000 bricks moulded in any one year; that the value of land in the parish let for agricultural pur-

poses was 2*l.* 6*s.* a year; that he had on the field four brickmaking stools, each stool capable of producing 750,000 bricks; that the field originally contained sufficient clay for 31,000,000 of bricks; that in the year before the rate was laid, he had nearly 3,000,000, and that there remained clay enough for 12,000,000. The sessions also found that the rent which a tenant would have been willing to pay, on taking a lease of the premises, with liberty to consume the brick-earth, and without being liable to royalty, was 10*l.* per acre; and they confirmed the rate by which he was assessed at 2*l.* 6*s.* per acre, and for royalty 1*s.* 6*d.* per 1,000, on as many bricks as the stools were capable of producing in a year:—Held, that the rent, estimated according to 6 & 7 Will. 4, c. 96, s. 1, was the proper criterion of the rate on this property. *Reg.* v. *Westbrook*, 10 Q. B. 178; 2 New Sess. Cas. 599; 16 L. J., M. C. 87; 11 Jur. 515.

And assuming the above facts to have appeared without any specific finding as to the rent which a tenant would be willing to pay:—Held, that the royalty, together with a fixed annual charge, was properly considered as the rent; that the payment in reepect of the brick-earth was not the less a rent because the subject-matter of the renting was in a course of being wholly consumed; that, in absence of proof to the contrary, the sessions were right in assuming the number of bricks, which the stools could make, to have been actually made within the year of rating; that the rate was properly assessed on the number supposed to remain in the particular year; and that no deduction was to be made for the breeze, ashes, and other materials used in making the bricks, it being presumable that these were allowed for in fixing the royalty. *Ib.*

Held, also, that the sessions having found specifically the sum which a tenant would give on taking a lease with liberty to consume the earth, and without a royalty, namely, 10*l.* a year per acre, that sum (from which tenants' rates and taxes were to be deducted) must be considered as the rent, within 6 & 7 Will. 4, c. 96, s. 1, and no inference from other facts was admissible. *Ib.*

In another case not materially differing, but in which the sessions neither expressly stated the rent which, in their opinion a tenant might reasonably be expected to pay, nor gave data for estimating it, except by stating the number of stools at work, and the amount of royalty actually paid (under an agreement still subsisting) in the five years immediately before that for which the rate was made; and the question propounded was, What is the net annual value of the land?—Held, that the fixed sum paid for occupation and the royalty constituted the rent; but that the court could not determine the amount which, at the time of making the rate, a tenant about to take a lease might reasonably be expected to pay; nor, in the absence of materials for such estimate, could the assessment be grounded on the ordinary amount of rent paid for land in the parish used for agricultural purposes, or the amount paid for the best garden ground in the parish. *Reg.* v. *Everist* or *Westbrook*, 10 Q. B. 178; 2 New Sess. Cas. 599; 16 L. J., M. C. 87; 11 Jur. 515.

—— **Interest paid by Lessees on Borrowed Money.**]—Commissioners of a navigation having borrowed 28,000*l.* on mortgage, and being still in want of funds, agreed to let the navigation and tolls for ninety-nine years, the lessee undertaking to pay the interest of the 28,000*l.* An act was afterwards passed confirming the agreement, and empowering the commissioners to lease the navigation and tolls for the remainder of the term to the persons entitled under the former agreement; and enacting, that they should pay the interest of the 28,000*l.* yearly to the mortgagees, in default of which the commissioners might require the toll collector to pay such interest to the mortgagees out of the moneys in his hands:—Held, that the interest paid by the lessees was in substance a rent, and that the rate ought to be calculated upon it; and that the lessees were not occupiers under a beneficial lease, though the interest was only about 1,400*l.* a year, and the annual earnings at the time of making the rate were 3,418*l.* (from which, however, about 1,000*l.* was to be deducted for repairs, &c.), one year's value being no criterion, and there being no proof that the rent was unduly small. *Rex* v. *Chaplin*, 1 B. & Ad. 926; 9 L. J. (O.S.) M. C. 121.

—— **Actual Profits.**]—The occupiers of cement works, and also of a chalk pit situated close by, were assessed separately as to their works and their pit. There were other equally good chalk pits in the neighbourhood, the chalk from which was used only for ballast and other purposes not so profitable as that of manufacturing cement, for which the occupiers used theirs. They appealed to quarter sessions against the assessment of the chalk pit; and the counsel who supported the rate, proposed to ask their manager for information as to the profits they obtained from the chalk, but the quarter sessions refused to admit evidence upon that subject:—Held, that the quarter sessions were right, and that although the convenience and situation of the chalk pit were to be considered in estimating what rent a tenant would reasonably pay, the actual profits derived by the occupiers were not material in forming that estimate. *Reg.* v. *Aylesford Union*, 26 L. T. 618.

Cotton Mill—Working Stopped.]—A cotton mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive:—Held, that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it, if let for a reasonable term of years, with the prospect of improvement in value. *Staley* v. *Castleton Overseers*, 5 B. & S. 505; 33 L. J., M. C. 178; 10 Jur. (N.S.) 1147; 10 L. T. 606; 12 W. R. 911.

In March, 1863, the owner of a silk mill gave up his business with the intention of never resuming it, and the mill had not since been worked, but, with the machinery and other articles and things in it, had been advertised for sale. All the contents of the mill were essential articles and things for a tenant to have in working for the manufacture of silk. The machinery, some of which was affixed to the floors and ceilings was in the nature of tenants' fixtures. A man occasionally went to the mill in order to protect the property against trespass or depredation:—Held, that the owner of the mill was rateable for the mill only upon its annual value as a warehouse for the machinery, articles, and things in it. *Harter* v. *Salford Overseers*, 6

B. & S. 591; 34 L. J., M. C. 206; 11 Jur. (N.S.) 1036; 13 W. R. 861.

Stoppage owing to Strike.]—When mills and factories have been assessed to the poor-rate, occupiers are not entitled to any reduction in assessment because of a stoppage of work consequent on a strike or to an allowance from the said rate on the basis that the said mill and factories were assessable during the continuance of a strike as warehouses for machinery only and not as going or working concerns. *Hoyle* v. *Oldham Union*, 63 L. J., M. C. 178; [1894] 2 Q. B. 372; 9 R. 287; 70 L. T. 741; 58 J. P. 669—C. A.

Machinery increasing Value of Premises.]—In a rate laid upon buildings, to which machinery is attached for the purpose of manufacture, the real property ought to be assessed according to its actual value as combined with the machinery, without considering whether the machinery is real or personal property, and liable, or not, to distress or seizure under a fi. fa., or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant. *Reg.* v. *Guest*, 7 A. & E. 951; 2 N. & P. 663; W. W. & D. 651; 7 L. J., M. C. 38.

A gaslight company laid down pipes in a parish, the soil not belonging to the company, and manufactured the gas out of the parish. In the valuation of their property they were entered for their mains, pipes, &c., for the value at which they would let, and for the land at the value of the land for a pipe-way. In certain houses of the parish there were steam-engines and other machinery affixed to the houses. These houses were valued at what they were worth to let, without reference to the value which they derived from the engines, &c.:—Held, that the valuation was bad. *Rex* v. *Birmingham and Staffordshire Gas Light Co.*, 6 Ad. & E. 634; 6 L. J., M. C. 92.

Machines used in connection with Hereditament, but remaining Personal Property capable of being Removed without Injury.]—In estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon, for the purpose of making them fit as premises for such a manufactory, are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises. *Tyne Boiler Works Co.* v. *Longbenton Overseers* or *Tynemouth Union*, 56 L. J., M. C. 8; 18 Q. B. D. 81; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420—C. A.

Premises were used as a manufactory for the purpose of lace-making upon which certain boilers, engines, bobbin-net, and other machines were placed for carrying on the said manufactory; such machines were essential to the use of the said premises as a bobbin-net lace factory. The machines were each of them, as machines, separate and distinct from each other, and could be easily removed for sale or repairs. Some were fastened to the floors by screws through the feet of the machines; others were not fastened, their own weight being sufficient to keep them steady, but further than this, the machines were no part of the soil or hereditaments:—Held, upon a case stated, that, although some of the machinery and plant was capable of being removed, without injury to itself or to the freehold, and although it remained personal property, yet, being essentially necessary and permanently attached to the appellants' business, it was all rightly taken into account in estimating the rateable value of the premises as enhancing the value of the hereditament. *Gifford* v. *Chard Union*, 63 L. T. 249.

Fixtures.]—The occupiers (not being owners) were rated to the poor as for "chemical works, lands, and buildings." Parts of the works consisted of chambers used for the manufacture of sulphuric acid. The chambers were vessels of sheet lead, weighing each several tons, 13 feet high, 13 feet wide, and from 40 to 60 feet long, the lower part forming a dish 12 inches deep, in which the acid was deposited, the upper shutting down upon the lower, and receiving vapour. They stood in the open air, each was surrounded by walls of strong masonry, forming an oblong, which was filled up with sand, and the chamber rested on the sand, being also supported by and riveted to a frame of wood, which ran round the tops of the walls. In some instances the wooden frame was laid in mortar on the tops of the walls, in others it merely rested upon them. At each end of the chamber was a pipe to convey gases and vapours in and out. Each pipe was fixed at its extremity into buildings which were part of the freehold. Where the pipes entered and passed out of the chamber, the lead of the chamber was beaten round the pipe, and the insertion was made vapour-tight by luting. Steam (necessary to the manufacture) was conveyed into the chamber also by a pipe which passed from the boiler, and was riveted to the wooden framework. The boiler was affixed to the freehold, and the pipe to the boiler. Every pipe might be removed by taking it to pieces, or by unfastening the rivets, without injury to the freehold, and then the chamber would rest on the ground by its mere weight, and might, with sufficient force, be lifted from the soil without displacing any part of the freehold. The sessions found that the chambers were attached to the freehold in manner before mentioned, but not affixed thereto:—Held, that assuming the chambers not to be so annexed as to form part of the freehold, yet being fixed machinery attached to buildings, and necessarily so attached for the purpose of being used, they were properly considered in a rate as increasing the rateable value of the buildings, and a rate calculated on such increased value was confirmed. *Reg.* v. *Haslam*, 17 Q. B. 220; 15 Jur. 972.

The premises of a distillery contained tanks which formed the roofs of rooms and houses, boiling backs and mash tuns, lying on brick piers against the walls, which formed the floors of some of the rooms and were connected by pipes to other houses, reservoirs and other articles necessary for the process of distilling. They were all heavy, and either unattached, except by the communicating pipes, to the walls or piers upon which they stood, or fastened only by screws for the purpose of being steadied. Each was to be bought and sold as a separate article, and if all were removed, the premises might be used for other manufacturing purposes:—Held, that these articles were not fixtures, and could not be properly rated in the assessment of the premises to the poor-rate. *Chidley* v. *West Ham Overseers*, 32 L. T. 486.

Refreshment Rooms at Railway Station—Evidence of actual Profits.]—The refreshment-rooms upon a railway station having been let to a contractor for a term of years at a fixed annual

rent, he appealed against a poor-rate made upon him as occupier of the premises, and at the hearing of the appeal sought to prove by his own testimony, and by his account-books, shewing the receipts and expenditure during the past year in respect of the refreshment-rooms, that the business was carried on at a loss, and that the rent reserved did not represent the true annual value of the premises:—Held, that such evidence ought to have been received as an element in ascertaining the rateable value. *Clarke* v. *Fisherton-Angar Overseers*, or *Alderbury Union*, 50 L. J., M. C. 33; 6 Q. B. D. 139; 29 W. R. 334; 45 J. P. 358.

Canteen—Money paid for Privileges.]—Where a canteen in barracks was demised to B. by the barrack board for a year, at a rent of 15*l.* for the canteen and buildings, and also the further sum of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors, usually sold by sutlers, with power of distress for the aggregate sum:—Held, to be one entire rent for the canteen; and therefore that B. was rateable, as occupier of the canteen, in respect of the 525*l.* aggregate rent, and not merely in respect of the 15*l.* *Rex* v. *Bradford*, 4 M. & S. 317.

Right of Shooting.]—The appellant was the owner and occupier of certain woodlands which were included in the rate. He used the lands as woods or plantations, and also enjoyed the right of sporting over them. The overseers, in assessing the property, added a fixed sum of 2*s.* per acre to the natural and unimproved value of the woodland, in respect of the right of sporting:—Held, that by 37 & 38 Vict. c. 54, s. 4, sub-s. a, this mode of rating was right, as the sporting enhanced the value of the occupation. *Eyton* v. *Mold Overseers*, 6 Q. B. D. 13; 43 L. T. 472; 29 W. R. 122; 45 J. P. 54.

Rent of Cows and Right of Grazing.]—Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman who rented under him his stock of cows to be depastured on the same land, was not rated for such dairy. *Rex* v. *Brown*, 8 East, 528.

Racecourse—Discovery of Profits.]—In ascertaining the rateable value of land used as a racecourse, the assessment committee may call for the books of the racecourse proprietors, or give affirmative evidence of the amounts of the profits made, the profits being a material element, though not a test, in determining the rateable value. *Reg.* v. *Verrall*, 45 L. J., M. C. 29; 1 Q. B. D. 9; 33 L. T. 379; 24 W. R. 139.

According to present Value.]—Every person is to be rated according to the present value of his estate, whether that value has or has not been increased by his own improvements. *Rex* v. *Mast*, 6 Term Rep. 154.

A lessee of lands should be rated according to the present value of the lands. *Rex* v. *Shingle*, 7 Term Rep. 549.

Houses and Lands.]—Whether houses are to be rated in a different proportion from lands must depend on local circumstances. *Rex* v. *Sandwich*, 2 Dougl. 582.

Proportion to other Lands.]—A poor-rate imposed in respect of two-thirds of the nett rent of farms, lands and tithes, and of one-half of the nett rent of the houses and other buildings, collieries and coal mines, is not necessarily unequal. *Rex* v. *Tomlinson*, 4 M. & Ry. 169; 9 B. & C. 163; 7 L. J. (o.s.) M. C. 64.

Allowable Deductions—Necessary Expenses.]—When houses or other buildings, either with or without land, are let to a tenant, and the tenant agrees to take upon himself, either wholly or in part, the repairs to which the 6 & 7 Will. 4, c. 96, s. 1, refers, and which would ordinarily fall upon the landlord, no allowance is to be made in respect of those repairs, and the rent actually paid is the rateable value of the premises. *Reg.* v. *Wells*, 8 B. & S. 607; 36 L. J., M. C. 109; L. R. 2 Q. B. 542; 16 L. T. 790; 15 W. R. 1059.

No allowance in respect of contingent or future renewal of buildings or machinery ought to be made from the rent before the latter is adopted as the test of value. *Ib.*

The annual profit is the rent which a tenant would give, he paying the poor-rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive, and allowing him a deduction from the rent, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. *Rex* v. *Lower Mitton*, 4 M. & Ry. 711; 9 B. & C. 810; 8 L. J. (o.s.) M. C. 57.

By the Everton Drainage Act, 1860, the owners and proprietors of land in Nottinghamshire were charged with embankment and drainage works, without which the annual value of the neighbouring lands would be considerably diminished. The rates so charged were made payable by the occupiers, who were authorised to deduct the amount from their rent:—Held, that the average annual cost of the works ought to be deducted from the occupier's rent, in order to estimate the nett annual value under the Parochial Assessment Act, 1836. *Reg.* v. *Gainsborough Union*, 41 L. J., M. C. 1; L. R. 7 Q. B. 64; 25 L. T. 589; 20 W. R. 250.

Proprietors of lands situate in parish V. and other parishes of the Isle of Canvey, granted one-third of all the lands in fee to J., in consideration of his embanking all the lands in the island. By a local act afterwards passed, commissioners were appointed to keep up the embankment, and for that purpose they were to tax the owners and occupiers of the lands by an annual rate, to the full annual rent or value of such lands, and, if the moneys so levied should be insufficient (but not otherwise), to tax the lands in the island. H. being the owner and occupier of all the granted lands in V., was rated by the commissioners for that property, described in the rate as house, premises and lands. H. had taken the lands subject to the above liability, paying no purchase-money. The assessment on these and the rest of the granted lands equalled the rack-rent or full annual value. The annual expenditure on the embankment was necessary to maintain the lands within the island in a state to command any rent from a tenant, or to be capable of occupation by the owner:—Held, that H. was rateable for the full annual value of his lands, without deduction on account of the embankment tax. *Rex* v. *Vange*, 3 Q. B. 242; 2 G. & D. 476; 11 L. J., M. C. 117; 6 Jur. 893.

—— **Small Tenements let by the Week—"Voids" and Losses of Rent—Cost of Collection.**]—The appellant was assessed to the poor-

rate as owner of a small house let by the week at a rent of five shillings, the landlord paying all outgoings. On appeal against the rate to quarter sessions the appellant claimed that, in arriving at the gross estimated rental, deductions should be made in respect of losses by reason of such houses often remaining unlet and void for some time, and by reason of losses of rent through inability of the tenants to pay, and in respect of the necessary cost of collection of the rent actually received. The recorder, however, refused to allow such deductions, and confirmed the rate. The recorder found, in a case stated on appeal from sessions, that it was practically impossible to let the house on any other terms than those on which the appellant let it; but, assuming for rating purposes that a tenant from year to year could be obtained, the house could be reasonably expected to let from year to year at a rent of 13*l.* (which sum amounted to fifty-two times the amount of the weekly rent), the landlord paying all usual tenants' rates and taxes and water-rates. But he found that with respect to house property of that description, whether let by the week or year, the landlord would be unable, by reason of "voids" and of losses by reason of non-payment of rent, to collect more than 95 per cent. of the rent, and that he would have to pay 5 per cent. as the cost of collecting the rent actually received:—Held, that the recorder must be taken to have found as a fact that 13*l.* was the rent which a tenant from year to year as above mentioned could reasonably be expected to give for the house; that there was nothing in the further facts found by him to shew that such finding was unreasonable or not justifiable in point of law, and therefore such finding was conclusive of the fact: and, that being so, that the appellant was not entitled to any of the deductions claimed, inasmuch as the test of gross estimated rental is the rent which a tenant from year to year would agree to give, and not the sum which the landlord ultimately receives. *Smith* v. *Birmingham Overseers*, 58 L. J., M. C. 161; 22 Q. B. D. 703; 53 J. P. 787—C. A. Affirming 60 L. T. 181.

—— **Cemetery Company—Salary of Directors and Auditors.**]—By an act incorporating a cemetery company, the company was required periodically to appoint directors, who should manage the business and concerns of the company subject to their control, keep and use the common seal, have the custody of books, deeds, &c., call meetings, purchase and sell lands, appoint and displace chaplains and other officers, allow them stipends, take of them securities, make contracts touching the company's undertaking, regulate the mode of interment and the disposition of vaults, catacombs, and graves, and the sums to be paid for exclusive right of burial therein, and for placing monuments, direct the issuing, receiving and disposal of the company's moneys, and all their other dealings, superintend their correspondence and the keeping of their accounts, and all other things necessary for carrying on their business, and maintaining actions or suits in their name in respect of debts or contracts, and making, enforcing and rescinding contracts, also auditors who should examine the report to be made by the directors of disbursements and receipts, audit the accounts from which the report was drawn, and inspect the vouchers. The company had two cemeteries in Middlesex and Surrey. The duties and authority of the directors extended to both:—Held, that they were not entitled to deduct from the rateable value the salaries of the directors and auditors, and the expenses of an office in London, at which the directors transacted the business of the company. *Reg.* v. *St. Giles, Camberwell*, 14 Q. B. 571; 19 L. J., M. C. 122; 14 Jur. 519.

—— **Dock Company—Use of Steam Tug.**]—On appeal by the Southampton Dock Company against a poor-rate, they claimed deductions from the amount at which the rateable value of their property was assessed, as follows. For the expenses of a steam-tug alleged by them to be part of the movable plant, but by the respondents to be independent of the dock establishment. The company was authorised by their act to build, purchase, or hire steam-tugs for the purpose of towing vessels into or out of the docks from or to Southampton Water, or any part of the British Channel, and to pay the expense out of the rents, rates and sums receivable under the act. The steam-tug was used for the above purpose, and was a useful appendage to the docks, and advantageous to those who frequented them, and conducive to the general profit of the concern, though not indispensably necessary, as other steam-vessels might have been hired and employed, but with less convenience and advantage:—Held, that the deduction was allowable, the steam-tug being ancillary to the dock undertaking. *Reg.* v. *Southampton Dock Co.*, 14 Q. B. 587; 6 Railw. Cas. 428; 20 L. J., M. C. 155; 15 Jur. 268.

—— **Machinery not fixed to the Soil.**]—Cranes, steam-engines, shears and other heavy machinery attached to the freehold, and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purpose of the tenant's trade, and usually valued as between incoming and outgoing tenant, are not an allowable deduction. *Ib.*

—— **Works in different Districts.**]—Where works producing rateable value are situate in several districts, and can be divided into two parts, the first directly producing the value, and the second indirectly conducing to such production, such division shall be made. Then all the expenses incidental to the second part, including the rates to which it may be liable, being deducted from the gross proceeds, and the nett rateable value being ascertained, such value is to be apportioned among the districts in which the first part is situate, in the ratio of the portion of that value. *Reg.* v. *Hammersmith Bridge Co.*, 3 New Sess. Cas. 424; 15 Q. B. 369; 18 L. J., M. C. 85; 13 Jur. 190.

—— **In respect of Rates and Taxes.**]—In ascertaining the nett rateable value of property assessable to the poor-rate, an allowance is made for rates and taxes. And such allowance ought to be made upon the nett rateable value after the rates and taxes themselves, in addition to all other proper allowances, have been deducted. *Tyne Improvement Commissioners* v. *Chirton Overseers*, 32 L. J., M. C. 192; 6 L. T. 489.

The payment by the landlord of water rent for water supplied to a house (such supply and payment being optional) does not entitle the occupier to a deduction in respect thereof as being an expense necessary to maintain the premises in a state to command the rent. *Reg.* v. *Bilston Overseers*, 6 B. & S. 908; 35 L. J.,

M. C. 73; L. R. 1 Q. B. 18; 12 Jur. (N.S.) 139; 13 L. T. 327; 14 W. R. 83.

By a local act it is provided that the owner of every tenement assessed to the poor-rate at any annual sum under 6*l.* 10*s.*, the said sum to be ascertained according to the provisions of the 6 & 7 Will. 4, c. 96, s. 1, shall be rated to and pay the poor-rates; but that in all cases where the owner is so liable to be rated, he may compound for the same by the payment of a reduced rate, whether such tenement be occupied or not; in which case he shall pay one-half of the rates only:—Held, that an owner so compounding is entitled to the same deductions as might be claimed by the tenant in whose place, for rating purposes, he stands, and that the amount is not to be regulated by the sum actually paid by him. *Reg.* v. *Dodd*, 6 B. & S. 903; L. R. 1 Q. B. 16; 12 Jur. (N.S.) 159. *S. C.*, nom. *Reg.* v. *Bilston Overseers*, 35 L. J., M. C. 97; 13 L. T. 327; 14 W. R. 83.

The owner and occupier of lands situate in a level within the jurisdiction of a commission of sewers, being rated, claimed deductions: first, in respect of the general sewers tax; secondly, in respect of the amount at which he was taxed for the maintenance and cleansing of the sewers in the level; and, thirdly, in respect of the sum annually expended by him in the maintenance and repair of a floodgate, sluice, and gate upon his own lands; and, fourthly in respect of the expenses of keeping in repair a sea-wall:—Held, that he was entitled to the deductions claimed. *Reg.* v. *Hall Dare*, 5 B. & S. 785; 34 L. J., M. C. 17; 11 Jur. (N.S.) 59; 11 L. T. 301; 13 W. R. 70.

In rating land liable to sewers-rate, the amount of such rate must be deducted from the valuation. *Rex* v. *Adames*, 1 N. & M. 662; 4 B. & Ad. 61; 2 L. J., M. C. 90.

Under an act for the embanking and draining a district consisting of several parishes, an annual rate was imposed on the district, and lands occupied by A. were rated at a certain proportion yearly. The rate by the act was expressly made a landlord's tax, and A.'s landlord had accordingly always paid the amount. The whole rate under the act was necessary for and was spent in each year in maintaining the drainage works. Without such drainage works the land occupied by him would have been under water at certain seasons, and the annual value would have been considerably diminished:—Held, that in assessing him to the poor-rate, a deduction was to be allowed under 6 & 7 Will. 4, c. 96, s. 1, in respect of the drainage rate, as an expense necessary to maintain the land in a state to command the rent. *Reg.* v. *Gainsborough Union*, 41 L. J., M. C. 1; L. R. 7 Q. B. 64; 20 W. R. 250.

A rate upon the Hull Dock Company to the full amount of their profits, without regard to the amount of poor-rates with which they are chargeable, is bad. *Rex* v. *Hull Dock Co.*, 5 D. & R. 359; 3 B. & C. 516.

The income-tax which a tenant would have to pay on his net profits after payment of his rent is not an allowable deduction. *Reg.* v. *St. Giles, Camberwell*, 14 Q. B. 571; 19 L. J., M. C. 122; 14 Jur. 519.

c. Right of Tenant to Deduct from Rent.

Assessment of Landlord—Necessity of.]—A local act for the parish of Marylebone makes the occupiers of houses liable to be assessed to parochial rates. The lessor, landlord, owner, or proprietor of houses let out in parts shall be deemed the occupier, and be liable to the payment of rates; and every person renting or occupying any such part shall be liable and compellable to pay such rates, and may deduct the same out of the next or any other rent due to such lessor, &c.:—Held, that to render the occupier of part liable to pay, and to enable him to deduct the rates for the whole of the house, the landlord must be assessed to the rates. *Lobban* v. *Cook*, 3 H. & N. 238; 27 L. J., M. C. 254; 6 W. R. 498.

Arrears Leviable on present Occupiers.]—Rates charged by act of parliament upon land, but which the occupiers are to pay, retaining the same out of their rent, and not paying more than the rent which shall from time to time become due from them, and leviable by distress on the occupier neglecting to pay them, are, if left unpaid by outgoing tenants (in the absence of any remedy either against the owners or against occupiers who may have left the rates unpaid, or of any provision for a different course), leviable on the present occupier to the amount of any rent becoming due on any current reservation. *Mattison* v. *Hart*, 14 C. B. 357; 2 C. L. R. 814; 23 L. J., C. P. 108; 18 Jur. 380; 2 W. R. 327.

An act directed that landlords should allow their tenants half the gaol-rate:—Held, that a rate was bad which the commissioners made on the parishioners long subsequently to the parish being rated by the county, and by which they collected more than was required, though they carried the overplus to the poor-rate, because it tended to charge the landlords beyond what they were obliged to pay, and occupiers of land who were not so at the time the parish was rated. *Curtis* v. *Kent Waterworks Co.*, 7 B. & C. 314; 5 L. J. (O.S.) M. C. 106.

In the Case of Mines.]—A lease of an iron mine made before the passing of the Rating Act, 1874 (37 & 38 Vict. c. 54), contained a covenant by the lessee to "pay or cause to be paid all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property-tax only excepted;"—Held, that the lessee had not "specifically contracted" to pay the whole of the poor-rate on the mine, in the event of the abolition of its exemption from the poor-rate, within 37 & 38 Vict. c. 54, s. 8. *Chalmer* v. *Bolckow*, 47 L. J., Q. B. 562; 3 App. Cas. 933; 39 L. T. 134; 26 W. R. 541—H. L. (E.)

The exception in s. 8 of 37 & 38 Vict. c. 54, to the right of a tenant of a mine to deduct one-half of the rate newly imposed by that act, and paid by him, from the rent payable to his lessor, namely, "unless he has specifically contracted to pay such rate in the event of the abolition of the exemption," does not take effect in favour of the lessor, unless the lease has in terms anticipated the imposition of this new liability and thrown it upon the tenant; and a covenant to pay the rent, "free of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any

other nature," will not deprive the tenant of his right to make the deduction given by the above section. *Devonshire* (*Duke*) v. *Barrow Hæmatite Steel Co.*, 46 L. J., Q. B. 435; 2 Q. B. D. 286; 36 L. T. 355; 25 W. R. 469—C. A.

Costs within "all Rates, Taxes," &c.]—By a local act, the commissioners appointed thereby were authorised to pave and flag footways, and the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining, in default whereof they were to be recovered by distress. Another clause empowered the tenant to deduct the costs so paid by him out of the rent:—Held, that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatever, which were, or during the term might be, rated, levied, assessed, or imposed on the premises. *Payne* v. *Burridge*, 12 M. & W. 727; 13 L. J., Ex. 190.

2. Promoters of Undertakings.

The Metropolitan Board of Works are promoters within the Lands Clauses Act, 1845, s. 133, and may be liable for an action in respect of any deficiency in the poor-rate caused during the construction of their works by their acquisition of rateable land in a parish. *Wheeler* v. *Metropolitan Board of Works*, 38 L. J., Ex. 165; L. R. 4 Ex. 703; 20 L. T. 984.

Sect. 133 applies, if it appears that the works, when constructed, may, in part or in whole, be the subject of beneficial occupation. *Ib.*

Under the Lands Clauses Act, 1845, s. 133, the promoters of the undertaking are not liable to be assessed. *London Corporation* v. *St. Andrew's, Holborn*, 36 L. J., M. C. 95; L. R. 2 C. P. 574; 16 L. T. 665; 15 W. R. 928.

When land assessed to the poor-rate is taken for public purposes, the promoters, under the Lands Clauses Act, 1845, are liable, until completion of the works, to make good all deficiencies in the poor-rate, even in respect of works such as public highways, which can never become assessable. *Stratton* v. *Metropolitan Board of Works*, 44 L. J., M. C. 33; L. R. 10 C. P. 76; 31 L. T. 673; 23 W. R. 447.

By the Thames Embankment Act, 1863 (26 & 27 Vict. c. 75), the Metropolitan Board of Works was authorised to construct an embankment on the right bank of the Thames, new streets and other works in a parish. By s. 14, when the roadway and new streets respectively were completed, of which completion a certificate signed by the chairman of the board was to be conclusive evidence, the same with the power of rating the hereditaments within the same respectively, were to be under the jurisdiction of the same persons as the other streets in the parishes in which the same were situate. The Thames Embankment Act, 1863, also incorporated the Lands Clauses Act, 1845, s. 133. The board in 1865 proceeded with the execution of the works, and took various lands in a parish. On the 11th of May, 1870, the chairman certified that the roadway and new streets were completed:—Held, that the board was liable to pay the deficiency in poor-rates on lands taken by them under the powers and for the purposes of the Thames Embankment Act up to the 11th of May, 1870, and that the churchwardens and overseers of the parish could enforce payment in a lump sum of the arrears of the deficiency in the poor-rate up to that date. *Ib.*

The borough-rate (under 45 & 46 Vict. c. 50, s. 145) and the county-rate (under 15 & 16 Vict. c. 81, s. 26) being respectively made chargeable on the poor-rate, the deficiency in the assessment for the poor-rate, which the promoters of the undertaking are liable to make good, includes any deficiency in respect of amounts raised for borough-rate and county-rate, as well as any deficiency in the assessment for poor law purposes properly so called. *Farmer* v. *L. & N. W. Ry.*, 20 Q. B. D. 788; 59 L. T. 542; 36 W. R. 590.

—— **Completion of Works.**]—An urban sanitary authority, acting under statutory authority, took for the purposes of improvements lands situate in a number of parishes and liable to be assessed to the poor-rate. In some cases all the land so taken was used in the construction of the roadways of new streets; but in some cases more land was taken than was required for that purpose, so that the sanitary authority became possessed of surplus land which was vacant, unoccupied, and unassessed. Such land was to be disposed of either by sale in fee-simple or by the creation of rent-charges which were to be sold within a specified time which had not expired when the rating authority brought an action to recover from the sanitary authority the amount of the deficiency in the assessment to the poor-rate caused by the lands having been taken:—Held, that the works were completed within the Lands Clauses Consolidation Act, 1845, s. 133, so as to relieve the undertakers from the liability to make good the deficiency so caused, when the streets were fully made, and such of the lands taken as might be liable to assessment had become assessable; and that the deficiency was to be computed from time to time by comparing the assessed value at the time of the special act of the lands taken with the assessed value at the time of computation of such of the lands taken as might have again become assessable. *Bristol Governors* v. *Bristol Corporation*, 56 L. J., Q. B. 320; 18 Q. B. D. 549; 56 L. T. 641; 35 W. R. 619; 51 J. P. 676—C. A.

—— **Various Improvement Schemes—Separate Undertakings.**]—The authority to put in force the compulsory powers of the Lands Clauses Consolidation Acts was conferred by a provisional order confirmed by a statute which described in one schedule, but under headings separately numbered, the several improvement schemes promoted by the sanitary authority:—Held, that each scheme described in the schedule constituted a separate undertaking, and that the deficiency in the assessment ought to be calculated on each separate undertaking within the rating area affected by it. *Ib.*

Owners Compounding — Liability of Promoters.]—The owners of houses on land taken by the promoters of an undertaking for the purposes of their works had made agreements under s. 3 of the Poor Rate Assessment and Collection Act, 1869, with the rating authority of the district to pay the rates instead of the occupiers, subject to being allowed a deduction of 25 per cent. from the amount of such rates, and those agreements were in force when the promoters took the land:—Held, that, on the true construction of s. 133,

the deficiency which the promoters were liable to make good must be computed having regard to the rateable value at the time the special act was passed, and that they were not entitled to claim the deduction of 25 per cent. from the amount of the rates levied according to that value. *St. Leonard, Shoreditch, Vestry* v. *London County Council*, 64 L. J., Q. B. 615; [1895] 2 Q. B. 104; 15 R. 516; 72 L. T. 802; 43 W. R. 598; 59 J. P. 423.

Lands Occupied but not Used.]—The promoters of a line of railway purchased lands beyond the limits of deviation, afterwards authorised by the company's special act, in order to get rid of the opposition of the owners to the passing of the act:—Held, that they could not escape from liability for the deficiency in the poor-rate by setting up their illegal act, in purchasing the lands without statutory powers. *Putney Overseers* v. *L. & S. W. Ry.*, 60 L. J., Q. B. 438; [1891] 1 Q. B. 440; 64 L. T. 280; 39 W. R. 291; 55 J. P. 422—C. A.

The deficiency is to be ascertained according to the rental at which the lands were valued or rated at the time of the passing of the special act; the fact that some of the lands were unoccupied at the time when they were purchased did not relieve the promoters of liability. *Ib.*

3. Crown, Government and Public Property.

Exemption of Crown Property.]—The possessions of the crown are not rateable. *Amherst (Lord)* v. *Somers (Lord)*, 2 Term Rep. 372; 1 R. R. 497.

The royal palaces are not rateable; but where the site of a palace is demised to a subject for a permanent interest, the grantee who occupies is rateable. *Portland (Duke)* v. *St. Margaret's, Westminster*, Cald. 3, n.; Bott's P. L. 131.

—— **House of Lords.**]—The statutes which authorise assessments for relief of the poor are silent as to the crown. Hence the crown is subject to no poor-rate. To this immunity a wide signification is ascribed; for not only are the palaces of which her majesty is in actual occupation deemed free from assessment, but even the House of Lords is exempt on the ground that it is regal. *Leith Harbour Commissioners* v. *Poor Inspectors*, L. R. 1 H. L. (Sc.) 17.

—— **Government Offices.**]—So likewise government offices, as the Post Office, the Horse Guards and the Admiralty, simply because they are in the service of the crown. *Ib.*

Institution in Occupation of the Crown.]—The National Gallery in Trafalgar square is not rateable. *Reg.* v. *Shee*, 3 G. & D. 80; 4 Q. B. 2; 12 L. J., M. C. 53; 7 Jur. 810.

Nor the Museum of Practical Geology. *De la Beche* v. *St. James, Westminster, Vestry*, 4 El. & Bl. 385; 3 C. L. R. 448; 24 L. J., M. C. 74; 1 Jur. (N.S.) 375; 3 W. R. 161.

The Museum of Practical Geology is built on part of the hereditary property of the crown. It is used as a museum and a place of education, the institution being under the control of the lords of the treasury. Professors lecture there, being partly paid by fees received from pupils, besides salaries from the public money; but they have no occupation beyond what is necessary for the purpose of giving lectures. A housekeeper resides there, appointed and paid by the board of trade, to take care of the premises, but having no further occupation than is necessary for that purpose:—Held, that the premises were in the occupation of the sovereign for public purposes, the commissioners of woods and forests being in the nature of her managers, and the other persons being in the occupation as her servants, and consequently no one was rateable in respect of the premises. *Ib.*

Property devoted to Public Purposes.]—To exempt property from poor-rates as being devoted to public purposes, it is not sufficient that it produces no benefit to the occupiers individually and that the occupation is in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community; the benefit must be exclusively public. *Reg.* v. *Harrowgate Commissioners*, 15 Q. B. 1012; 4 New Sess. Cas. 319; 20 L. J., M. C. 25; 15 Jur. 422.

The 43 Eliz. c. 2, is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under acts of parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupations are exclusively applied to the maintenance of the works. *Mersey Docks and Harbour Board Trustees* v. *Cameron*, 11 H. L. Cas. 443; 20 C. B. (N.S.) 56; 35 L. J., M. C. 1; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.

A statute which vests property in trustees for purposes of public advantage, and authorises the trustees, for the maintenance of the property and such purposes, to levy tolls upon such portions of the public as may use the property, does not thereby exempt the trustees from the liability to be rated; such exemption can only arise from the use of express negative words, or by necessary implication from other words in the statute, amounting to a prohibition to apply the tolls to the payment of poor-rates. *Reg.* v. *Birkenhead Docks (Trustees)*, 2 El. & Bl. 148; 21 L. J., M. C. 209; 17 Jur. 162.

The commissioners of works and buildings were empowered to construct a bridge at Chelsea, and to borrow money from the treasury on an assignment of the tolls. The commissioners were authorised to take tolls, which were to be applied in payment of the expenses of the bridge, then in repayment of the sum borrowed, and when that had been repaid there was to be no toll charged for foot passengers. There was no ultimate appropriation of any surplus:—Held, that the commissioners were not liable to be rated, as they were in occupation of the bridge as servants of the crown, deriving themselves no benefit from the receipt of the tolls. *Reg.* v. *McCann*, 9 B. & S. 33; 37 L. J., M. C. 25; L. R. 3 Q. B. 141; 17 L. T. 643; 16 W. R. 397. Affirmed 37 L. J., M. C. 123; L. R. 3 Q. B. 677; 19 L. T. 115; 16 W. R. 985—Ex. Ch.

Trustees of a market, under a local act were held rateable for a market site occupied by them and for which they received the tolls, although

there was no surplus profit after paying the annual expenses and interest on the mortgages charged thereon. *Reg.* v. *Badcock* or *Taunton Market (Trustees)*, 6 Q. B. 787; 1 New Sess. Cas. 543; 14 L. J., M. C. 58; 9 Jur. 250.

The doctrine that lands held for public purposes are on that account not rateable is now exploded. *London County Council* v. *Erith Overseers*, 63 L. J., M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821—H. L. (E.)

—— **Public Park.**]—When a public body acting under statutory powers purchases land, which it is directed to maintain as a public park, and the cost of maintenance exceeds any income which can be derived in respect of grazing rights, supply of refreshments, &c., there is no rateable occupation. *Lambeth Overseers* v. *London County Council*, 66 L. J., Q. B. 806; [1897] A. C. 625; 76 L. T. 795; 46 W. R. 79; 61 J. P. 580—H. L. (E.)

Property owned by Local Boards.] — A corporation was by their town council constituted a local board of health of a district co-extensive with the borough. The local board occupied a yard within the borough in a parish, solely for the purposes of repairing the highways in the district of which they, as local board, were surveyors. The parish was partly not within the borough:—Held, that the local board of health was rateable in the parish, as occupiers of the yard; their occupation not being for such public purposes as to exempt them from rateability. *Reg.* v. *Kingston-upon-Hull JJ.*, 4 El. & Bl. 29; 23 L. J., M. C. 183; 18 Jur. 899; 2 W. R. 620.

Prisons—Use of Corn-mill and Tread-mill.]—The justices of the West Riding of Yorkshire were assessed as occupiers of a corn-mill, tread-mill, rooms, work-rooms, and warehouse, which were within, and formed part of the house of correction. The tread-mill, and the corn-mill to which it was annexed, were maintained for the employment of the prisoners, and corn was ground partly for hire, but chiefly for consumption in the gaol. The work-rooms and warehouses were used exclusively for the prisoners to work in, principally for the use and repair of the gaol, and in a small proportion for hire:—Held, that the justices were not rateable. *Reg.* v. *Shepherd*, 1 Q. B. 170; 4 P. & D. 534; 10 L. J., M. C. 44; 5 Jur. 432.

—— **Governor's House and other Parts of Building.**]—The governor was rated for a house and garden in the gaol. He occupied nine apartments; he was obliged, by the rules, to reside within the walls, and the accommodation provided for him was not more than was necessary and convenient. His family used the garden as a pleasure-garden, by permission of the justices, but it was not specially appropriated to their use, the area being essential to the health of the prisoners:—Held, that he was not rateable. *Ib.*

The officers and matrons of a gaol are not rateable, though they occupy distinct dwellings within the wall, if it is their duty to reside in the gaol, and the accommodation provided for them is not more than is necessary for the discharge of their respective offices. *Ib.*

Land and buildings were rented by the directors of convict prisons from the duchy of Cornwall, to be used as an establishment for convicts. The land was cultivated, and the produce of it was consumed in the establishment, or sold, and the profits applied to the service of the prison expenditure. The buildings consisted of a prison and a governor's house within the prison walls; also residences at some little distance from the prison, and not connected with it by any boundary wall or otherwise, occupied by the medical officer, the chaplain, and other persons employed in the prison. These houses were allotted to the officers as their official residences; in some cases rent was paid; in others the value of the occupation was taken into account in the amount of wages paid. Part of the building within the walls was occupied as a canteen for the sale of beer to the officers of the prison, and part of the buildings outside the walls was occupied by a grocer, who supplied the residents within the walls, and other customers. The governor had a coach-house and more stabling than was necessary for the discharge of his duties:—Held, that the prison and the governor's house were exempt, with the exception of so much in the governor's occupation as was found to be beyond what was necessary for the discharge of his duties. *Gambier* v. *Lydford Overseers*, 3 El. & Bl. 346; 2 C. L. R. 951; 23 L. J., M. C. 69; 18 Jur. 352; 2 W. R. 226.

Held, also, that the land used for the employment of the convicts was rateable. *Ib.*

Held, also, that the official residences without the walls were rateable. *Ib.*

Held, also, that the canteen and the grocer's shop were rateable. *Ib.*

Three houses situate beyond the actual wall of a county gaol, but within its precincts, were appropriated to the occupation of the governor and of two of the warders of the gaol respectively, and they inhabited these houses solely as officers of the gaol. The house of the governor had an internal communication with the gaol, but the other houses had no communication with it, except by means of the principal entrance of the gaol:—Held, that the occupier of each of these houses was exempt from liability to be assessed to the poor-rate, on the ground that the houses were virtually part and parcel of the gaol. *Beds JJ.* v. *St. Paul, Bedford*, 7 Ex. 650; 21 L. J., M. C. 224.

Assize Courts and Police Buildings.]—So buildings occupied for the county police and the county assize courts, being in the occupation of the crown for public purposes, are exempt. *Reg.* v. *St. Martin's, Leicester*, 8 B. & S. 536; 36 L. J., M. C. 99; L. R. 2 Q. B. 493; 16 L. T. 625; 15 W. R. 1096.

By a local act the magistrates of a county were empowered to build assize courts, and to let them for other purposes; they accordingly let them to the borough magistrates to be used as courts of quarter sessions, and made a net profit on such letting, after deducting the expenses incurred thereby:—Held, that they were rateable in respect of the profit so made. *Lancashire JJ.* v. *Cheetham Overseers*, 8 B. & S. 548; 37 L. J., M. C. 12; L. R. 3 Q. B. 14; 16 W. R. 124.

—— **Judges' Lodgings.**]—By a local act certain buildings were vested in the justices of a county, to permit and suffer all the courts of assize, sessions, and others, to be holden there, and also to permit the courts, and the lodgings provided for the judges of assize, to be used and enjoyed

for the purposes for which the same might be designed. The buildings were supported by the county at large, and the justices were authorised to let the buildings when not used for county purposes. A quantity of plate and wine, the former paid for by the county, the latter by subscriptions amongst the magistrates, was kept in that part of the buildings used as the judges' lodgings during the assizes, and the plate was used by the judges, and by the magistrates at sessions; the wine was used by the latter exclusively. There were also sleeping-rooms at this building, which were used by the magistrates during the sessions:—Held, that as the buildings were vested in the justices at large for public purposes only, a beneficial occupation of them by certain of the number did not make the whole body rateable. *Reg.* v. *Worcestershire JJ.*, 3 P. & D. 8; 11 A. & E. 257; 1 Arn. & H. 80; 9 L. J., M. C. 17; 3 Jur. 1050.

County Court—Occupation by Treasurer.]—A treasurer of a county court was lessee under 9 & 10 Vict. c. 95, s. 48, of a building used for the court-houses, and for other purposes of the act exclusively:—Held, that neither the treasurer nor any one else had such an occupation of the building as to be liable to poor-rates. *Reg.* v. *Manchester Overseers*, 3 El. & Bl. 336; 2 C. L. R. 974; 23 L. J., M. C. 48; 18 Jur. 267.

Middlesex Sessions-house.]—By an act passed in 1777 justices were empowered to buy land and build a sessions-house, which was not to be rated at a higher figure than the assessment of the site at the date of the act. In 1879 the justices, acting under further statutory powers, bought additional land, and built additions and enlargements to the sessions-house. The sessions-house with the additions was used solely for the administration of justice, the performance of the queen's service, and the discharge of the public business of the county. An officer employed in the business of the sessions resided on the premises with his family. From 1777 to 1879 the sessions-house was rated at the assessment of 1777. Afterwards the assessment was raised and the justices appealed:—Held, that the buildings being used for public purposes connected with the government of the country were not liable to be rated to the poor-rate, for the case came within the principle of *Coomber* v. *Berkshire JJ.* (9 App. Cas. 61), and neither the provisions of the act of 1777, nor the fact that a rate at the valuation named in that act had been acquiesced in and paid, deprived the justices of their right to contest the rateability of the premises. *Nicholson* v. *Holborn Union*, 56 L. J., M. C. 54; 18 Q. B. D. 161; 55 L. T. 775; 35 W. R. 230; 51 J. P. 341.

Sessions-house—Occupation by County Council—Joint User with Justices.]—County councils are rateable in respect of the occupation of property for administrative purposes, as such purposes are not crown purposes. Where part of a building is used by a county council and by justices jointly for the performance of their administrative duties respectively, the county council, to the extent to which they occupy this part, are rateable. *Middlesex County Council* v. *St George's, Hanover Square*, 66 L. J., Q. B. 101; [1897] 1 Q. B. 64; 75 L. T. 464; 45 W. R. 215; 61 J. P. 38—C. A.

Shirehall—Occupation by County Council—User by Justices for Crown Purposes.]—A county council is liable to be rated to the poor-rate in respect of premises vested in and occupied by them for the purposes of the administrative business of the county, although the same premises are also used by other persons for crown purposes. *Worcestershire County Council* v. *Worcester Union*, 66 L. J., Q. B. 323; [1897] 1 Q. B. 480; 76 L. T. 138; 45 W. R. 309; 61 J. P. 244—C. A.

Occupation by Servants, Officers or Lessees of the Crown.]—A storekeeper or a porter employed by the crown in the public service, occupying premises belonging to the crown for the purpose of performing such service, is not rateable in respect of such occupation, although it constitutes part of the emoluments of his office. But if he has an occupation of more than is reasonably necessary for the performance of such service, he is rateable in respect of the excess and of no more. *Reg.* v. *Stewart*, 8 El. & Bl. 360; 27 L. J., M. C. 81; 4 Jur. (N.S.) 187; 6 W. R. 35.

—— **When Excessive.**]—In estimating the question of excess, the station of the party employed should be taken into consideration, and reasonable accommodation for his family will not constitute an excess. An excess which is merely trifling ought to be disregarded. *Ib.*

The same rule applies to the governor of a garrison town, occupying crown property within the town, though he is also commanding officer of a military district much more extensive than the town. *Ib.*

The rule is applicable though none of the duties are executed on the premises occupied. *Ib.*

—— **By Permission of the Crown.**]—By permission of the crown certain persons occupy apartments in Hampton Court Palace, which was formerly a royal residence, but in which the sovereign has ceased to reside. A housekeeper employed by the crown has superintendence of other apartments, containing pictures (which the public are allowed to see) and lumber. The housekeeper resides with her family in the palace for this purpose, and has also the power to enter the apartments first mentioned. In other respects the occupiers of these have exclusive possession of them. Before the entry of each occupier, his apartments are put into ordinary repair by the crown, but afterwards the occupiers themselves do such repairs as are considered necessary by the crown surveyor. They reside there with their families and servants, providing their own furniture, and in some instances (but without the sanction or the privity of the crown) have allowed others, on payment of a sum of money, to use the apartments:—Held, that the occupiers by permission of the crown were rateable in respect of the apartments so held by them. *Reg.* v. *Ponsonby*, 3 Q. B. 14; 1 G. & D. 713; 11 L. J., M. C. 65; 6 Jur. 642.

—— **According to Profits.**]—The ranger of a royal park is rateable for inclosed and cultivated lands in the park, if he is in the enjoyment of the profits of those lands. *Bute (Earl)* v. *Grindall*, 2 H. Bl. 265; 1 Term Rep. 338; 1 R. R. 220.

But not for the herbage and pannage, which yield no profits. *Ib.*

—— **Officers' Quarters.**]—Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing a kitchen, wash-house and coach-house, together with a stable, yard and garden:—Held, that he was rateable for the same, having a beneficial enjoyment of them beyond his necessary accommodation as an officer for the purpose of the public service. *Rex* v. *Terrott*, 3 East, 506; 7 R. R. 502.

An adjutant having charge of militia stores, under 17 & 18 Vict. c. 109, s. 4, and occupying, for that purpose, premises provided for such stores, under 17 & 18 Vict. c. 105, s. 2, is rateable to the poor in respect of such occupation so far only as he has a use of them exceeding what is necessary for himself and family, taking into account his station in life. *Reg.* v. *Fuller*, 8 El. & Bl. 365, n.

—— **Stables rented for a Regiment.**]—Stables rented by the colonel of a regiment, by order of the crown, for the use of the regiment, are not rateable to the poor. *Amherst (Lord)* v. *Somers (Lord)*, 2 Term Rep. 872; 1 R. R. 497.

—— **Storehouse occupied by Volunteer Corps.**]—The rule that premises occupied by servants of the crown for the purposes of the crown are not rateable applies to premises occupied by a volunteer corps, as servants of the crown. *Pearson* v. *Holborn Union*, 62 L. J., M. C. 77; [1893] 1 Q. B. 389; 5 R. 290; 68 L. T. 351; 57 J. P. 169.

—— **Houses occupied by Postmaster-General.**]—No one is rateable in respect of the occupation of houses, the property of a subject, taken by the postmaster-general, and occupied as a post-office for the purposes of the post-office revenue. *Smith* v. *Birmingham Union*, 7 El. & Bl. 483; 26 L. J., M. C. 105; 3 Jur. (N.S.) 769; 5 W. R. 496.

—— **Where Employé leases Premises to the Crown.**]—A. let to the inland revenue department, for their offices, five rooms of a house in his occupation, it being stipulated that the rent was to be 90*l.* per annum, this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals; also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same. A. himself occupied the shop as distributor of stamps for the district:—Held, that the premises so let and occupied were not exempt. *Reg.* v. *Smith*, 30 L. J., M. C. 74; 7 Jur. (N.S.) 24; 3 L. T. 687.

—— **Lessees of Crown Property—Actual Occupiers.**]—Gasworks were erected by the crown at Aldershot for the use of the camp there, and by an arrangement with A. and B., who agreed to make and supply gas to the camp upon certain terms, a licence was granted by the crown to them to use the premises for seven years, for the purpose of enabling them to perform their contract, the crown reserving a right to enter by its servants for certain purposes at all times, the licence also containing a stipulation that it should be revocable any time by writing, and that full possession might thereupon be had without any proceeding at law or equity. A. and B. were rated in respect of occupation of the premises:—Held, that as actual occupiers, they were liable to be so rated. *Reg.* v. *Stevens*, 12 L. T. 491.

Police Quarters—Occupation by Officer.]—Officers of the county constabulary under 2 & 3 Vict. c. 93, are not rateable in respect of their occupation of rooms in the police-office, in which, by the terms of their appointment, they are required to live. *Reg.* v. *St. Martin's, Leicester*, 8 B. & S. 536; 36 L. J., M. C. 99; L. R. 2 Q. B. 403; 16 L. T. 625; 15 W. R. 1096.

Under 3 & 4 Vict. c. 88, a house was provided as a police-station for a district of the county; the police constables required to be stationed there resided in it, having no more accommodation than was necessary for the discharge of their duties, and suitable for their degree in life; a deduction was made from their wages as a charge for rent:—Held, that the station being occupied for a public purpose, no one was rateable in respect of it. *Lancashire JJ.* v. *Stretford Overseers*, El. Bl. & El. 225; 27 L. J., M. C. 209; 4 Jur. (N.S.) 1274.

A cottage was let by the owner to the chief constable of a county, as yearly tenant, at 6*l.* 4*s.* per annum. This cottage the chief constable underlet to one of the county constabulary, whom he appointed, and had power to dismiss, as a weekly tenant at 2*s.* per week (deducted from his wages) so long as he continued such constable, or until he should be removed to another district, determinable upon a week's notice. The constable being assessed to the poor-rate as occupier of the cottage:—Held, that he was properly rated, there being nothing in the nature of the occupation to create exemption. *Reg.* v. *Bridgehouse*, 20 L. T. 658.

A superintendent of the police for a county police division had as his quarters a house, which was rented for him by the county authorities, and which he furnished; his rent was paid out of the police rates, and the amount deducted from his salary as superintendent. The house was liable to be examined and its fitness reported by one of her majesty's inspectors, and to be used for purposes connected with the police force as the chief constable might direct, but no room in it was specially set apart for any other purpose than for the use of the superintendent and his family. The house was a quarter of a mile from the police station, within a convenient distance of which it was necessary that the superintendent should reside for the performance of his duties; and he was compelled to live in it as long as it was rented for him by the county authorities, but he was liable to be removed from it at any time, and from one police division to another:—Held, that such superintendent was rateable to the poor-rate in respect of such house, as his occupation was a beneficial one, and the house, being no part of the police-station, did not come within the recognised heads of property which is treated as crown property. The case of *Gambier* v. *Lydford Overseers* (3 El. & Bl. 346) approved. *Martin* v. *West Derby Union*, 52 L. J., M. C. 66; 11 Q. B. D. 145; 31 W. R. 489; 47 J. P. 500—C. A.

M., a sergeant of county police, with his wife, was obliged to occupy a cottage distant two miles from the nearest county police-station, and another constable also occupied part of the same house, the chief constable paying the rent out of the county-rate. There were no cells attached, nor

was any room set apart for county police business to be done there, but sometimes complaints were made there, and summonses signed by magistrates. M. was assessed to the poor-rate :—Held, that M. was not exempt, on the ground that the house was occupied by him in the discharge of his duties as constable or otherwise. *Macharg* v. *Stoke-upon-Trent Assessment Committee*, 48 J. P. 775.

The chief constable and certain other officers of the Essex constabulary, with their families, occupied for residence certain premises belonging to the county, in the parish of Springfield, about a mile from Chelmsford. The buildings were all under one roof, and surrounded by a wall. They were used exclusively for police residences, and for no other purpose. There were no cells for prisoners, nor offices, but there were store rooms for police clothing, stables, and a parade room. The police paid rent for the premises according to their rank, which was deducted from their pay. The overseers of the parish rated the appellants for the relief of the poor in respect of their occupation of the premises :—Held, upon the facts, that the premises, not being either one building occupied solely for public purposes, or a police-station in the ordinary sense of the term, were not exempt from rateability, and that the police officers had been properly rated. *Showers* v. *Chelmsford Union*, 60 L. J., M. C. 55 ; [1891] 1 Q. B. 339 ; 64 L. T. 755 ; 39 W. R. 231 ; —C. A. Affirming 55 J. P. 8.

Assessment, how Made.]—The gross estimated rental and rateable value of buildings occupied by municipal corporations and other public bodies are to be ascertained for the purpose of parochial assessment by reference to the amount of rent which a tenant, unfettered as to user and unrestricted as to charges, would give if the premises were in the market, and not by reference to the annual profit, if any, made or capable of being made by those using the premises for public purposes. *Chorlton-upon-Medlock Overseers* v. *Chorlton Union*, 51 L. J., Q. B. 458 ; 47 L. T. 96 ; 46 J. P. 535.

When land is used for a public purpose, and the occupiers are prevented by statute from deriving the full pecuniary benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually made, and not with reference to the amount which might be earned by the occupiers if they were not subject to restrictions. *Worcester Corporation* v. *Droitwich Assessment Committee*, 46 L. J., M. C. 241 ; 2 Ex. D. 49 ; 36 L. T. 186 ; 25 W. R. 336—C. A.

A local board of health erected and occupied works for the purpose of supplying the inhabitants with water. The works were situate within a parish. In order to benefit the inhabitants, the local board made the scale of charges so low, as to leave a profit far less than would have accrued to a company carrying on the works as a commercial undertaking. In adopting the scale of charges above mentioned, the local board intended to carry out those provisions of the Public Health Act, 1848, the object of which was to insure a supply of water at a low price for sanitary purposes. The assessment committee of the union, within which the parish was situate, by a valuation list assessed the local board at a rateable value of 1,400*l.*, based upon the amount which might have been earned by a trading company carrying on the waterworks for its own benefit ; the local board claimed to be assessed at a rateable value of 540*l.*, based upon the profit actually earned by them :—Held, that the assessment at 1,400*l.* was wrong, and that the local board was liable to be assessed at 540*l.* only ; for under the provisions of the Public Health Act, 1848, they could not make rates of an amount more than sufficient to enable them to maintain the waterworks, and they could be lawfully assessed only with reference to the profit actually earned. *Ib.*

In determining the rateable value of land and buildings owned by a public body for the discharge of duties imposed on them by law, the public body must themselves be taken into account as possible tenants, notwithstanding that such body could not, under the statutes giving them their powers, become tenants of the premises of which they are the owners. *London County Council* v. *Erith Overseers*, 63 L. J., M. C. 9 ; [1893] A. C. 562 ; 6 R. 22 ; 69 L. T. 725 ; 42 W. R. 330 ; 57 J. P. 821—H. L. (E.)

4. Sewers and Sewage Works.

Rateability.] — The Metropolitan Board of Works was empowered to make the necessary sewers and works for the improvement of the main drainage of the metropolis. The sewers, except at the pumping stations, passed under the highways of the metropolis, or under land on which the board had no property. The pumping stations were erected upon land the property of the board, but were used solely as part of the main drainage scheme. The board was also in occupation of a wharf, lay-by for barges, tramways, engine-houses, coal sheds and dwelling-house, all of which were occupied for the purposes of the main drainage scheme. The board derived no pecuniary advantages from the sewers and other drainage works, but the whole was maintained out of funds raised by a rate made in pursuance of the statutes :—Held, that the sewers were not rateable, on the ground that they were not the subject of a beneficial occupation ; but that the rest of the property had an occupation value, and the board was rateable in respect of them, as there was nothing in the statutes exempting them from rateability. *Reg.* v. *Metropolitan Board of Works*, 38 L. J., M. C. 24 ; L. R. 4 Q. B. 15 ; 19 L. T. 384 ; 17 W. R. 527.

The Metropolitan Board of Works constructed sewers on an embankment in a parish, and erected a pumping station and other works, forming part of the main drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, and the whole were maintained out of funds raised by a rate made in pursuance of the statutes :—Held, that the sewers were not rateable to the poor-rate, on the ground that they were not the subject of a beneficial occupation ; but the rest of the property was rateable at the value for which the same would let to a tenant from year to year, supposing they were not used for the purpose of the main drainage scheme, but were entirely disconnected from it ; and applied to any other purpose for which they might be available. *Metropolitan Board of Works* v. *West Ham*, 40 L. J., M. C. 30 ; L. R. 6 Q. B. 193 ; 23 L. T. 490 ; 19 W. R. 246.

A corporation under the provisions of a private act, acquired land at a distance from the

town for the disposal of sewage, and they also had land and a pumping station nearer the town to pump the sewage on to the farm. It was impossible to work the sewage farm except at a loss, and the land and pumping station, whilst used as part of the sewage system, were incapable of yielding a profit; but if either the sewage farm with its appliances, or the land and pumping station, had belonged to a private owner, he would have let, and the corporation would have hired the same respectively, at a yearly rent sufficient to support a rate which had been made:—Held, that as the corporation would have been willing to pay a rent for the sewage farm and pumping station if they had not been the owners, they must be taken into account as hypothetical tenants from year to year in order to ascertain the rateable value of the sewage farm and pumping station. *Reg.* v. *London School Board* (17 Q. B. D. 738) followed. *Burton-on-Trent Corporation* v. *Egginton Overseers* or *Burton Union*, 59 L. J., M. C. 1; 24 Q. B. D. 197; 62 L. T. 412; 38 W. R. 181; 54 J. P. 453—C. A.

The Metropolitan Board of Works, under powers given to them by statute, constructed certain sewers in the respondent parish for the purposes of the main drainage of the metropolis. The powers, liabilities, and property of the board were, by the Local Government Act, 1888, s. 40, sub-s. 8, transferred to the appellants. The above-mentioned sewers having been rated to the poor-rate of the parish, in a case stated by quarter sessions upon appeal against the rate, it was found that, whilst used as part of the metropolitan sewage system, the sewers were incapable of yielding a profit and could not be worked except at a loss; but it was also found that, if they were, not in the possession of the appellants, but in the hands of a private owner and connected with the metropolitan sewage system to be let to the appellants, they would be willing to pay a yearly rent for the same, for the purpose of being used as part of the metropolitan sewage system, sufficient to support the rate:—Held, that even supposing the appellants had no power legally to become tenants of such sewers they ought to be taken into account as possible tenants of them; that the sewers were capable of a beneficial occupation: and that they were rateable. *London County Council* v. *West Ham*, ([1892] 2 Q. B. 44), and *London County Council* v. *St. George's Union*, ([1893] 1 Q. B. 210) reversed. *London County Council* v. *Erith Churchwardens*, 63 L. J., M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821—H. L. (E.)

Outfall sewers belonging to the London County Council, and constructed on land purchased for the purpose, and formerly assessed to the poor-rate, held rateable. *Ib.*

In rating property in the occupation of the owner the question what the owner would have given if the premises had been to let and he had been free to take them, must be taken into consideration. In determining the rateable value of land and buildings owned by a public body for the discharge of duties imposed on them by law, the public body must themselves be taken into account as possible tenants, notwithstanding that such body could not, under the statutes giving them their powers, become tenants of the premises of which they are the owners. *Ib.*

To constitute beneficial occupation it is not necessary that it should be such as to yield a pecuniary profit, but the true test is whether it is of value to the occupier. *Ib.*

Reg. v. *London School Board* (17 Q. B. D. 738) and *Burton-on-Trent Corporation* v. *Egginton Overseers* (24 Q. B. D. 197) approved; and *Owens College* v. *Chorlton-upon-Medlock Overseers* (18 Q. B. D. 403) disapproved. *Ib.*

The sewage works on a sewage farm (e.g. a rising main, storage tanks and effluent culverts), which is the subject of beneficial occupation, are rateable. *Leicester Corporation* v. *Beaumont Leys Churchwardens*, 63 L. J., M. C. 176; 10 R. 401; 70 L. T. 659.

5. Hospitals and Charitable Institutions.

Profitable Land—Charitable Purpose.]—If land and houses produce profit which is not entirely applied to purely charitable purposes, the occupiers are rateable, although they apply it to purposes beneficial to the public, unless the benefit is enjoyed by all who contribute to the poor-rate, and by them exclusively. *Reg.* v. *Temple*, 2 El. & Bl. 160; 22 L. J., M. C. 129; 17 Jur. 572; 1 W. R. 349.

Occupants of Almshouses.]—The objects of a charitable foundation, in the actual occupation of the almshouse and lands for their own benefit, in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, are rateable in respect of such occupation. *Rex* v. *Munday*, 1 East, 583.

So, where paying no rent, they are removable at the pleasure of the patrons of the charity. *Rex* v. *Green*, 9 B. & C. 203; 4 M. & Ry. 164; 7 L. J. (o.s.) M. C. 94.

Training School for Army Musicians.]—Premises were occupied and set apart as a training school for the musicians and bandmasters of the army. The men and boys who entered the establishment were duly attested as soldiers, but no money was received from them. The establishment was supported by private contributions from the officers of the Queen's regiments, and by contributions from private pupils for the benefit of the masters who occupied the premises:—Held, that the premises were rateable to the relief of the poor. *Reg.* v. *Kneller Hall Trustees*, 6 W. R. 605.

Railway Servants' Orphanage—Local Act.]—By a Local Improvement Act, 6 Geo. 4, c. cxxxii. s. 103, the commissioners of a town were authorised to make district rates for defraying the expenses of the act, provided that none of the rates or assessments which should be made by virtue of the act should be laid upon or in respect of any houses or buildings used and occupied exclusively for the purposes of public charity:—Held, that an orphanage founded and used for the purpose of boarding, lodging, clothing and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants, but mainly by donations from the public, was open to such an extensive class of the community of the kingdom, that the premises were used and occupied exclusively for the purposes of "public charity," within the proviso of the act, and therefore exempt from rateability under it. *Hall* v. *Derby Sanitary Authority*, 55

L. J., M. C. 21 ; 16 Q. B. D. 163 ; 54 L. T. 175 : 50 J. P. 278.

Lunatic Asylum—Producing a Profit.]—Lands purchased by voluntary contribution were conveyed to trustees for the purpose of erecting thereon a lunatic asylum, and for such purposes relative thereto as should be determined by the subscribers. The asylum was originally designed for parish paupers or other indigent persons, but, the funds being insufficient, a limited number of affluent persons were afterwards admitted at certain rates of payment in proportion to their abilities. From this and other sources of revenue the trustees, after paying all the expenses of the establishment, had accumulated, in five years, profits to the amount of 2,000*l.*, part of which had been laid out in buildings and purchases for the institution, and part continued to accumulate. All benefactors of 20*l.* or upwards were governors, and they exercise the entire control over the asylum and its funds. The trustees derived no personal benefit from the institution : —Held, that, as the building produced a profit, it was rateable. *York Lunatic Asylum* v. *St. Giles, York*, 3 B. & Ad. 573 ; 1 L. J., M. C. 50.

Bethlehem Hospital—Effect of Residence.]—Bethlehem Hospital was erected on lands in the parish of St. George, Southwark, demised to trustees for the corporation of London, under a private act, which directed the building thereon of a new lunatic hospital, in lieu of the old one situate in the city of London, of which the corporation were governors, under letters-patent of Henry 8. In this hospital indigent lunatics were received for cure, and if not capable of cure, were admitted into the incurable class. Payments were made for some of the incurable by friends of the patients or by the officers of the parishes from which they were sent, but the payments were in no instance sufficient to afford a profit. Part of the hospital was used for the custody, care, &c., of criminal lunatics, for whom government made a payment as nearly as possible equal to the expense of their maintenance, but without charge of lodging. The whole funds were applied for the purposes of charity :—Held, that the corporation was not rateable for these premises, although by a local act, persons occupying any land, ground, house, building, tenement, hereditament or premises in the parish were rateable, it being enacted, after noticing by recital the existence of many charitable institutions in the parish which contributed nothing to its exigencies, that no settlement should be gained in the parish by any occupation, residence, &c., in any hospital or other charitable institution then or thereafter situated or established in the parish. *Reg.* v. *St. George, Southwark*, 10 Q. B. 852 ; 16 L. J., M. C. 129 ; 11 Jur. 968.

County Lunatic Asylum.]—A county lunatic asylum, built upon land acquired under 8 & 9 Vict. c. 126, and 16 & 17 Vict. c. 97, consisted of buildings and of land, twenty acres of which were laid out as a garden, and thirty acres were under cultivation as a farm. The farm and garden were cultivated by gardeners, who were part of the establishment, assisted by the patients, and the result was a source of profit arising from the sale of produce not required for the establishment. The committee of visitors acting under the powers contained in 16 & 17 Vict. c. 97, ss. 42, 43, admitted other pauper lunatics than those belonging to their county, and also private lunatics, thereby realising considerable profit :—Held, first, that this was an asylum within 16 & 17 Vict. c. 97, s. 35, and therefore rateable only at the value at which the land was assessed at the time of the purchase. *Reg.* v. *Fulbourn Overseers*, 6 B. & S. 451 ; 34 L. J., M. C. 106 ; 11 Jur. (N.S.) 620 ; 12 L. T. 344 ; 13 W. R. 713.

Held, secondly, that the building and land were used for the purposes of an asylum within s. 35, the primary object of the farm and garden being the sanitary occupation of the patients with a view to their cure. *Ib.*

Held, thirdly, that the committee of visitors was not rateable in respect of the profits. *Ib.*

—— **Chaplain—Medical Officer.**]—The committee of a lunatic asylum appropriated for their chaplain a residence on ground purchased since the passing of the 16 & 17 Vict. c. 97, but detached from the asylum buildings ; and appropriated for their medical superintendent a house, reasonably fit for a person in his station of life and his family, being on land purchased when the asylum was first erected, adjoining to it, but not being within the curtilage, and he discharged a portion of his official duties in that house :—Held, that the chaplain was rateable to the relief of the poor like any other occupant ; but, by force of s. 35, the medical superintendent was liable to be rated only according to the value or rent of the land at the time it was purchased. *Congreve* v. *Upton Overseers*, 4 B. & S. 857 ; 33 L. J., M. C. 83 ; 10 Jur. (N.S.) 538 ; 9 L. T. 684 ; 12 W. R. 403.

Infirmary.]—A local rate imposed a rate on "all halls, gaols, chapels, meeting-houses, schools, almshouses and other public buildings, churchyards, chapelyards, and meeting-house yards, for every yard running measure of the length in front of such halls, gaols, chapels," &c. An infirmary for sick persons, supported by voluntary contributions, stood within its own grounds, the principal entrance to which was on the south-east side, from a public highway ; and there was also an entrance on the north-west side, from a public road, by a private avenue through pasture land not occupied by the governors of the infirmary ; and on the north-east side it was bounded by a public footway, which extended beyond its grounds, along the pasture land, up to the public road, but there was no entrance from this footway to the infirmary :—Held, first, that the infirmary was a public building, within the act. *Bedford Infirmary Governors* v. *Bedford Improvement Commissioners*, 7 Ex. 768 ; 21 L. J., M. C. 224.

Held, secondly, that the rate ought to be assessed according to the running measure on the whole of the south-east side, and on so much of the north-east side as the footpath extended in front of the grounds of the infirmary, but not beyond or on the north-east side. *Ib.*

Hospitals from which Revenue may be derived.]—A hospital founded by royal charter as a house for the cure and healing of the diseased and infirm poor brought to or received in the house, is rateable to the poor under 43 Eliz. c. 2, s. 1, it being possible that a revenue might be derived from its occupation. *London Corporation* v. *Stratton, St. Thomas's Hospital Governors* v. *Lambeth Overseers*, 45 L. J., M. C. 23 ;

L. R. 7 H. L. 477; 23 W. R. 882. Affirming 30 L. T. 37—Ex. Ch.

Semble, that the hospital would also have been rateable had it, by charter or statute, been prohibited strictly and expressly, from being made a source of profit. *Ib.*

St. Thomas's Hospital was founded by royal charter for the relief and sustenance of poor sick and infirm people, and vested in the mayor, commonalty and citizens of London. The patients pay nothing for their maintenance or the medical services rendered to them. There is a medical school connected with the hospital, and its students pay fees which are wholly devoted to the expenses of the medical school, and are not paid to or in any way accounted for to the governors of the hospital:—Held, that the hospital was liable to be rated, and not at a merely nominal sum. *Ib.*

Missionary Society—Occupation by Honorary Treasurer.]—The London Missionary Society occupied, under an agreement for a lease, a building for conducting the affairs of that institution. The society was founded entirely for religious and charitable purposes, and was supported by charitable and voluntary contributions. No person slept on the premises. The officers of the establishment attended during a portion of the day only, and the honorary treasurer attended once a week to superintend the society's affairs. Neither he nor any other person connected with the society derived any pecuniary profit or emolument from the occupation of the premises. The treasurer was assessed:—Held, that the treasurer, not being a beneficial occupier, was not liable to be assessed. *Reg.* v. *Wilson*, 4 P. & D. 130; 12 A. & E. 94; 9 L. J., M. C. 100.

—— **Sale of Works to defray Expenses.**]—The objects of the Baptist Missionary Society are, the sending out and supporting missionaries for the conversion of the heathen; it is entirely supported by voluntary contributions, except a fund of 20,000*l.*, the interest of which it devotes to the widows and orphans of missionaries dying abroad, and two funds remitted from Calcutta, to be applied to preaching abroad. No member derives any private advantage from his connection with the society. The society occupies a building comprising various apartments; and employs a secretary, an accountant, three clerks and a porter, some of whom live in a small house in the rear of the main building. The society prints a report and other periodicals, and sells them, if applied for, occasionally, on the premises, the proceeds of which sale are carried to the credit of the society, but do not cover the original cost. Two other charitable societies connected with the Baptist denomination, no member of which has any private benefit from the occupation of any part of the premises, use some part of the building for the purpose of holding their meetings, for which they pay a sum for gas, fire, cleaning, and attendance, equal to the expense incurred by the society on behalf of each, but no more:—Held, that the society had such a beneficial occupation of the premises as made it rateable, *Reg.* v. *Baptist Missionary Society*, 3 New Sess. 555; 10 Q. B. 884; 18 L. J., M. C. 194; 13 Jur. 748.

Held, also, that persons occupying premises merely for the purpose of diffusing religious instruction are not, on that account, exempt from rateability. *Ib.*

College for Religious Purposes.]—A college was founded and endowed for the education of young men for the ministry of the Presbyterian church, and high-class education was therein provided for a comparatively trifling sum. Each professor was paid out of the college funds a fixed salary, and received in addition certain fees from the pupils:—Held, that this was not an exclusively charitable institution within the meaning of the Valuation Statutes, 15 & 16 Vict. c. 63, and 17 Vict. c. 8 (Ir.), and therefore not exempt from liability to be rated. *Magee College Trustees* v. *Valuation Commissioners*, 19 W. R. 328.

Church Funds — Schools.]—Premises solely used for the purposes of the management of churches, schools, and funds under the Irish Church Act, 1869, are not used for charitable purposes exclusively, and are not exempt from valuation for rating purposes. *Representative Church Body* v. *Valuation Commissioner*, Ir. R. 6 C. L. 561.

6. Schools.

National Schools.]—National schools are rateable although the sums received from the schools are insufficient for the support of the school. *Laughlin* v. *Saffron Hill Overseers*, 12 L. T. 542; 13 W. R. 678.

Sunday and Ragged Schools.]—Under 32 & 33 Vict. c. 40, s. 1, which enacts that every authority having power to impose rates, "may exempt" a building used as a Sunday or ragged school from any rate, the rating authority has a discretion whether they will or not exempt such a building. *Bell* v. *Crane*, 42 L. J., M. C. 122; L. R. 8 Q. B. 481; 29 L. T. 207; 21 W. R. 911.

Industrial Schools.]—Premises occupied as a school, the managers of which have received a certificate under 29 & 30 Vict. c. 118, s. 7, constituting it a certified industrial school, are liable to be rated to the poor-rate. *Reg.* v. *West Derby Overseers*, 44 L. J., M. C. 98; L. R. 10 Q. B. 283; 32 L. T. 400.

Premises occupied as an industrial school certified and carried on under 29 & 30 Vict. c. 118, are liable to be rated to the poor rate. *Durham County Council* v. *Chester-le-Street Union*, 60 L. J., M. C. 9; [1891] 1 Q. B. 330; 63 L. T. 461; 39 W. R. 188; 54 J. P. 759.

Reformatory.] — A reformatory established under 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, 19 & 20 Vict. c. 109, and 20 & 21 Vict. c. 55, is not rateable, though a part of its support is derived from weekly payments contributed by the parents of the inmates, and part from the proceeds of work done by the inmates, washing, mangling, and needlework, for strangers. *Sheppard* v. *Bradford Overseers*, 16 C. B. (N.S.) 369; 33 L. J., M. C. 182; 10 Jur. (N.S.) 799; 10 L. T. 421; 12 W. R. 867.

A reformatory school, which has been certified under the Reformatory Schools Act, 1866, is rateable to the poor-rate. *Sheppard* v. *Bradford* (16 C. B. (N.S.) 369), overruled. *Tunnicliffe* v. *Birkdale Overseers*, 20 Q. B. D. 450; 59 L. T. 190; 36 W. R. 360; 52 J. P. 452—C. A.

School Board — Hypothetical Tenant.]—In assessing to the poor-rate schools occupied by a

school board, which can make no profit in a commercial sense as tenants of the schools, the school board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the board might reasonably be expected to pay for the premises for use as schools. *Reg.* v. *London School Board* or *London School Board* v. *St. Leonards, Shoreditch*, 55 L. J., M. C. 169 ; 17 Q. B. D. 738 ; 55 L. T. 384 ; 34 W. R. 583 ; 50 J. P. 419—C. A.

—— **Land Owned and Land Rented by.**]—A school board formed under the Elementary Education Act, 1870, is liable to be assessed to the poor-rate, both in respect of schools built upon land belonging to the board, and in respect of schools rented by the board as tenants, even though the board make no profit out of such schools. *Reg.* v. *West Bromwich School Board*, or *West Bromwich School Board* v. *West Bromwich Overseers*, 53 L. J., M. C. 153 ; 13 Q. B. D. 929 ; 52 L. T. 164 ; 32 W. R. 866 ; 48 J. P. 808—C. A.

Master of Charity School.]—A master of a free school, appointed by the minister and inhabitants of a parish under a charitable trust, whereby a house, garden, &c., were assigned "for the habitation and use of the master and his family, freely, without payment of any rent, income, gift, sum of money or other allowances whatsoever," for the teaching of ten poor boys of the inhabitants, is rateable for his occupation of the same. *Rex* v. *Catt*, 6 Term Rep. 332 ; 3 R. R. 193.

Premises and land were conveyed to trustees, to use the same as a school and a dwelling for a certain number of poor boys, with power to appoint a schoolmaster and necessary servants, who should reside in the school-house, for the management and carrying on thereof. Part of the premises was appropriated to the master, as a dwelling-house, the remainder of the building being occupied by the servants and boys, the objects of the charity :—Held, that the master was rateable in respect of so much of the premises as was in his occupation, and that the trustees were rateable for the remainder; the occupation not being one for public purposes. *Reg.* v. *Stapleton*, 4 B. & S. 629; 33 L. J., M. C. 17 ; 10 Jur. (N.S.) 44 ; 9 L. T. 322 ; 12 W. R. 49.

Superintendent with no distinct Apartments.]—A person employed by the Philanthropic Society to superintend the children at annual wages, under an agreement that she should have a dwelling free from taxes, with certain other perquisites, and who might be dismissed at a minute's warning on receiving three months' wages, is not rateable as the occupier of the house provided by the society: she having no distinct apartments in the house but in a bedchamber, and her family not being allowed to live there. *Rex* v. *Field*, 5 Term Rep. 587.

Trustees—Beneficial Occupiers.]—The trustees of a Friends' school were assessed in respect of a house and a garden in their possession. The school was a charitable institution supported by donations and voluntary subscriptions, and managed by a committee, for the maintenance and education of poor children. No child was admitted whose parents could not contribute 12*l.* annually towards its maintenance and education, or could afford to educate it elsewhere. The average annual cost of each child was about 20*l.* The trustees and committee received no pecuniary benefit. The superintendent, matron, and servants, who alone (except the scholars) resided on the premises, received salaries and wages. The house contained a room for the meetings of the committee, and sufficient apartments, but no more, for the officers and servants of the establishment. The garden was cultivated for the use of the children :—Held, that the trustees were beneficial occupiers, and were liable to be rated. *Reg.* v. *Sterrey*, 4 P. & D. 122 ; 12 A. & E. 84 ; 9 L. J., M. C. 105.

—— **Use of Hall for General Purposes.**]—The society of licensed victuallers was established by charter, which directed that the members of the society should meet together for the purposes of the society four times in every year, and have power to make by-laws. A school was established for the clothing, educating, and putting out in the world of the children of distressed, decayed and deceased licensed victuallers, in which such children were maintained, clothed and educated free of charge. The school-house contained a hall, in which the quarterly and other meetings of the society upon the general business of the society were held. By a by-law the meetings of the society were to be held in the school or at such other place as the committee might appoint :—Held, that the society was liable to be assessed in respect of the school premises, by reason of their holding meetings in the hall. *Licensed Victuallers' Society* v. *St. Mary, Lambeth, Overseers*, 1 B. & S. 71 ; 30 L. J., M. C. 131 ; 7 Jur. (N.S.) 521 ; 4 L. T. 241 ; 9 W. R. 599.

—— **Hypothetical Tenant.**]—Trustees were incorporated under an act of parliament for the purpose of establishing and for ever maintaining a college for educational purposes. They were by the act empowered to acquire and hold land as a site, and to erect buildings thereon for the college ; and they had no power to sell or let the land so acquired. In pursuance of the act they purchased land in fee simple, and erected buildings upon it, which they used for the purposes of such college. Such an institution as the college could not be carried on at a profit in the locality, as the expenses would always exceed the amount to be derived from students' fees. The college premises having been rated to the poor-rate on a gross estimated rental of 3,833*l.*, it was found, in a case stated on appeal against the rate, that, if let for any purposes to which (without considerable structural alterations) they were capable of being applied, they would not let for more than 1,300*l.* per annum, which would make the rateable value 1,083*l.* 6*s.* 8*d.* The trustees were willing to be rated on that rateable value, but contended that they were not liable to be rated on any larger amount. In arriving at this amount the trustees themselves were not taken into consideration as possible tenants of the premises :—Held, that (assuming the trustees to be rateable upon more than a nominal amount) in estimating the rental the trustees, being unable themselves to rent the premises by virtue of the statutory provisions, must be excluded from consideration as possible tenants, and therefore the rateable value must be reduced to 1,083*l.* 6*s.* 8*d.* *Reg.* v. *London School Board* (17 Q. B. D. 738) explained

and distinguished. *Owens College* v. *Chorlton-upon-Medlock Overseers*, 56 L. J., M. C. 29; 18 Q. B. D. 403; 56 L. T. 373; 35 W. R. 236; 51 J. P. 356—C. A. But see *London County Council* v. *Erith Overseers* (63 L. J., M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821), in which *Reg.* v. *School Board for London* is approved, and *Owens College* v. *Chorlton-upon-Medlock Overseers* is disapproved.

7. Workhouses.

Workhouse for Employment of the Poor.]—The guardians of a union formed under 4 & 5 Will. 4, c. 76, s. 28, comprehending a parish, and others, built a workhouse in the parish, for the employment of the poor, under 4 & 5 Will. 4, c. 76, s. 23:—Held, rateable in the parish as occupiers of the workhouse, though it was built on land which, from the nature of the former occupation, had not previously been rated. *Reg.* v. *Wallingford Union*, 10 A. & E. 259; 2 P. & D. 226; 8 L. J., M. C. 89.

—— **Exemption "for Public Purposes."**]—By 22 Geo. 3, c. 56, the workhouse of the parish of St. Luke shall not be liable to be rated to any greater amount than it was at that time assessed at, "during such time and so long as the same shall be used and occupied" for the purposes of the poor of St. Luke's parish. In 1869 the parish of St. Luke was added to the Holborn union, and since that time the workhouse has been, with others, for the common use of the union, and (under the powers conferred on the poor law commissioners by 4 & 5 Will. 4, c. 74, s. 26) the poor of the union have been so classified that many of the poor of St. Luke's parish are maintained in its own workhouse whilst some of the poor of St. Luke's parish are maintained in the workhouses of other parishes of the union, and some of the poor of other parishes are maintained in the workhouse of St. Luke's parish. Notwithstanding this, and notwithstanding that the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), charges all the cost of the relief of the poor upon the common fund of the union:—Held, that the workhouse of St. Luke's parish still continues to be "used and occupied" for the purposes of the poor of St. Luke's parish, within the meaning of the original act, and that its exception from a higher rateability, conferred by that act, still continues. *Holborn Union* v. *St. Leonard's Vestry, Shoreditch*, 28 L. T. 106; 21 W. R. 541.

A local act enabled the directors of the poor of Bedford to erect a workhouse, and enacted that all buildings erected by virtue of the act should be free from "all parochial and parliamentary taxes":—Held, that a workhouse erected under the act was liable to be assessed under another local act, which imposed a rate on public buildings for the improvement of the town of Bedford. *Bedford Union* v. *Bedford Improvement Commissioners*, 7 Ex. 777; 21 L. J., M. C. 224.

—— **House outside Special District.**]—Governors of the poor hiring a house without their district for the purpose of setting their own paupers to work there, and using it for that purpose only, are rateable in the parish in which the house is, as occupiers, whether the employment of the paupers there is profitable or not. *Bristol (Governors)* v. *Wait*, 5 A. & E. 1; 6 N. & M. 383; 5 L. J., M. C. 113.

By 21 & 22 Vict. c. 98, s. 55, the district rate shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are, or may be, assessable to any rate for the relief of the poor. The guardians of the poor of an extra-parochial place maintaining its own poor, and situated partly within and partly without a borough, occupied a workhouse in the part without the borough, which part was a separate district for the purpose of levying district rates:—Held, that they were liable to a district rate for works in the part without the borough, as occupying a kind of property assessable to the poor-rate within s. 55. *Toxteth Park Union* v. *Toxteth Park Local Board*, 1 B. & S. 167; 30 L. J., M. C. 154; 7 Jur. (N.S.) 860; 4 L. T. 283; 9 W. R. 691.

What is a Workhouse within 4 & 5 Will. 4, c. 76.]—Eight cottages were erected by a parish (for the better lodging the impotent and other poor), partly by means of benefactions, and partly by a fund raised under an inclosure act, according to which such fund was to be applied to the relief of the poor, and accounted for as rates. The cottages were repaired out of the poor-rate. Four of these cottages were always let, at a rent under their value, to industrious labourers; these tenants paid no poor-rates, and occasionally received relief; but, at the time of their being admitted, were liable to pay the rent, which was always collected:—Held, that these four cottages were not workhouses for the purposes of 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69. *Cantrell* v. *Windsor Union*, 4 Bing. (N.C.) 348; 5 Scott, 716; 7 L. J., C. P. 205.

8. Places of Divine Worship.

Receiving Rents for Pews.]—The trustees of a Methodist chapel, receiving money annually for the rents of the pews, were rateable for the profits made of the building, though in fact they expended the whole of what they received in making disbursements for repairs, and to attendants in the chapel, and in paying the salaries of the preachers; considering that these latter in effect were entitled to receive the surplus profit, after paying all necessary expenses of the chapel; and, therefore, that the rate was substantially upon them, through the medium of the trustees, who received the profits in the first instance. *Rex* v. *Agar*, 14 East, 256.

The trustees of a Quakers' meeting-house, of which no profit was made by the pews, were not rateable. *Rex* v. *Woodward*, 5 Term Rep. 79.

9. Cemeteries and Churchyards.

Company owning Graveyard.]—By an act a cemetery company was empowered to purchase land to be exclusively used and applied for the purpose of burial; and, in pursuance thereof, to sell and dispose of the exclusive right of burial, either in perpetuity or for a limited period, in the vaults made by them; and also the right of making any family or other vault, with the exclusive right of burial therein, either in perpetuity or for a limited period; and also the right of single interment in any of the

vaults made by the company, or in the open ground of the cemetery; which rights were to be exercised subject to the regulations of the company. And the company was required to keep the cemetery and the buildings, and external walls, and all other parts of it, in repair. The company purchased the necessary land in pursuance of the act, and used a portion of it as a common burial-ground, and made vaults which they sold to some parties in perpetuity, to others for a limited period, and disposed of portions to be used as family graves:—Held, that the company was rateable as an occupier of the vaults and family graves, as well as of the common burial-ground. *Reg.* v. *Kensington*, 4 P. & D. 327; 12 A. & E. 824; 1 Arn. & H. 105; 10 L. J., M. C. 25; 5 Jur. 170.

A company purchased lands and laid them out as a cemetery. They received fees for interments and conveyed plots of ground to be used as graves. In one year the sum of 2,333*l.* was received by the company as purchase-money for such plots of ground. Each plot was conveyed by indenture purporting to grant it in fee-simple upon trust that the grantee might use it as a place of burial, subject to the regulations of the company, and, subject to such trusts, in trust for the company as part of their property. The company was rated as the occupiers of the lands, and upon the principle that the sum of 2,333*l.* was to be treated as part of the annual value of the occupation of the lands by the company in that year:—Held, that the company was in occupation of the plots of ground which had been sold; and that the principle upon which they were rated was correct. *Reg.* v. *Abney Park Cemetery Co.*, 42 L. J., M. C. 124; L. R. 8 Q. B. 515; 29 L. T. 174; 21 W. R. 847.

Receiving Rents and Profits for Graves.]—Commissioners were authorised "to pave and cleanse streets, squares, &c., within a township, and to charge the expenses upon the owners of buildings, ground or land within or adjoining the streets, squares," &c.; provided that if the sewers required enlarging, "the owners of houses, buildings, lands, grounds and hereditaments," should pay only a proportion of the expense. B., a clergyman, desirous of building a church and setting out a churchyard, purchased a plot of ground, which was conveyed to trustees for the purpose; and the church and churchyard, having been built and set out accordingly—were consecrated. By the deed of consecration, the right of letting or otherwise disposing of the pews, vaults and graves in the churchyard was reserved to B. The church and churchyard adjoined a street which had been paved by the commissioners. B. conveyed to the defendant, in fee, by way of mortgage, the pews and vaults in and under the church remaining unsold, and so much of the churchyard as had not been sold, together with the rent, pensions, stipends, &c., thereunto belonging. The defendant received the rents and profits arising from the pews, vaults and graves in the church and churchyard and appropriated the same in part satisfaction of his debt:—Held, that he was not liable to be charged, as he was not "the owner of buildings, ground or land" within the meaning of the act. *Chorlton-upon-Medlock (Constables)* v. *Walker*, 10 M. & W. 742; 12 L. J., Ex. 88.

Mode of Assessment—Deductions.]—By an act incorporating a cemetery company the company was required periodically to appoint directors who should manage the business and concerns of the company subject to their control, keep and use the common seal, have the custody of books, deeds, &c., call meetings, purchase and sell lands, appoint and displace chaplains and other officers, allow them stipends, take of them securities, make contracts touching the company's undertaking, regulate the mode of interment, and the disposition of vaults, catacombs and graves, and the sums to be paid for exclusive right of burial therein, and for placing monuments, direct the issuing, receiving and disposal of the company's moneys, and all their other dealings, superintend their correspondence, and the keeping of their accounts, and all other things necessary for carrying on their business, and maintaining actions or suits in their name in respect of debts or contracts, and making, enforcing and rescinding contracts, also auditors, who should examine the report to be made by the directors of disbursements and receipts, audit the accounts from which the report was drawn, and inspect the vouchers. The company had two cemeteries in Middlesex and Surrey. The duties and authority of the directors extended to both:—Held, that they were not entitled to deduct from the rateable value the salaries of the directors and auditors and the expenses of an office in London at which the directors transacted the business of the company. *Reg.* v. *St. Giles, Camberwell*, 14 Q. B. 571; 19 L. J., M. C. 122; 14 Jur. 519.

10. Universities and Colleges.

Oxford.]—The University of Oxford is exempt from liability to be rated in respect of the occupation of the Bodleian Library, the Divinity and other schools, the Convocation House, the Old Convocation House, and Law School, the Clarendon Buildings, and the University Galleries, such occupation being necessary for the purposes for which the university was erected, namely, the advancement of national religion and learning, and appearing not to be used for any quasi private purpose inconsistent with the public purposes of the university. *Oxford University, In re*, 8 El. & Bl. 184; 27 L. J., M. C. 33; 3 Jur. (N.S.) 1249; 5 W. R. 872.

—— **Colleges.**]—The colleges are liable to be rated in respect of the occupation of college chapels and college libraries. *Ib.*

Edinburgh.]—The property of the Edinburgh University is neither held by the Crown nor for the Crown. It is therefore rateable. *Greig* v. *Edinburgh University*, L. R. 1 H. L. (Sc.) 348.

11. Literary and Scientific Societies.

Absence of Money Profits.]—A society is not entitled to exemption from rates, under 6 & 7 Vict. c. 36, s. 1, unless it has an express law prohibiting the making of "any dividend, gift, division, or bonus in money unto or between any of its members." *Reg.* v. *Jones*, 2 New Sess. Cas. 382; 8 Q. B. 719; 15 L. J., M. C. 129; 10 Jur. 613.

Society for the Advancement of Fine Arts—Society supported by "Voluntary" Contributions.]—The Art Union of London is incorporated by royal charter "for the general advancement

of the fine arts." Any person may become a member for a year by subscribing a guinea. Every member is entitled in each year to an engraving of a picture, selected by the governing body and purchased out of the funds of the union, and to one chance in a lottery for pictures, to be selected by the successful members themselves from any of the art exhibitions of the year in London. The art union is specially exempted by act of parliament from any liability to the penalties for an illegal lottery :—Held, that the art union was not a society "supported wholly or in part by annual voluntary contributions," and is, therefore, not entitled to exemption from rating under 6 & 7 Vict. c. 36, s. 1. The word "voluntary" in that section means gratuitous, and does not apply to a case in which an advantage is obtained in return for the money paid. *Savoy Overseers* v. *Art Union of London*, 65 L. J., M. C. 161 ; [1896] A. C. 296 ; 74 L. T. 497 ; 45 W. R. 34 ; 60 J. P. 660—H. L. (E.)

Institution for the training of Teachers as well as Pupils.]—By the rules of a society, it was provided that this institution should be designated the Institution for promoting Education of the Labouring and Manufacturing Classes of Society of every Religious Persuasion ; and for the purpose of making manifest the extent of its object, the title of the society should be the British and Foreign School Society ; that a school should be maintained to educate children for the purpose of supporting and training up teachers ; and it was stated that the grand object of the institution was to promote education in general. In the normal school, for training teachers, lectures were to be given on specified branches of literature, science and the fine arts, also lectures on the art of teaching and bible lessons. Instruction was also given in needlework. There were model schools for boys and girls, for the purpose of elucidating the art of teaching ; and it was stated, that the number of children in them was large, in order to afford a sufficient scope and opportunity for the pupil-teachers to instruct and put in practice the science of teaching, the object of the institution being to train up teachers, who might promote education, according to the particular system of this institution, in the United Kingdom and in the colonies :—Held, that the society was not "instituted for the purposes of science, literature, or the fine arts exclusively," and, therefore, that the lands, &c., belonging to it were not exempted from rates. *Reg.* v. *Pocock*, 8 Q. B. 729 ; 15 L. J., M. C. 132 ; 10 Jur. 662.

Society for training Members for a particular Profession.]—A society known as "The Institution of Civil Engineers" was formed for the purpose of promoting the general advancement of mechanical science, and more particularly the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade, as applied in the construction of roads, bridges, &c., and in the art of navigation by artificial power for the purpose of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns. The by-laws and regulations of the society stated under the head of "Objects," that the institution was established for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. The institution consisted of three classes, namely, members, associates, and honorary members, with a class of students attached, and papers were read at the institution on various subjects :—Held, that the primary purpose of the institution was the edification and instruction of its members and students in sundry arts, with the view of enabling them the better to practise a particular profession, and consequently that such institution was not entitled to be exempted from rates under 6 & 7 Vict. c. 36, as a society established exclusively for the purposes of science, literature, or the fine arts. *Reg.* v. *Institution of Civil Engineers*, 49 L. J., M. C. 34 ; 5 Q. B. D. 48 ; 42 L. T. 145 ; 28 W. R. 253 ; 44 J. P. 265.

Institution confined to a particular Profession.]—The United Service Institution comprised a museum of natural history, curiosities and armour, a library, a lecture-room, and rooms for meetings of the members and council or committee of management. The trust deed and the laws of the institution declared it "to be instituted as a central repository for objects of professional art, science and natural history, and for the books and documents relating to those studies, or of general information and the delivery of lectures on appropriate subjects." By the laws the members consisted of officers of the navy, army, marines, regular and local militia, the East India Company's land and sea services, yeomanry, and civil functionaries attached to the naval and military departments. Gentlemen above the age of fifteen, whose names were on the list of the commander-in-chief for commissions in the army, were admissible to become provisional members ; and eminent individuals and benefactors to the institution, and ladies who contributed to the institution might be admitted honorary members :—Held, that the institution was not established exclusively for the purposes of science or the fine arts, and therefore was not exempted from liability to be rated. *Reg.* v. *St. Martin's-in-the-Fields Overseers*, 21 L. J., M. C. 53 ; 16 Jur. 335. *S. C.*, nom. *Reg.* v. *Cockburn*, 16 Q. B. 480.

Society established by Royal Charter—Part Underlet to Stranger.]—The Linnean Society, incorporated by royal charter, and instituted for the purpose of science exclusively, was supported in part by annual contributions of the fellows, who, before admission, signed an obligation for the payment of such contributions ; which, in case of default in payment, might be sued upon. The society was lessee of contiguous premises, 32, Soho square, and 17, Dean street, which had formerly been one house, and underlet 17, Dean street, and five rooms in Soho square to B. The other part of the premises in Soho square was occupied for the purposes of the society, the librarian and housekeeper occupying as his dwelling, two rooms, and the porter also dwelling in the house, the use of the rooms being taken into account in fixing the amount of salary. On appeal against a poor-rate assessed on the society in respect of 32, Soho square :—Held, first, that it was "a society supported in part by annual voluntary contributions." *Linnean Society* v. *St. Ann, Westminster, Overseers*, 3 El. & Bl. 793 ; 2 C. L. R. 761 ; 23 L. J., M. C. 148 ; 18 Jur. 859 ; 2 W. R. 516.

Held, secondly, that it was entitled to exemption from rating in respect of the rooms in 32, Soho square, in the occupation of the librarian and housekeeper and the porter. *Ib.*

Held, thirdly, that B. was liable to be rated for the rooms in 32, Soho square, underlet to him. *Ib.*

—— **Special Privileges to Members.**]—The Zoological Society, which was incorporated by charter for the advancement of zoology and animal physiology, occupied land and buildings for housing animals, a museum for stuffed animals, a porter's lodge and greenhouses, and residences for the keepers. Part of the land was cultivated as a flower-garden. Refreshments were sold in the gardens by a person who paid to the society an annual sum for that right, and a band usually played there every Saturday during the months of June, July and August. The fellows of the society paid an annual contribution, or composition. There were also annual subscribers and honorary foreign and corresponding members, who, as well as the fellows, were entitled to a copy of the scientific proceedings of the society. They might obtain, on the payment of one guinea annually, an ivory ticket, which would admit a named person of their immediate family to the gardens and museum, with one companion, daily, each fellow was entitled to personal admission, with two companions, daily:—Held, that it was not a society for the purpose of science exclusively, nor supported in part by annual voluntary contributions within 6 & 7 Vict. c. 36, s. 1. *Reg.* v. *Zoological Society*, 3 El. & Bl. 807; 2 C. L. R. 766; 23 L. J., M. C. 139; 18 Jur. 786; 2 W. R. 491.

Musical Society.]—A society by its rules declared to be instituted exclusively for the promotion of the science or art of music within a town, by the giving of concerts or other musical performances at the concert-hall, now belonging to the institution. The hall was occupied for the purpose of giving concerts, to which members of the society, and persons having tickets, which members had authority to give, were admitted. These concerts were much sought after; the music was of a high order, and the art of music was promoted in consequence in the town. The society was rated in respect of their occupation. On one occasion, before the time of the rate, the society had granted the use of the hall gratuitously for a concert, the proceeds of which were given to a charity:—Held, that the casual use of the concert-hall in one instance for a purpose of charity before the rate did not affect the claim to exemption; but that the society, though instituted for the purpose of promoting the fine arts, and producing that effect, was not exempt, since it appeared that the promotion of the fine arts was not the primary object of the society, but only incidental, the primary object being the gratification of the subscribers. *Reg.* v. *Brandt*, 16 Q. B. 462; 20 L. J., M. C. 119; 15 Jur. 223.

When Publications restricted for Religious Purposes.]—The Working Men's Educational Union was founded in 1852, having for its object the support of the efforts variously put forth for the elevation of the adult operative population, as it regarded their physical, intellectual, moral and religious condition. The means were, by encouraging popular literary and scientific lectures by preparing suitable diagrams and other aids to lectures, and by promoting the formation of popular lending libraries and mutual instruction classes. There was a provision that the publications issued or recognised by the society should be free from the party politics of the day, and should be scriptural and unsectarian in their character. The lectures and discussions embraced political subjects:—Held, that both by the laws and usages of the society, some of the purposes for which it was instituted were different from those of science, literature, or the fine arts, and therefore it was not exempted from rates by the statute. *Scott* v. *St. Martin's-in-the-Fields, Westminster, Overseers*. 5 El. & Bl. 558; 25 L. J., M. C. 42; 1 Jur. (N.S.) 1207; 4 W. R. 87.

Libraries and Reading Rooms.]—By a statute which incorporated a company the company was empowered to purchase land and erect buildings thereon in which the proprietors were to be beneficially interested in proportion to their subscriptions, and such interest was to be personalty; it was provided that two or more rooms should be set apart and used as public rooms for transacting business. One of the rooms so provided was supplied with newspapers, and non-subscribers were admitted upon an annual subscription:—Held, that the company was rateable for the revenue derived from such using the room. *Rex* v. *Liverpool Exchange Proprietors*, 1 A. & E. 465; 3 N. & M. 550; 3 L. J., M. C. 107.

A society had a newsroom, where many of the periodical publications and usual newspapers of the day were taken in; and the Parliamentary Votes, the Course of Exchange, Mark Lane Express, and shipping lists, also share-lists and advertisements of sales, were supplied for the perusal and information of the subscribers. A library was attached to it, in which were 300 volumes, comprising statistical and topographical works, the Mirror of Parliament, and the Statutes at Large. The commercial and general directories and other documents were preserved and filed for the use of commercial subscribers:—Held, that the society was not instituted for purposes of science, literature, or the fine arts exclusively. *Reg.* v. *Phillips*. 3 New Sess. Cas. 134; 8 Q. B. 745; 17 L. J., M. C. 83; 12 Jur. 431.

—— **Periodical Papers taken in not for Objects of the Society.**]—The Cambridge Philosophical Society was originally established for the promotion of philosophy and natural history, and, to carry out its objects, occupied a house consisting of first floor, ground floor and basement, divided into rooms, which were used as a museum, lecture-room, library, and reading-room. In the reading-room were reviews, magazines and periodicals, some of which only were of a purely scientific character; and also the daily newspapers. Part of the subscription of every fellow of the society was paid for the use of the reading-room, and it was generally used by all:—Held, that the society was not entitled to be exempted from rateability, as, whatever might be the objects of the society, as originally instituted, the premises rated were not occupied at the time when the rate was imposed for the purposes of science, literature or the fine arts exclusively. *Purchas* v. *Holy Sepulchre, Cambridge, Overseers*, 4 El. & Bl. 156; 3 C. L. R. 6; 24 L. J., M. C. 9; 1 Jur. (N.S.) 304; 3 W. R. 15.

Held, also, that the society was liable to be rated in respect of the whole building, and not merely in respect of the reading-room. *Ib.*

—— **Subscription Library—Interest of Members Transferable.**]—By the rules of a society formed for the purpose of creating and maintaining a library, it was provided that a person admitted a member should pay two guineas, and 1*l.* annually, in advance, towards the expenses of the current year; that if the annual subscription was in arrear for three months he should be deprived of all privileges of a subscriber till the subscription was paid; and that he should have the power of transferring his property in the library by any of the methods by which personal property is usually transferred; but that no dividend, gift, or bonus in money should be made to or between any of the members:—Held, first, that the society was instituted for purposes of literature exclusively. *Birmingham New Library, In re*, 3 New Sess. Cas. 445; 18 L. J., M. C. 89; 13 Jur. 357. *S. C.*, nom. *Birmingham Overseers* v. *Shaw*, 10 Q. B. 868.

Held, secondly, that it was supported by voluntary contributions. *Ib.*

Held, thirdly, that the rule allowing subscribers to transfer their property in the library was not a contravention of the rule prohibiting any dividend, and therefore that the land belonging to the society was exempted from rates. *Ib.*

—— **Subscriptions in Form of Shares—Fines Levied for Nonpayment.**]—The property in a library was held in shares, the holders of which subscribed one guinea annually. Proprietors might assign their shares. If the annual subscriptions were unpaid for a certain period, fines became due; if unpaid for two years, the shares might be forfeited. The committee had power to dispose of the earlier copies of periodical works. It was not lawful to make any dividend, gift, division, or bonus, in money or otherwise, unto or between any of the members, and no such division was in fact made:—Held, that the premises occupied by the society were exempt; and, first, that the possible increase in the value of the shares did not deprive the society of the benefit of the enactment; and, secondly, that the annual payments were voluntary, because the society could not enforce the payment of them. *Liverpool Library* v. *Liverpool Corporation*, 5 H. & N. 526; 29 L. J., M. C. 221; 2 L. T. 325; 8 W. R. 498. S. P., *Bradford Library and Literary Society* v. *Bradford Overseers*, 1 El. & El. 88; 28 L. J., M. C. 73; 5 Jur. (N.S.) 513; 7 W. R. 36.

—— **Society with Privilege confined to Members, but open to all.**]—A society, called the London Library, was established for the purpose of lending books to its members, being supported in part by annual subscriptions, and in part by the voluntary contributions of its members, and precluded by its laws from making any dividend, gift, division, or bonus in money, to or between any of its members:—Held, that such society, being duly certified, was exempted from rates. *Clarendon (Earl)* v. *St. James's (Rector)*, 10 C. B. 806; 20 L. J., M. C. 213; 15 Jur. 492.

But, where portions of the premises leased by such society were underlet to other scientific bodies:—Held, that this was not such an exclusive occupation of the premises for the purpose of the society as to entitle it to the exemption. *Ib.*

Privileges confined to Members.]—Premises called the Portico were held in trust for a society consisting of the subscribers for the time being, during such time as they should continue members, pay certain annual subscriptions, and conform to the rules. Their numbers were 400. Books and newspapers were provided out of the annual subscriptions. The Portico consisted of a library of 15,000 volumes on scientific and general subjects, for reference and for circulation among the subscribers; a reading-room, containing magazines, reviews, and other periodical works; and a newsroom, in which were the newspapers, gazettes, reports of the markets, notices of sales, &c.:—Held, that the society was not exempt in respect of the premises, for that the purposes to which they were appropriated were not exclusively purposes of science, literature, or the fine arts; and the promotion of these was not the primary object of the society, inasmuch as the use of the premises and their contents was confined to the members themselves. *Reg.* v. *Gaskell*, 16 Q. B. 472; 21 L. J., M. C. 29; 15 Jur. 1156.

Lectures Delivered—Money taken from the Public.]—An institution comprised a library, a theatre or lecture-room, and a newsroom, and was founded in 1808 for the following objects: "First, the formation of a library, consisting of the most useful works in ancient and modern literature; secondly, the establishment of a reading-room provided with the best foreign and English journals and other periodical publications; and thirdly, for lectures on literary and scientific subjects." The funds for purchasing the building and supporting the institution were raised by shares, which were transferable. Persons who were not shareholders might become annual subscribers, and by reason of their subscriptions were entitled to the privileges of proprietors. The members and the annual subscribers amounted to about 400, and the privilege of resorting to and using the establishment was confined to them, except as to the admission to lectures. The library consisted of about 18,000 volumes; the principal reviews, magazines and other periodicals were taken in, together with books of reference, directories, the mining and railway journals and railway time-tables. Of the twenty-four daily newspapers and the weekly newspapers so taken in, some were filed, and the rest were sold for the benefit of the institution. Lectures were delivered on subjects connected with science, literature and the arts, to which the public were admitted on paying for their admission. The whole income was applied in defraying the expenses of the institution; and no dividend, gift, division or bonus in money or otherwise could be made unto or between the members. On appeal against a poor-rate assessed on the premises of the institution:—Held, that it was not a society instituted for the purposes of science, literature or the fine arts exclusively within 6 & 7 Vict. c. 36, s. 1. *Russell Institution* v. *St. Giles-in-the-Fields and St. George, Bloomsbury*, 3 El. & Bl. 406; 2 C. L. R. 755; 23 L. J., M. C. 65; 18 Jur. 597; 2 W. R. 169.

Letting Premises for other Purposes.]—A society instituted for purposes of science, literature, or the fine arts, is not exempt from rates, unless their premises are occupied solely for those purposes. *Purris* v. *Traill*, 3 Ex. 344; 3 New Sess. Cas. 459; 18 L. J., M. C. 57.

Such a society letting their premises for other purposes are liable to be rated, although the funds are applied to the objects of the institution. *Ib.*

Rent for Part of Premises.]—A poor-rate was assessed on part of a building occupied by a society, the rules of which declared that its purposes were the promotion of literature, science and the arts. The society was partly supported by annual voluntary contributions. Objections to the claim of exemption were raised under the following circumstances:—The building was the property of the society. The part in question was occupied by it wholly for its own purposes; the rest was let to tenants; the tenants were rated in respect of their own occupations. The rents were received by the society, and formed part of, and were applied as, its general funds:—Held, that this fact did not affect the exemption from rates of the part occupied by the society. *Reg.* v. *Manchester Overseers*, 16 Q. B. 449; 20 L. J., M. C. 113; 15 Jur. 219.

Receipt of Money to defray Expenses.]—The society exhibited on the premises at intervals works of art, which it allowed to be sold there. The society paid the carriage of such works of art as were sent to its exhibition from a distance, and on the sale of such of these as were sold received 5 per cent. on the price to defray the expense of carriage, to which purpose, however, the receipt was not adequate. Strangers were admitted to the exhibition on payment at the door:—Held, that the exhibitions appearing to be made bonâ fide with a view of promoting the fine arts, the receipt of money as above in the course of such exhibitions did not affect the exemption. *Ib.*

In the trust deed of the society was a power to use the premises for the imparting and diffusion of education and knowledge, consistent with the general purposes of the institution:—Held, that these words did not authorise the use of the buildings for the diffusion of education or knowledge, except as connected with the general purposes of the institution, viz., the promotion of science, literature and the fine arts, and therefore did not prejudice the exemption. *Ib.*

Dividing Proceeds on Dissolution.]—The trust deed of the society contained a provision, that on its dissolution the property should be sold, and the proceeds divided among the then members:—Held, that this was no answer to the claim of exemption, the provision not appearing to be a pretext for accumulation. *Ib.*

Purpose at the Time of Rating.]—In order to entitle a society to exemption from rates, as being instituted for the purposes of science, literature, or the fine arts exclusively, the purposes to which the society is applied at the time when the rate is made must be such as described in the statute; it is not enough that its original purposes should have been such. *Purchas* v. *Holy Sepulchre, Cambridge, Overseers*, 4 El. & Bl. 156; 3 C. L. R. 6; 24 L. J., M. C. 9; 1 Jur. (N.S.) 304; 3 W. R. 15.

Certificate of Exemption.]—The certificate of a barrister that a society is entitled to the benefit of the statute, although a condition precedent to the claim for exemption, is not conclusive proof of a right thereto. *Reg.* v. *Phillips*, 3 New Sess. Cas. 134; 8 Q. B. 745; 17 L. J., M. C. 83; 12 Jur. 431.

—— **Appeal.**]—After a society has obtained a certificate of exemption, and is afterwards rated to the poor-rate, the remedy is by appeal to the quarter sessions. *Birmingham Union* v. *Shaw, Birmingham New Library, In re*, 10 Q. B. 868; 18 L. J., M. C. 89.

Effect of Local Act.]—A local act empowered the council of a borough to makes rates on every person occupying any house or land within the borough, for certain purposes therein named. It provided that no person shall be rated in respect of any church, chapel, &c., "or in respect of any building used for the education of the poor exclusively":—Held, that this act did not repeal the 6 & 7 Vict. c. 36, s. 1, or affect the exemption from rates of a house occupied by a society, established for the purposes of literature within the borough. *Liverpool Library* v. *Liverpool Corporation*, 5 H. & N. 526; 29 L. J., M. C. 221; 2 L. T. 325; 8 W. R. 498.

12. CORPORATIONS.

Power to Rate.]—By a local act power was given to levy a rate upon all and every the person or persons who did inhabit, hold, &c., any land, house, &c.:—Held, that this authorised a rate being made on a corporation, although, by a clause giving an appeal, they were bound to enter into a recognizance. *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 314; 5 L. J. (O.S.) M. C. 106.

When Seised of Land for Profit.]—A corporation seised of land in fee for its own profit is within the words "inhabitants or occupiers" in 43 Eliz. c. 2, s. 1, and liable in its corporate capacity to be rated in respect of such land. *Rex* v. *Gardiner*, Cowp. 79.

Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle, &c.; and by a court of orders and decrees regulations were annually made concerning the right of common to be exercised by the freemen as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head; which price was always paid by the freemen exercising the right to the treasurer of the corporation, and which money, after deducting the expense of management, was distributed among the poorer burgesses who had no cattle to depasture:—Held, that the corporation was liable to be rated as beneficial occupiers of the land in question. *Rex* v. *Sudbury Corporation*, 2 D. & R. 651; 1 B. & C. 389; 25 R. R. 423.

The freemen of York had certain rights of common over land, which being inclosed under an inclosure act, other lands were set out to the mayor and commonalty for the use of the freemen, who turned out cattle to the extent of 2*l.* a year value, but the mayor and commonalty, although they appointed the pasture masters, who regulated the apportionment of the right, derived no benefit:—Held, that the mayor and commonalty were rateable. *Reg.* v. *York Corporation*, 1 N. & P. 539; 6 A. & E. 419; 6 L. J., M. C. 121.

Within the precincts of a city was a commonable pasture, containing about thirty acres of

land, over which the resident freemen of the city, in number about five hundred and fifty, had rights of pasturage, the soil being vested in the corporation as lords of the manor. The corporation always maintained and repaired out of their corporate funds the fences of the common, and, since 1835, had appointed and paid out of those funds an officer, called the commons warden, to check the illegal stocking of the common, with power to inflict fines, the average amount of which did not cover the expenses. The freemen enjoyed by prescription a right of depasturing on the common all the year round two head of cattle; if a freeman had no stock, his right was in abeyance. The exercise of these rights exhausted all the profits of the land:—Held, that the corporation was the occupier of the soil, subject to a right in gross, which exhausted the profits of the land, and therefore, either it had no beneficial occupation, or the rate must be reduced to nothing. *Lincoln Corporation* v. *Holmes Common Overseers*, 8 B. & S. 344; 36 L. J., M. C. 73; L. R. 2 Q. B. 482; 16 L. T. 739; 15 W. R. 786.

Before 4 & 5 Vict. c. 48, a corporation was not rateable in respect of lands of which the profits were payable to the borough fund, although the land was situated in a parish without the limits of the borough. *Reg.* v. *Exminster*, 4 P. & D. 69; 12 A. & E. 2.

Exemption under 4 & 5 Vict. c. 48.]—A corporation created since 5 & 6 Will. 4, c. 76, is, by 16 & 17 Vict. c. 79, s. 2, entitled to the exemption in 4 & 5 Vict. c. 48, s. 1, because, it being an affirmative enactment that property so situate should be exempt, the exemption continues, notwithstanding the decisions which originally created the exemption of corporate property have been overruled, and the Union Chargeability Act (28 & 29 Vict. c. 79) does not affect this exemption of corporate property, in a parish in a union. *Reg.* v. *Oldham Corporation*, 9 B. & S. 202; 37 L. J., M. C. 169; L. R. 3 Q. B. 474; 18 L. T. 240; 16 W. R. 789.

Occupation of Yard for the Repair of Highways.]—A municipal corporation was by its town council constituted a local board of health of a district co-extensive with the borough. The local board occupied a yard within the borough in a parish, solely for the purposes of repairing the highways in the district of which they, as local board, were surveyors. The parish was partly not within the borough:—Held, that the local board of health was rateable in the parish as occupiers of the yard, their occupation not being for such public purposes as to exempt them from rateability. *Reg.* v. *Kingston-upon-Hull JJ.*, 4 El. & Bl. 29; 23 L. J., M. C. 183; 18 Jur. 899; 2 W. R. 620.

13. BRIDGES.

Lease of Tolls—Liability of Owner.]—The lessee of the tolls of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the occupier of any local visible property within the parish, nor that he was an inhabitant resident there, deriving profit there from such tolls, beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge. *Rex* v. *Eyre*, 12 East, 416.

Where tolls traverse of a bridge were let at yearly rent, but not by deed:—Held, that no interest passed, and that the owner of the bridge was rateable in respect of his beneficial occupation. *Reg.* v. *Salisbury* (*Marquis*), 3 N. & P. 476; 8 A. & E. 716; 7 L. J., M. C. 110.

Company occupying Bridge—Use of Tolls for temporary Purpose.]—A local act recited, that it would be of great utility to the public to build a bridge, and empower a company to raise a capital sum amongst themselves by shares, and to borrow a further sum by mortgage or annuity, for the building thereof, and authorised tolls to be taken; and enacted that the tolls should be applied, first, in discharging the expenses of the act and paying the mortgagees their interest, and that the surplus should be divided among the proprietors, not exceeding 7½ per cent. on their shares. The excess arising from the tolls beyond the dividends was to be applied in paying off the capital advanced by the proprietors, afterwards to pay off the mortgage debt, afterwards to form a fund for the repairs of the bridge, and then the tolls to cease altogether. The company raised the sums authorised under the act, and also incurred a further debt in completing the bridge. The tolls were applied in discharging this further debt and the interest of the money raised. This debt had not been wholly discharged, and no dividend to the proprietors had ever been made:—Held, that the company was beneficially interested in the tolls till their capital was paid off, and therefore rateable as occupiers of the bridge. *Reg.* v. *Blackfriars Bridge Co.*, 1 P. & D. 603; 9 A. & E. 828.

Bridge in the Hands of Public Commissioners.]—The commissioners of works and buildings were empowered to construct a bridge at Chelsea, and to borrow money from the treasury on an assignment of the tolls. The commissioners were authorised to take tolls which were to be applied to the payment of the expenses of the bridge, then in repayment of the sum borrowed, and when that had been repaid there was to be no toll charged for foot-passengers. There was no ultimate appropriation of any surplus:—Held, that the commissioners were not liable to be rated, as they were in occupation of the bridge as servants of the Crown, deriving themselves no benefit from the receipt of tolls. *Reg.* v. *M'Cann*, 37 L. J., M. C. 123; L. R. 3 Q. B. 677; 19 L. T. 115; 16 W. R. 985—Ex. Ch. Affirming 9 B. & S. 33.

Bridge vested in Trustees for Benefit of Shareholders.]—The property in Putney bridge was vested in trustees to permit thirty shareholders to receive the tolls, and to have the entire management of the bridge. The shareholders were assessed jointly for the relief of the poor of Putney; and the amount not being paid, a summons was issued to all the shareholders to appear before a magistrate of the district. A., a shareholder, living at the toll-house on that side of the bridge which was not within the parish making the rate, appeared in pursuance of the summons served on him, but refused to pay the whole amount of the assessment, whereupon application was made to the magistrate to grant a distress warrant, which he refused to do:—Held, that the shareholders were properly assessed, and that the rule must be made absolute for a mandamus to the magistrate to issue a distress warrant to levy on the goods of A. for the assessment due from all the shareholders. *Reg.* v.

Paynter, 1 New Sess. Cas. 631 ; 7 Q. B. 255 ; 14 L. J., M. C. 179 ; 9 Jur. 877.

Land occupied in Two Parishes—Toll taken in One.]—A bridge was erected over a navigable river pursuant to an act of parliament. The proprietors purchased on each side of the river in parishes A. and B. land on which they erected a pier and an abutment. They were authorised to erect toll-gates, and to take certain tolls, before any foot-passenger should be permitted to pass or return over or through the bridge. The proprietors took tolls at one side of the bridge only, in parish A. :—Held, that they were rateable for the land occupied by them in parish B. *Rex* v. *Barnes*, 1 B. & Ad. 113 ; 8 L. J. (O.S.) M. C. 115.

The owner of a bridge resting on piles driven into the soil, one end of which was in the parish of A., and the other in the parish of B., in which parish was situate the toll-house, is rateable for an occupation of land in A., pro ratâ, although the road over the bridge was repaired by other persons. *Reg.* v. *Salisbury* (*Marquis*), 8 A. & E. 716 ; 3 N. & P. 476 ; 7 L. J., M. C. 110.

By two local acts, a company was authorised to erect a bridge across the Thames, from H. to B., and to make roads and approaches, and maintain them at their own expense ; and to erect toll-gates and to collect a portion of the tolls on the roads for the roads alone, and the remainder on the bridge ; or to take the whole toll for the bridge and roads in one sum, and at any part of the bridge or roads. Half of the bridge was to be deemed to be in H. and half in B. In pursuance of the acts the company erected a bridge and formed roads and approaches, and took the tolls at a toll-house at the entrance on the bridge in H. :—Held, that the net rateable value of the bridge, the expenses incidental to the roads and approaches, including the rates to which they were liable, being deducted, was to be divided between H. and B. in equal moieties. *Reg.* v. *Hammersmith Bridge Co.*, 3 New Sess. Cas. 424 ; 15 Q. B. 369 ; 18 L. J., M. C. 85 ; 13 Jur. 190.

Liability for Bridges as "Buildings."]—By a paving act, commissioners were to rate all "houses, shops, warehouses, coach-houses, stables, cellars, vaults, buildings and tenements," and the rates "upon or in respect of any chapel, meeting-house, hospital, school or other public building, or any garden, wall, yard or void space of ground, should be ascertained according to the number of square yards of pavement paved, &c., belonging to such chapel, to the middle of the street on which the same should abut ; but so, nevertheless, as that no rate or assessment should be laid upon, or so collected, or received for or in respect of any wall, garden, yard, or void space of ground, unless the space should abut upon or front some street, &c., to be paved." A railway company was required to build and for ever after keep in repair a bridge over their railway, with a brick wall at each side thereof, at a spot where their railway intersected a public street or road, which was paved or repaired under the local act. The land upon which that part of the railway was constructed and the bridge erected was conveyed to the company in fee by a former owner, with a reservation of the use and enjoyment of the bridge. The surface of the bridge was paved by the local commissioners :—Held, that the company was liable to be assessed under 57 Geo. 3, c. xxix. ; for although the bridge was not a public building within the meaning of that act, the company was rateable in respect of the side walls, under the description of "dead walls." *Arnell* v. *L. & N. W. Ry.*, 12 C. B. 697.

By a local act, commissioners are empowered to view any street, square or other public passage or place (within the limits of the act) which now is or hereafter may be built upon or in building ; and if of opinion that the foot and carriage ways are fit to be levelled and paved, to give notice to the owner, proprietor or lessee of any such land, ground, house, . . . tenement or hereditament, situate in any such street, square, or other passage or place, to meet and compound with them for the paving, &c., of such foot and carriage ways ; and in default of the owner compounding, the occupier of the premises may do so, and deduct the composition money from the rent. The defendants were owners of a canal within the limits of the act, over which they had built a bridge, as required by their private act ; the bridge was of brick, having brick walls four or five feet high on each side, and was a public highway, and connected two public streets, the houses of which were built up to either end of the bridge :—Held, that the defendants were not liable to compound for paving the bridge, as it was not within the meaning of the act, not being "a place or passage built upon or in building." *Arnell* v. *Regent's Canal Co.*, 14 C. B. 564 ; 23 L. J., C. P. 155 ; 18 Jur. 632 ; 2 W. R. 457.

14. Canals.

Principle of Assessment.]—Unless there is some clause of exemption in the acts of parliament by which the canal is governed, land taken for the purpose of a canal will be rateable not according to the value of the land when taken, but according to the value acquired from its having been used as a canal. *Rex* v. *Grand Junction Canal Co.*, 1 B. & Ald. 289 ; 19 R. R. 316. S. P., *Rex* v. *St. Peter the Great*, 5 B. & C. 473 ; 8 D. & R. 331.

Statutory Provisions — Same Proportion as Adjacent Property.]—By a private act of Geo. 3 it was provided that a canal company should from time to time be rated to all parliamentary and parochial taxes, in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the company, in the same proportion as other lands, grounds and buildings lying near the same are or shall be rated, and as the same lands, grounds and buildings would be rateable in case they were the property of individuals in their natural capacity. Land was purchased by the company, and the canal was made with towing-paths and lock-houses and buildings attached thereto ; subsequently a railway was made on land lying near the canal, running parallel with, and in one place crossing, the canal. Buildings were erected on much of the land lying near the canal, and portions of such lands were converted into gardens for watercresses, and otherwise greatly improved in value. In 1848, the company adopted the 8 & 9 Vict. c. 42, and commenced business as carriers on their own account on the canal :—Held, first, that the land occupied by the canal was to be rated in the same proportion as the open land lying near, the value of which might be increased from time to time by circumstances ; and the buildings belonging to the company in the same

proportion as the buildings lying near. *Grand Junction Canal Co.* v. *Hemel Hempstead Overseers*, 40 L. J., M. C. 25; L. R. 6 Q. B. 173; 24 L. T. 228; 19 W. R. 443.

Held, secondly, that the land occupied by the canal lying near the railway was not to be rated in proportion to the improved value of land with a railway upon it. *Ib.*

Held, thirdly, that the rateable value of the canal under the private act was not affected by reason of the company carrying on the business of carriers. *Ib.*

By a local act of 1793, a canal company was to be rated in respect of their lands and grounds, and all warehouses and other buildings, in the same proportion as other lands, grounds, and buildings lying near the same were rated. Near the offices, machine-houses, wharf, canal, towing-path, and premises, for which the company was rated in a parish, were pieces of vacant land, a piece of garden ground, and sets of premises consisting of warehouses or gasometers, and also of yards and wharves used therewith:—Held, that the wharf, canal, and towing-path of the canal company ought not to be rated in the same proportion as the neighbouring piece of garden ground; nor as if it were land occupied by the canal company, supposing no canal to exist; but that the land upon which the neighbouring sets of premises stood ought to be calculated in the proportion. *Warwick and Birmingham Canal Co.* v. *Birmingham Union*, 27 L. T. 487.

A canal act directed that the company should be rated for their lands in the proportion as other lands lying near the same were rated:—Held, that they were to be rated for their lands at the same value as other adjacent lands used for agricultural or garden purposes, and not at the value of adjacent lands let or capable of being let on building leases. *Reg.* v. *Grand Junction Canal*, 7 W. R. 597.

By a canal company's special act, it was provided that the lands of the company, whether covered with water or not, and also all dwelling houses, wharves, warehouses, lock houses, and other houses of the company, should be rateable: the lands according to their quantity and quality, and the dwelling houses, &c., according to the nature and respective uses, dimensions and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality, and dwelling houses, &c., of a like and similar size, nature, dimension or description in the respective parishes where the same should be situate, were, or should be assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing path on the following principle. They assumed the area occupied thereby to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such rateable value as representing the rateable value of the lands so covered as distinguished from the buildings:—Held, that the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect. *Regent's Canal Co.* v. *St. Pancras Assessment Committee*, 47 L. J., M. C. 37; 3 Q. B. D. 73; 37 L. T. 637; 26 W. R. 281.

An act incorporating a canal company provided that the company should from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the company, in the same proportion as other lands lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity. In pursuance of the act, the company purchased lands and made the canal. At that time the lands adjoining those so purchased were let for use as mere land; but they afterwards greatly increased in value, and, at the time that the rate appealed against was made, were extensively built over, and worth, if let for the purpose of being built on, 6*d.* per annum the square yard. The average rateable value, at the time of making the rate, of the nearest land to the canal, which was then still used as mere land, was about 3*l.* per acre per annum. Upon other lands adjoining the canal, wharves, yards and buildings had, before then, been erected, the average rateable value of which was then 5*d.* the square yard:—Held, that the company was not rateable in proportion only to the rateable value of the whole of the lands adjoining the canal, considered as mere land; but that the true principle of their rateability was that the adjoining land covered with buildings should be brought into hotchpot with adjoining lands of other descriptions, and that the company should be rated for the lands occupied by the canal, according to the aggregate value, at the time of making the rate, of the whole land brought into hotchpot; the value being the rent which a tenant from year to year would give for the whole: in estimating which, regard was to be had to that portion of the rent paid by the tenant of any buildings standing on the land, which he might be supposed to pay in respect of its site, as enhanced in value beyond the uncovered land, by being built upon. *Reg.* v. *Glamorganshire Canal Co.*, 3 El. & El. 186; 29 L. J., M. C. 238; 6 Jur. (N.S.) 1146; 2 L. T. 694; 8 W. R. 690.

By 3 & 4 Will. 4, c. 90 (Lighting and Watching Act), s. 33, the owners and occupiers of houses, buildings and property (other than land) rateable to the relief of the poor in any parish, shall be rated at a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at for the purposes of that act. A company was possessed of a canal and a towing-path, bridges, and a dry dock, lined with masonry, used for repairing the canal boats:—Held, that "property" meant things ejusdem generis with houses and buildings, and did not include a canal and a towing-path; that the bridges and dry dock were accessories to the canal, and must be considered part; and that the whole ought to be rated as land. *Reg.* v. *Neath Canal Co.*, 40 L. J., M. C. 193; L. R. 6 Q. B. 707.

The possessors of canal property, consisting of the canal, towing-path and warehouses and offices adjacent, are to be assessed upon the same principle as the occupiers of land. *Rex* v. *Bridgewater Trustees*, 4 M. & Ry. 143; 9 B. & C. 68; 7 L. J. (O.S.) M. C. 81.

A canal company, being rateable as occupiers of land, can only be rated by the same estimate as the other land in the parish, namely, according to the value of their tolls, to be let by the

year. *Rex* v. *Oxford Navigation Co.*, 6 D. & R. 86 ; 4 B. & C. 76 ; 3 L. J. (o.s.) K. B. 168.

—— **Improvement of Land by Use of Canal.**]—An act directed that a canal company should be rated for all lands and buildings in the same proportion as other lands and buildings lying near the same, and as the same would be rateable if they were the property of individuals in their natural capacity ; and a subsequent act directed that all rates and assessments upon the personal estate of the company should be assessed in every parish in proportion to the length of the canal in such parish :—Held, that the company was liable to be rated for their lands and buildings only at the same value as other adjacent lands, and not according to the improved value derived from the land being used for the purposes of the canal. *Rex* v. *Grand Junction Canal Co.*, 1 B. & Ald. 289 ; 19 R. R. 316.

An act of parliament (33 Geo. 3, c. 121) provided that the company of proprietors of the Dudley Canal Navigation should from time to time be rated in respect of the land and grounds taken and used by them, and warehouses and buildings erected, or to be erected, by them, as other lands, grounds and buildings lying near their canals and collateral cuts, were or should be rated :—Held, that this clause was not to be construed retrospectively, so as to be applicable to the works made previously to the passing of the statute ; the latter were rateable according to the improved value derived from tonnage dues. *Rex* v. *Dudley Canal Co.*, 7 D. & R. 466.

By a clause in a canal act, tolls were not to be rated, and the company was to be rated from time to time for and in respect of the lands taken, and the warehouses and other buildings to be erected by the company, "in the same proportions as, but not at any higher value or improved rent than other lands, grounds and buildings lying near or adjacent thereto, are or shall for the time being be rated, and as the lands, warehouses and other buildings so taken and erected would have been rateable in case the same had been continued in their former state, and not been used for the purpose of the navigation" :—Held, first, that the proper mode of laying a poor-rate on the company was according to the fluctuating value of adjacent lands and buildings, and not according to their value at the time of the formation of the canal ; and, secondly, that the increased value was to be taken for the time being, from whatever source it might arise, and not that the increase arising from the canal itself was to be omitted. *Rex* v. *Monmouthshire Canal Navigation Co.*, 5 N. & M. 68 ; 3 A. & E. 619 ; 1 H. & W. 464.

By an act for making a navigable communication between two places, a company was formed, and authorised to purchase lands. The act then directed that the company should be rated and charged to all parliamentary and parochial taxes, rates and assessments for any lands to be purchased or taken, or warehouses, or any other buildings to be erected by them in pursuance of that act, in the same proportion as other lands and buildings adjoining to or lying near the same :—Held, that the company was liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of the navigation. *Rex* v. *Chelmer and Blackwater Navigation Co.*, 2 B. & Ad. 14 ; 9 L. J. (o.s.) M. C. 125.

—— **Lease to Railway Company—Annual Rent.**]—In pursuance of an act of parliament a canal company granted a lease in perpetuity of their undertaking to a railway company, under the provisions of which a canal, part of their undertaking, was worked and managed by a joint committee in the name of the canal company, and was worked by the railway company, and the railway company made up to the shareholders of the canal company the deficiency in the earnings of their undertaking in accordance with the guarantee in the lease of the payment of certain rents or sums of money in the nature of rent :—Held, that the annual rent or sum of money received by the canal company from the railway company under the lease was not to be taken into account in determining the rateable value of the canal. *Reg.* v. *Lapley Overseers*, 9 B. & S. 568.

—— **Deduction of Expenses.**]—In fixing the amount of a rate on a canal company, the sum paid by the proprietors for poor-rate, the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits. *Rex* v. *Oxford Canal Co.*, 5 M. & Ry. 100 ; 10 B. & C. 163 ; 8 L. J. (o.s.) M. C. 62.

—— **When Tolls on Part of Canal exempt from Rateability.**]—Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the tolls, and the other not ; though the voyage happen to finish on the unexempted line, yet the canal company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the tolls should be exempt from any taxes, rates, &c., other than such as the land which should be used for the purpose of the navigation would have been subject to if the act had not been made, that goes to exempt the tolls, quâ tolls, altogether from being rated in respect of the line so exempted, leaving the land rateable as before. *Rex* v. *Leeds and Liverpool Canal Co.*, 5 East, 325.

Assessment of different Parts of Canal Property.]—A company was the owner of a canal and premises, such as wharves, engine-house and reservoirs. The assessment to the poor-rate upon the wharves was made upon the whole area, each taken as a whole, on wharf, land and buildings, with fixtures and machinery attached, and deriving some additional value from the capacity of being applied to such purposes as those of a canal company. As regarded the engine-house, that was assessed at the rent which it was considered reasonable for the company to pay from year to year. As regarded the canal proper, it was assessed to the gross receipts along the whole line of the canal, allowing certain deductions for repairs, salaries, tenants' profits, &c. As regarded the reservoirs, these were assessed as land independently of their contributing to the earnings of the canal :—Held, that the principle of assessment was correct. *Birmingham Canal Navigation Co.* v. *Birmingham Overseers*, 19 L. T. 311.

A canal company is rateable in each and every parish through which its canal passes, as an occupier of land covered with water. *Rex* v. *Trent and Mersey Canal Co.*, 2 D. & R. 752; 1 B. & C. 545.

The proprietors of a canal navigation are in general, and when there is an act of parliament directing otherwise, to be rated in proportion to the profits derived from the use of that part of the canal situate within the parish for which the rate is imposed. *Rex* v. *Dudley Canal Navigation Proprietors*, 1 M. & Ry. 20; 7 B. & C. 236; 6 L. J. (o.s.) M. C. 3; 31 R. R. 181.

The tolls payable for passing through locks belonging to a canal company are rateable wholly in the parish in which the locks are situate. *Rex* v. *Lower Mitton*, 4 M. & Ry. 711; 9 B. & C. 810; 8 L. J. (o.s.) M. C. 57.

A navigation act empowered the proprietor to take so much per mile per ton for all goods carried along the canal:—Held, that they were rateable for the tolls in the different parishes where the tolls became due, that is, where the respective voyages finished, though for convenience they were authorised to collect the tolls where they pleased, and did collect them in other parishes. *Rex* v. *Stafford and Worcester Canal Navigation*, 8 Term Rep. 340.

Where a canal runs through several parishes, a rate in one should be in proportion to the earnings in that parish, not in proportion to the length of the part of the canal there. *Rex* v. *Kingswinford*, 1 M. & Ry. 20; 7 B. & C. 236; 6 L. J. (o.s.) M. C. 3; 31 R. R. 181. S. P., *Rex* v. *Chaplin*, 1 B. & Ad. 926; 9 L. J. (o.s.) M. C. 121.

—— **Under a Local Act—Construction.**]—By a local act a canal company was incorporated, and power was given to the company to hold lands, without restriction as to amount or locality, and to take lands, and to form a canal in enumerated parishes, amongst which H. was not. By s. 101, lands of the company were to be rated like other lands of a like quality in the same parishes. Subsequently, lands were purchased in the parish of H., in the name of a trustee, and occupied by the company as a reservoir:—Held, that the section was prospective, and applied to all lands acquired by the company, and that the lands in H., the fee of which was in another party, but which were substantially occupied by the company, were to be rated as other lands of a like quality in the parish of H. *Regent's Canal Co.* v. *Hendon Overseers*, 6 El. & Bl. 852; 3 Jur. (N.S.) 208; 4 W. R. 743.

A local act enacted that a canal company should be rated to all parliamentary and local taxes and assessments for its lands and buildings in the same proportion as other lands and buildings lying near and as the lands and buildings would be rateable if they were the property of individuals:—Held, that a parish in Buckinghamshire was to be assessed to the county rate on an estimate on which the company's lands and buildings were assessed as directed by the statute. *Reg.* v. *Aylesbury with Walton*, 9 Q. B. 261; 4 Railw. Cas. 315.

—— **Deduction of Expenses.**]—In assessing a canal passing through several townships, and having locks and other works in the particular township, the expenses of repairing and maintaining those locks and works are not to be deducted from the gross earnings of the canal of that township, but only such proportion of the whole expenses of repairing and maintaining the locks and works on the entire canal as, upon an apportionment on the mileage principle, would attach to that township. *Reg.* v. *Coventry Canal Navigation Co.*, 1 El. & El. 572; 28 L. J., M. C. 102; 5 Jur. (N.S.) 862.

Exclusive Occupation—Ancient River formed into a Canal, with New Cuts, Channels, Locks, &c.—Towing-path.]—By virtue of a series of private acts the Manchester, Sheffield, and Lincolnshire Railway Company were empowered to dredge and cleanse the river Dun, and otherwise to maintain it with locks, new cuts, channels, canals, and towing-paths made in connection with it, navigable for large boats, and to exact toll in respect of all craft except pleasure boats conducted along the river and the artificial cuts. The railway company having been rated to the relief of the poor in respect of the river and artificial cuts, &c., in ten parishes of the respondent union, objected that they ought not to be rated in respect of the natural river course, or the towing-paths on the banks thereof, on the ground that they had there only an easement or right of way, and had not exclusive possession, either as owners or occupiers:—Held, that they were liable to be rated in respect of the natural river course, but that they were liable in respect of the towing-paths as exclusive occupiers, irrespective of the question whether or not they were owners of the soil. *Manchester, Sheffield, and Lincolnshire Ry.* v. *Doncaster Union*, 69 L. T. 350; 57 J. P. 792.

Exemption of Land from Rates.]—Where a statute empowered the proprietors of a canal to make rates in respect of vessels, and expressly exempted such rates from all taxes, rates, &c.:—Held, that the land occupied by the canal was also thereby exempted. *Rex* v. *Calder and Hebble Navigation Co.*, 1 B. & Ald. 263. S. P., *Erewash Canal* v. *Eastwood*, 4 W. R. 494.

15. WATERWORKS.

Assessment—Profitable Occupation.]—The Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the city of Worcester, and the corporation of Worcester became the local board of the city, and for the purposes of supplying the sanitary requirements of the city took land, and erected waterworks thereon, in a portion of the parish of Claines, which was within the municipal boundary of the city. The parish of Claines forms part of the Droitwich Poor Law Union, and its area is partly without and partly within the city of Worcester, but for poor-law purposes is distinct and separate from the city. The city was supplied with water from these works, and the corporation fixed a rate of fourpence in the pound per annum on the net annual value of the dwelling-houses supplied with water for domestic purposes, and made an additional charge for water used for trade and other special purposes, and a certain rate for water supplied by meter. These prices were fixed with a view to the sanitary improvement of the city and not as a commercial transaction, and, in fact, left but little profit above the actual cost of supply. In the case of small tenements, the charge was still further reduced. The sums charged for domestic purposes would, where the rent of the house was twenty pounds or less, be less than twopence per week, to which limit they were permitted to rate by 11 & 12 Vict. c. 63, s. 76. In the other cases the statute did

not limit the rate to any particular sum :—Held, that the rateable value of the waterworks was to be assessed on the profitable occupation, as it was in fact, and not on what it might be in the hands of a trading company without restrictions. *Worcester Corporation* v. *Droitwich Union*, 45 L. J., M. C. 81; 34 L. T. 288; 24 W. R. 490. Affirmed, 46 L. J., M. C. 241; 2 Ex. D. 49; 36 L. T. 186; 25 W. R. 336—C. A.

A waterworks company was empowered to lay pipes in the streets, and did lay pipes accordingly. The company was assessed to the land-tax as holders of land in a district in which they had pipes laid down, but in which they had no other property :—Held, that the company was not liable to be assessed to the land-tax for the land occupied by their pipes. *Chelsea Waterworks Co.* v. *Bowley*, 17 Q. B. 358; 20 L. J., Q. B. 520; 15 Jur. 1129.

Where land is occupied by a local authority for public purposes the land is to be assessed to the poor-rate at the rent which a tenant would pay if subject to the same restrictions as are imposed upon the local authority. Therefore, where a sanitary authority occupies land and works for the purpose of supplying its town with water, the authority being precluded by law from making a profit out of these works, the rateable value of the lands and works is nothing. *Peterborough Corporation* v. *Stamford Union*, 31 W. R. 949.

—— **Land covered by Water and Land occupied by Pipes.**]—By 30 & 31 Vict. c. 113, s. 17, the occupier of any land covered with water . . . shall pay to the sewer rate in respect of his property one-fourth part only of the rate in the pound payable in respect of houses and other property. A waterworks company was possessed of a canal, of filter beds supported on brick arches, and sometimes covered with water, at other times not, and of land used for keeping sand for the filter beds; and they also occupied land by iron pipes, mains, and service pipes :—Held, that the canal and the filter beds were land covered with water within the meaning of s. 17, and ought to be assessed at one-fourth of the amount to be imposed on houses; but that the land used for the purpose of keeping sand, and the land occupied by iron pipes, mains, and service pipes, did not come within that description, and ought to be assessed at the full value. *East London Waterworks Co.* v. *Leyton Sewer Authority*, 40 L. J., M. C. 190; L. R. 6 Q. B. 669; 20 W. R. 95.

An act for lighting a hamlet empowered trustees to raise money by rate upon all persons who should inhabit, occupy, or enjoy "any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements or hereditaments, situate or being in any of the streets, squares, lanes, or other public passages and places within the said hamlet," so as all rates after the first be laid upon all persons who should inhabit, occupy, or enjoy "any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements or hereditaments, situate and being in such of the streets, squares, lanes, and other public passages and places only within the hamlet as shall from time to time be lighted by virtue of this act" :—Held, that a waterworks company was not rateable for their mains and other pipes, plugs and apparatus, fixed in the ground and used for the conveyance of water in the streets, roads, and public places in the town, as tenements. *East London Waterworks Co.* v. *Mile End Old Town Trustees*, 17 Q. B. 512; 21 L. J., M. C. 49; 16 Jur. 121.

Paving commissioners appointed under a local act were empowered to make rates upon all persons who "shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments within any of the streets, &c., of a district; such rate not to exceed 1*s.* 2*d.* in the pound of the yearly rents or value of such of the lands, houses, &c., situate in the streets, &c., the greater part of which should be paved in a certain manner, and not to exceed 7*d.* or 6*d.* in the pound respectively for such of the lands, houses, &c., situate, &c., the greater part of which should be paved in a certain other manner, or only repaved under the act." Different assessments were provided for public buildings, dead walls, and vacant ground adjoining the streets, &c., and for unoccupied houses. No specific assessment was provided for water-pipes laid down in the district. The commissioners in whom the paving materials of the streets, &c., were expressly vested, were empowered to alter the position of the pipes belonging to any water or gas company underneath such streets, squares, &c. :—Held, that an incorporated water company, whose mains, pipes, and other apparatus were laid down within the district, was liable under the act to be rated as occupiers of land. *Reg.* v. *East London Waterworks Co.*, 18 Q. B. 705; 21 L. J., M. C. 174; 16 Jur. 711.

Hypothetical Tenant — Gross Profits.] — The total receipts of a local board in respect of water rates, rents, and charges for a year were 5,700*l.*, and the total expenditure debited to the waterworks account 14,107*l.* To balance accounts 8,404*l.* was transferred from the general district rate to the water rent account. No part of the 8,404*l.* was a receipt in respect of water rates, rents, or charges, nor was any part applied towards working expenses; but 5,680*l.* of it was applied to payment of instalments on loans, and 2,724*l.* to other purposes. An assessment committee had assessed the waterworks at 8,424*l.*, made up of the 5,700*l.* for water rates, rents, and charges, and 2,724*l.*, the difference between the 8,404*l.* taken from the district rate and 5,680*l.* the instalment of loan. Upon a question whether 5,700*l.* only or that sum supplemented by 2,724*l.* (making 8,424*l.*) was the correct figure to adopt as a basis of calculation for ascertaining the rateable value of the works :—Held, that, having regard to the 63rd and 71st sections of the Local Act of 1858, the 2,724*l.* was not received by the local board as an unconditional aid, but by way of loan, and that it was not the less so received because the repayment was deferred and conditional upon a contingency; accordingly that, for the purpose of arriving at the rateable value of the waterworks, the 2,724*l.* should not be included as a receipt by a hypothetical tenant under conditions that made it potentially available to him as an item of gross profit. *Merthyr Tydfil Local Board* v. *Merthyr Tydfil Union*, 60 L. J., M. C. 42; [1891] 1 Q. B. 186; 63 L. T. 647; 39 W. R. 255; 55 J. P. 294.

—— **Deduction for Interest on Money Borrowed.**]—The appellants under an act of parliament constructed a reservoir in the respondent's parish for the supply of water to mills situated on

certain streams. They were authorised by the act to apply to this purpose money subscribed for the relief of sufferers by the bursting of a former reservoir, and also to raise a further sum on the security of rates to be levied on the occupiers of such mills in proportion to the falls of water occupied by them. The rates so to be levied were limited by the act and were appropriated to current expenses, maintenance of the reservoir, payment of interest on sums borrowed, reserve, &c. The water flowed from the reservoir into the natural course of the streams supplying the mills, nothing further having to be done to it by the appellants after it left the reservoir. Some of the falls in respect of which the rates were payable were situated within and others without the respondent's parish :—Held, that the appellants had a beneficial occupation of the reservoir in respect of which they were liable to be rated ; in estimating the rateable value they were not entitled to deduct the sum paid for interest on money borrowed ; that the property was not exempted from rates by reason of the appropriation clause ; that in estimating the rateable value the sums recovered for rates payable in respect of falls situate without the parish should be taken into account as well as those within the parish. *Reg.* v. *Holme Reservoirs Directors*, 10 W. R. 734.

—— **Deduction for Rates—Works in Excess of Existing Requirements.**]—A waterworks company had works extending over many parishes. All the works were in use for the supply of their customers, but they were in excess of the existing requirements of the company, and were created for and adapted to an increased supply in future years. In the calculation by which the rateable value of the mains and service pipes in one of the parishes supplied was to be arrived at :—Held, that, the whole of the works being used for the purpose of distributing water as a source of profit, the whole of the capital expenditure must be taken into account, and not merely so much as would have sufficed to provide the existing supply :—Held, also, that the deduction to be made in respect of the rates which the hypothetical tenant would have to pay is the amount of the rates that would be payable on the sum at which the works ought to be assessed, and not necessarily the rates based on the existing valuation list. *Reg.* v. *South Staffordshire Waterworks Co.*, 55 L. J., M. C. 88 ; 16 Q. B. D. 359 ; 54 L. T. 782 ; 34 W. R. 242 ; 50 J. P. 20—C. A.

—— **Deduction for Repairs—Water-rates in aid of Water-rents — Remuneration to Contractor.**]—By their special act, 39 & 40 Vict. c. clxxxv., the appellants, a local board, were empowered to make a public water-rate, but s. 106 provided that they should not levy any higher public water-rate than might be required to discharge so much of the expenses of maintaining the waterworks as the amount of water-rents and other payments for a supply of water should not be sufficient to discharge :—Held, that in assessing the appellants to the poor-rate in respect of their reservoirs, pipes, and works, the amount collected by means of a water-rate ought to be taken into account ; that a certain percentage on the total cost of the property might be allowed for wear and tear as the "probable average annual cost of repairs" within the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), s. 1 ; and that the adequate remuneration to a contractor for erecting the works was not the true measure of the net rateable value of the premises. *Dewsbury Waterworks Board* v. *Penistone Union*, 55 L. J., M. C. 121 ; 17 Q. B. D. 384 ; 54 L. T. 592 ; 34 W. R. 622 ; 50 J. P. 644—C. A.

Occupiers of Reservoir—Use of Pipes.]—Geo. 1 granted to a company a canal or basin and an old pond in St. James's-park, to be converted into reservoirs, and to be used and enjoyed by them as such, for the purpose of supplying Westminster with water during the royal pleasure. Liberty was also granted to them to break up the ground through the park for laying pipes from the old pond and canal for the purpose aforesaid, making good the ground so broken as soon as possible. The company took the basin and pond in pursuance of the warrant, and used it accordingly, making a reservoir, but was never allowed to alter or repair it but under the inspection of the crown surveyor. They paid no rent. The ranger was rated for the herbage growing on the surface of the soil in the park, including that under which the pipes passed :—Held, first, that the company was rateable as occupiers of the reservoir ; and, secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though the ranger was rated for the herbage. *Rex* v. *Chelsea Waterworks Co.*, 2 N. & M. 767 ; 5 B. & Ad. 156 ; 2 L. J., M. C. 98.

Waterworks occupied under Special Enactments.]—By a local act commissioners were empowered to erect waterworks for the purpose of supplying water for watering the streets, used in case of fires, and other public purposes, in Liverpool, and to levy a rate on the borough for the expenses thereof. The act contained express prohibitions against using this water for domestic purposes. The commissioners erected waterworks in an adjoining township of West Derby. By subsequent acts the property and powers of these commissioners became vested in the corporation of Liverpool. Water was supplied in Liverpool for domestic purposes by trading companies from waterworks also situated in the township of West Derby. The corporation was, by a local act, empowered to purchase the undertakings of these companies, and for that purpose to borrow money. When purchased, the corporation was to supply water for domestic purposes to the inhabitants of Liverpool, which then comprised the parish of Liverpool, and part of the township of West Derby, and parts of other townships, with power to supply the inhabitants of an adjoining district, including the whole township of West Derby. It was enacted that the corporation was so to regulate the charges for the water so supplied as to raise no more money than the interest of the money borrowed, and the expenses of managing the waterworks. The purchase was completed, and those waterworks were vested in the corporation. By a subsequent act the corporation was empowered to use the water from the commissioners' waterworks and the company's waterworks indiscriminately, and the pipes were accordingly united, and the two sets of waterworks were occupied in common :—Held, that the corporation was rateable in the township of West Derby for the waterworks there occupied by them under these enactments. *Liverpool Corporation* v. *West Derby Overseers*, 6 El. & Bl. 704 ; 25 L. J., M. C. 112 ; 2 Jur. (N.S.) 1002.

Licence to Lay down Pipes.—By a paving and lighting act, the tenants and occupiers of all

messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brewhouses, and other buildings, gardens or garden ground, and other tenements within the same town, were liable to be rated for the purposes of the act:—Held, that, under such act, a waterworks company was not rateable as occupiers of a tenement in respect of their water-pipes carried under ground, for supplying those towns with water. *Rex* v. *Manchester Waterworks Co.*, 3 D. & R. 20; 1 B. & C. 630.

A mere liberty granted under an act of parliament to a water company to break up the ground and lay down pipes is not liable to be rated. *Ib.*

"Property other than Land," what is.]—A water company were occupants of pipes under the surface of the soil in a parish in which the provisions of the 3 & 4 Will. 4, c. 90, had been adopted. The parish was within the metropolitan district. In a lighting rate imposed under the Metropolitan Management Act (18 & 19 Vict. c. 120), the company was rated as coming within the description in s. 165 of occupants of "houses, buildings, and property other than land," at a rate three times greater than that at which the occupiers of land were rated:—Held, that they were rateable at the lower rate, as occupiers of land. *Reg.* v. *Southwark and Vauxhall Water Co.*, 6 El. & Bl. 1008; 3 Jur. (N.S.) 411; 5 W. R. 71.

By an improvement act, a town council was empowered to make and levy a rate upon any person who occupied any house, shop, &c., except as hereinafter excepted, according to the full net annual value thereof respectively; and by a section it was provided that "the occupiers of any land covered with water" shall be rated in respect of the same at one-fourth part only of the net annual value:—Held, that a reservoir of a water company came within the proviso, but that water-pipes did not. *Reg.* v. *Birmingham Waterworks Co.*, 1 B. & S. 84; 4 L. T. 242.

Held, secondly, that the pipes and mains of the company within the borough were rateable to the borough to the full extent, and not thereby to one-fourth part of their net annual value as land covered with water. *Ib.*

Reservoir—Property occupied solely for Public Purposes.]—Commissioners under a local act constructed a reservoir in a township across a stream, upon land purchased by them under the powers of the act, for the purpose of affording a more regular supply of water to the mills upon the stream, and by means thereof cleansing the stream, and thereby promoting the health of the persons residing upon its banks. The water flowed from the reservoir along the ancient bed of the river, and the result obtained was a more regular supply of water to the mills, and thereby an increased regularity in the motive power, whereby the mills were enabled to continue working at times when, without the reservoir, they would be compelled partially to cease working. None of the mills benefited by the reservoir were situate in the township, but in other townships lower down the stream. The commissioners, under the powers contained in the act, levied rates upon the mills, in order to pay the interest on the money borrowed for constructing the reservoir, and the necessary expenses of its maintenance. The commissioners were rated as occupiers of the land and reservoir, and it was admitted that the assessment would be a fair and proper assessment on the occupiers of the reservoir if the works constructed and carried on by the commissioners had been a private undertaking of any person or persons who had increased the available supply of water to the different millowners, as was done by the reservoir, and who at pleasure could allow or refuse the millowners the benefit of such increase of water, and could charge them for such supply:—Held, first, that the reservoir was not exempted as property occupied solely for public purposes. *Reg.* v. *Kentmere*, 17 Q. B. 551; 21 L. J., M. C. 13; 16 Jur. 265.

—— **Increase of Water Supply to Millowners.**]—Held, secondly, that the amount of the rate was correct, because, first, the commissioners, being all millowners, must be considered as representing the whole class to be benefited by the improved supply of water, and in the situation of a water company established for the same purpose; secondly, the purpose to which the land was then applied, and not the manner in which it was used at any former period, must be regarded; and, thirdly, the rateable value of the mills must be estimated at an amount minus the contribution to the assessment paid by each millowner, so that the millowners should not be doubly assessed. *Ib.*

Water-pipes extending into several Districts.]—A metropolitan parish contained seventeen large districts of building land, for each of which a special act of parliament was passed, and the rating clauses for paving, lighting, &c., differed in language. The N. water company had water-pipes under the streets in all the districts. In one local act, the rating clause specified only "houses, shops, warehouses, cellars, vaults, buildings, and tenements." Another specified only "grounds, houses, shops, gardens, vaults, and other buildings":—Held, that the words "tenements" and "grounds" must have the widest meaning, and included all land capable of being let at an annual value, and that the N. company was rateable in all these local districts as occupiers of land in respect of their water-pipes. *New River Co.* v. *St. Pancras Vestry*, 45 J. P. 75.

The 6 Geo. 3, c. 70, for better supplying the inhabitants of Bath with water, reciting that there were springs of water in the neighbourhood belonging to the corporation, enacts, that they shall have power and authority to cause the water to be conveyed from such springs to the city, and gives them authority to enter upon and break up the soil of any public highway or waste, and the soil of any private grounds within two miles of the city, and the soil or pavement of any street within the city, in order to drain and collect the water of the springs, and to make reservoirs, and to erect conduits, water-houses, and engines, necessary for keeping and for distributing the water, and to lay underground aqueducts and pipes for the same purpose; and it vests the right and property of all these in the corporation:—Held, that, in addition to the springs, the corporation was liable to be rated for the reservoirs made by them in the parish of Lyncomb and Widcombe under the act, as for land occupied by them, which reservoirs, by means of aqueducts and pipes laid underground partly in the same parish, and through the parish of St. James into the parish of St. Peter and St. Paul in Bath, for the supply of the city, produced to the corporation a clear annual profit of

600*l.*; but that the corporation was not rateable for the whole of the entire profit in the first-mentioned parish, in which the springs were first collected into the reservoirs; a proportion of such entire profit accruing to them from the underground aqueducts and pipes laid into the soil of the other parishes, in respect of which they were to be considered as the occupiers of land yielding annual profit in those parishes. *Rex* v. *Bath Corporation*, 14 East, 609; 13 R. R. 333.

Where a company was empowered by act of parliament to lay underground through the streets of a town main pipes for the conveyance of water, and the inhabitants, with the company's consent, to lay pipes communicating with such main pipes to their houses, paying to the company a rate for such privilege:—Held, that the company was rateable in the parish where the main pipes lay in respect of those pipes, and the rates paid thereon. *Rex* v. *Rochdale Waterworks Co.*, 1 M. & S. 634. And see *Rex* v. *Liverpool*, 8 East, 455, n.

—— **Apportionment of Rateable Value and Deductions.**]—Works of a water company extended into several parishes, and consisted of two portions, one of which, being the several pipes which delivered the water to the consumer, was directly productive of profit; and the other consisting of reservoirs, buildings, &c., indirectly conduced to such production in some parishes. The company had no works, but service pipes. The rateable value, for the purposes of poor-rates, of the entire works was 30,800*l.*, the rateable value of the reservoirs, buildings, &c., valued as land and buildings deriving additional value for their capacity of being applied to the objects of a water company, 6,500*l.*:—Held, that the rateable value ought to be apportioned among the several parishes in the following manner: the rateable value of the reservoirs, buildings, &c., valued as above to be first deducted from the total rateable value, and distributed among the parishes in which this portion of the works was situate, according to the extent of such works in each parish; and the residue of the rateable value to be apportioned among the parishes containing the service pipes, in the ratio of the net profits produced in each of those parishes. *Reg.* v. *Mile End Old Town Overseers*, 10 Q. B. 208; 3 New Sess. Cas. 13; 16 L. J., M. C. 184; 11 Jur. 985.

The pipes and reservoirs of a waterworks company were so placed in the several parishes in which they were respectively situate, that the whole together formed one apparatus for the supply of water, in some only of such parishes, to the customers of the company; a part of such apparatus being rateable to the poor-rate in each parish:—Held, that it was not a correct principle, in order to ascertain the rateable value of the apparatus in any one particular parish, to calculate the total rateable value of the whole apparatus in all the parishes, and then divide that value among the several parishes, according to the quantity of land occupied by the apparatus in each of them. *Chelsea Waterworks Co.* v. *Putney Overseers*, 3 El. & El. 108; 29 L. J., M. C. 236; 6 Jur. (N.S.) 940; 2 L. T. 663; 8 W. R. 607.

A waterworks company was empowered to construct works and lay mains and pipes through and under certain highways, roads, &c., and to supply certain parishes with water. The company erected in a parish, H., not being one of those parishes, engine-houses and other works, and laid down a main thence, part of which ran through H., conveying the whole of the water to reservoirs in another parish, from which reservoirs the water was distributed, through other mains and pipes, to the customers of the company in the several parishes named in their acts. The company derived no direct profit in H., and had no freehold or leasehold interest in the soil of the highway:—Held, that the company being in possession of the mains buried in the soil, and therefore, de facto, in beneficial occupation of the part of the soil occupied by the mains, was rateable in respect of them. *Reg.* v. *West Middlesex Waterworks Co.*, 1 El. & El. 716; 28 L. J., M. C. 135; 5 Jur. (N.S.) 1159.

—— **Calculation of Profits.**]—Held, also, that, as regarded the principle of assessment, the company was to be rated in H. in respect of the plant, engine-houses, buildings, wharves, mains, lands, and premises, as for mere land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company, such additional value being derived from an increase of demand beyond supply, according to the principle regulating exchangeable value, and not by reference to receipts earned in another parish, beyond assuming that they were sufficient to pay for all outgoings, including profits on capital. *Ib.*

Direct and Indirect Sources of Profit.]—It may be doubted whether the distinction which has been taken between direct and indirect sources of profit, as applied to the mains and pipes of a water company running through different parishes, is well founded, and more especially in cases where the mains only belong to the company, and not the service-pipes. *Sheffield United Gaslight Co.* v. *Sheffield Overseers*, 4 B. & S. 135; 32 L. J., M. C. 169; 9 Jur. (N.S.) 623; 8 L. T. 692; 11 W. R. 1064.

The proper allowance to be made for tenants' profits and interest on capital is entirely a question of fact. *Ib.*

Supplemental Valuation List.]—During the first year after a quinquennial valuation list in the metropolis had come into operation, some new houses were connected by means of service pipes with a water company's main previously existing and assessed in the quinquennial list. Such connections caused an increase of the company's gross receipts arising from the additional rentals derived from the new houses; but no alteration was made in the mains themselves, the service pipes being the property of the owners or occupiers of the houses:—Held, that the increased rental so derived constituted an alteration of the matters stated in the valuation list, within s. 46 of the Valuation of Property (Metropolis) Act, 1869, and was properly taken into account in a supplemental list made under that section, whereby the rateable value of the company's mains was assessed at a greater amount than it had stood at in the quinquennial list. *Reg.* v. *St. Mary, Islington, Assessment Committee*, 48 L. J., M. C. 123; 4 Q. B. D. 309; 40 L. T. 322; 27 W. R. 785.

16. Navigable Rivers.

Easement for the Purpose of River Navigation—Bed of River.]—Certain persons were authorised under an act to make navigable, clear,

cleanse, scour, open, enlarge and straighten a river, dig and cut banks, erect weirs, locks and dams, make new cuts and trenches through lands adjoining which they were to purchase, and make towing-paths over land partly purchased and partly rented by them:—Held, that they were not rateable as occupiers of the river or of the land taken for the purposes of the navigation, because they were not occupiers of it, but had a mere easement in it; but that they were rateable for the new cuts and trenches, and for the weirs, locks and dams erected on their own land. *Rex* v. *Mersey and Irwell Navigation Co.*, 4 M. & Ry. 84; 9 B. & C. 95; 7 L. J. (O.S.) M. C. 70. And see *Rex* v. *Chelsea Waterworks Co.*, 5 B. & Ad. 156; 2 N. & M. 765; 2 L. J., M. C. 98.

—— **Bed of River and Towing-path.**]—Where the predecessors in title of a railway company were empowered by statute to scour, enlarge and deepen, and otherwise to improve the navigation of a river, and to make a towing-path, the company are not in occupation of the bed of the river, but have merely an easement; nor is the ownership or exclusive occupation of the towing-path vested in them. They are not, therefore, rateable in respect either of the bed of the river or of the towing-path. *Rex* v. *Mersey and Irwell Navigation Co.* (9 B. & C. 95) and *Badger* v. *South Yorkshire Ry. and River Don Navigation Co.* (1 El. & El. 347) followed. *Doncaster Union* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 6 R. 280; 71 L. T. 585—H. L. (E.)

—— **Cuts and Towing-Paths.**]—By a local act, a company was authorised to make the river Avon navigable from B. to H., and to make any new cuts through the lands adjoining the river; and commissioners and a compensation jury were authorised to settle and assess what satisfaction the landowners should have for their lands made use of by the company, and to adjust what share of such purchase-money every tenant having a particular estate should have; and the order, sentence or decree so made was directed to be made a record of quarter sessions. By a subsequent act, the company was authorised to make a horse towing-path, and further powers were given for the purchase of lands. The company made a new cut and a horse towing-path; and an inquisition of a jury assessed, as a recompense for the value of the land taken for the act, thirty years' purchase. No conveyance was ever made to the company of any lands for the cuts or towing-path; but previously to making the latter, the company gave a satisfaction to the respective landowners of a general sum or annual payment, as a recompense for the land taken. The remainder of the land taken by the company for a towing-path, and not used by them, was depastured or otherwise used by the adjoining landowners:—Held, that the company had such an exclusive occupation both of the cuts and towing-path as made them rateable. *Bath River Navigation Co.* v. *Willis*, 3 P. & D. 220; 11 A. & E. 463; 2 Railw. Cas. 7. *S. C.*, nom. *Bruce* v. *Willes*, 9 L. J., M. C. 43.

Locks and Cuts in Land.]—An act authorised certain persons to make and maintain the river Avon navigable, to scour the river, to make new cuts through lands adjoining, and to build locks, first making satisfaction to the owners of lands. The act then appointed commissioners for settling and apportioning such satisfaction, and then empowered the undertakers to take certain tolls. The undertakers made the river navigable, and scoured and cleansed it from time to time, and made a cut and lock for the purposes of the navigation on land purchased by them:—Held, that they were not the occupiers of the river Avon, and rateable in respect of it, as land covered with water, but that they were rateable in respect of the cut and the lock made on their own land. *Rex* v. *Avon Co.*, 4 M. & Ry. 23. *S. C.*, nom. *Rex* v. *Thomas*, 9 B. & C. 114; 7 L. J. (O.S.) M. C. 66.

Occupation of House by Surveyor.]—A person occupying a house as surveyor under the trustees of a navigable river is liable for poor-rates, although by the act regulating the tolls to be taken on the river, such tolls are exempted from being rated, and although the trustees have no beneficial interest in the navigation of the river or the tolls. —— v. *Armstrong*, 2 Stark. 543. And see *Malkin* v. *Vickerstaff*, 3 B. & Ald. 89.

Right of Navigation—Liability of Grantee.]—The grantee of the right of navigation of a river is rateable in respect of tolls arising from a sluice erected in the parish, though he himself resides elsewhere, and the tolls are collected in another parish. *Rex* v. *Cardington*, Cowp. 581.

Navigation through several Parishes.]—Where a navigation runs from A. to B. through several intervening parishes, and the tolls for the whole navigation are collected in those two parishes, they may be assessed in those two parishes for the whole amount, according to the proportion collected in each. *Rex* v. *Aire and Calder Navigation*, 2 Term Rep. 660; 1 R. R. 579.

Where by a navigation act the proprietor was entitled to a toll of 4*s.* per ton for goods carried from A. to B., or from B. to A., and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection:—Held, that the tolls for goods carried the whole voyage from A. to B. were rateable in B., though in fact they were collected in a parish between A. and B., because the tolls become due where the voyage is completed. *Rex* v. *Page*, 4 Term Rep. 543; 2 R. R. 454.

Where the proprietors of an inland navigation, running through fourteen different parishes, were rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits:—Held, that the rate was too high, and ought to have been apportioned among all the parishes though which the navigation passed. *Rex* v. *Palmer*, 2 D. & R. 793; 1 B. & C. 546; 25 R. R. 502.

Where a navigable river passed through several parishes, and dues on tonnage became payable for goods carried along the line of navigation, and landed at a wharf locally situate within a particular parish:—Held, that a rate on the proprietors of those dues, for their whole amount in that parish for the river tonnage, could not be considered as a rate on that part of the river locally situate within such parish, but as a rate on the parts of the river situate as well within that parish as without it; and consequently that it could not be supported. *Rex* v. *Milton*, 3 B. & Ald. 112; 22 R. R. 317.

The owners of mills in a township, in compensation for the loss of water occasioned to them by an adjoining navigation, were allowed, by act of parliament, to take certain tolls at a lock

situate on the line of navigation, but in a different township :—Held, that they were not rateable at their mills, in respect of the tolls so taken. *Rex* v. *Aire and Calder Navigation Co.*, 3 B. & Ad. 533 ; 1 L. J., M. C. 90.

—— **Proportion to Profits.**]—The proprietors of a river navigation are rateable in a parish through which the navigation passes (though no riverage dues are received in such parish), in proportion to their profits upon the whole line of navigation. *Rex* v. *Portmore* (*Earl*), 2 D. & R. 798 ; 1 B. & C. 551 ; 25 R. R. 505.

—— **Deductions for Expenses and Tenant's Profits.**]—The proprietors of a river navigation, formed under an act of parliament, are rateable in every parish through which it passes, in proportion to the profit derived from the navigation in such parish. *Rex* v. *Woking*, 5 N. & M. 395 ; 4 A. & E. 40 ; 1 H. & W. 539 ; 5 L. J., M. C. 17.

The proprietors of a river navigation running through several parishes were entitled to claim a toll of 4*s*. The trustees fixed the tolls at 4*s*. for the whole distance, and at different decreased rates for fixed portions only of the whole distance :—Held, that in calculating the sum at which the proprietors were to be rated in any one parish, the proportion was to be ascertained on a mileage calculation with respect to the whole distance as regards the thorough trade ; and on a mileage calculation with respect to the distance gone over as regards the short trade, excluding in the latter case all trade in parts in which the particular parish was not situated. *Ib.*

In calculating the amount of profit, a deduction for the necessary repairs and expenses must be made, the proportion of the particular parish being ascertained where the repairs are equal throughout the whole distance, by a mileage calculation. *Ib.*

So a reasonable sum must be deducted for tenants' profits. *Ib.*

No deduction is to be made in respect of sums payable by the act of parliament, as compensation to persons injured by the navigation, out of the profits of the undertaking ; such sums being only in the nature of rent-charges, and not affecting the value of the occupation. *Ib.*

Commissioners of a navigation having borrowed 28,000*l*. on mortgage, and being still in want of funds, agreed to let the navigation and tolls for ninety-nine years, the lessee undertaking to pay the interest of the 28,000*l*. An act was afterwards passed confirming the agreement and empowering the commissioners to lease the navigation and tolls for the remainder of the term to the persons entitled under the former agreement, and enacting that they should pay the interest of the 28,000*l*. yearly to the mortgagees, in default of which the commissioners might require the toll-collector to pay such interest to the mortgagees out of the moneys in his hands :—Held, that the interest paid by the lessees was in substance a rent, and that the rate ought to be calculated upon it, and that the lessees were not occupiers under a beneficial lease, though the interest was only about 1,400*l*. a year, and the annual earnings at the time of making the rate were 3,418*l*. (from which, however, about 1,000*l*. was to be deducted for repairs, &c.), one year's value being no criterion, and there being no proof that the rent was unduly small. *Rex* v. *Chaplin*, 1 B. & Ad. 926 ; 9 L. J. (o.s.) M. C. 121.

17. MOORINGS.

Barge Moored to Bed of River and made into a Pier.]—A. moored a barge in the Thames between high and low water mark ; the moorings, by which it was moored, were stationary in the bed of the Thames, and were in the parish of Greenwich. The barge was connected by a chain with stairs on the land, the soil of which was not the property or in the occupation of A., and which was at that point a common highway to the Thames. Movable planks were laid from the shore on to the barge, and thence to another barge moored farther out in the Thames, and which always floated. By this means a pier was constructed, which was permanently kept there and used for embarking in steamboats and landing from them ; and A. was remunerated by the parties so using, and he had the sole control of the pier :—Held, that he was rateable to the poor-rate for Greenwich, as an occupier of land in the bed of the river. *Forrest* v. *Greenwich Overseers*, 8 El. & Bl. 890 ; 27 L. J., M. C. 96 ; 4 Jur. (N.S.) 480 ; 6 W. R. 279.

Floating Pontoon.]—A railway company owned a pontoon which they used for a landing stage for a steam ferry across a tidal river. The pontoon floated, except at low tide, when it rested upon the mud of the foreshore. It was moored to a pier, by the licence of the pier owners, by means of mooring chains. To protect the piles of the pier from being chafed by the mooring chains, the company had driven a pile into the bed of the river, and with the permission of the pier owners had bolted it and a cross-piece of timber to the piles of the pier :—Held, that the company were not in occupation of land so as to make them rateable to poor-rate. *Manchester, Sheffield, and Lincolnshire Ry.* v. *Kingston-upon-Hull Union*, 75 L. T. 127 ; 60 J. P. 789—C. A.

Barge attached to Posts—Movable Chattel.]—On a navigable river, the bed of which was vested in a corporation, a barge, the property of an individual, was moored by means of two iron rings fixed to the barge and passed loosely and movably round two posts which had been placed in the bed of the river twenty years before for the purpose of being so used, but without the leave and licence of the owners of the soil. The barge could be, but had never actually been, moved :—Held, that he was not rateable in respect of the posts, inasmuch as he was not shewn to have been in exclusive possession of them, nor of the barge, it being a movable chattel. *Grant* v. *Oxford Local Board*, 38 L. J., M. C. 39 ; L. R. 4 Q. B. 9 ; 19 L. T. 378 ; 17 W. R. 76.

Licence to use Moorings—Exclusive Occupation.]—The conservators of the Thames were owners of the soil and bed of the river and of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a coal depôt, under the following document : "We, the conservators of the Thames, grant to W. liberty and licence to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given to the other one calendar month's notice in writing, in consideration whereof W. agrees to pay towards the expenses of placing and maintaining and repairing the moorings the annual sum of 30*l*." W. was

assessed as occupier of part of the bed of the river:—Held, that the document was not a demise, but only granted a licence to use the moorings, and that W. was therefore not the occupier, nor liable to be rated. *Watkins* v. *Gravesend and Milton Overseers*, 37 L. J., M. C. 73; L. R. 3 Q. B. 350; 18 L. T. 601; 16 W. R. 1059.

Derrick always Afloat, and subject to be Moved.]—Persons were possessed of a derrick for loading and unloading (but not storing) coals in the Thames, which was moored within a parish under a licence from the conservators, in the following manner, viz. by two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream anchors one at the head and the other at the stern. The anchors and stones (which could be hauled on board by the machinery on the derrick) were merely dropped into the river, no force being used for the purpose of fastening them, but only a small quantity of ballast being removed in the bed of the river to enable the stones to lie flat. The derrick was always afloat, and was subject to be moved to any other part of the river, at the pleasure of the conservators:—Held, that the owners of the derrick were not liable to be rated to the relief of the poor in respect of these moorings. *Cory* v. *Greenwich Overseers*, 41 L. J., M. C. 142; L. R. 7 C. P. 499; 27 L. T. 150.

A local act authorised commissioners to make a rate upon all persons occupying or enjoying "any messuage or tenement, land, shop, warehouse or other building, wharf, yard, storehouse, ground, cellar, hereditaments or premises." A steamboat company occupied the ground floor of premises called the Mill, abutting on the Thames, and constructed a pier or landing-place in connection therewith. The pier consisted of floating barges, boarded over, and kept in their places by cables fastened to anchors sunk in the bed of the river. The barges were connected by wooden bridges, with a platform resting upon an abutment, and made fast to the wall of the premises occupied by the company. Passengers embarking by the boats passed through the ground floor of the building, where a fare was paid, and proceeded over the platform, bridge and barges to the boats. The upper part of the mill was occupied by S. The steamboat company was rated in respect of "tenement, land, landing-place and premises, and the brow or brows, barge or barges, lying upon, fixed to, or connected with the same tenement, land, landing-place or premises, and the easement or easements, anchorage or anchorages, held, used or enjoyed therewith"; and S. was rated for "mill and premises, exclusive of the steamboat pier":—Held, that the rate was valid, being laid, not on the floating pier, as distinguished from the land, but upon the landing-place and premises, together with the floating pier, by which the occupation of the land was rendered more valuable. *Reg.* v. *Leith*, 1 El. & Bl. 121; 21 L. J., M. C. 119; 16 Jur. 522.

Held, also, that the rate on S. excluded the ground floor and landing-place occupied by the company, and therefore the same subject was not rated twice. *Ib.*

Derrick fixed in Permanent Way.]—The 20 & 21 Vict. c. cxlvii. (the Thames Conservancy Act), vests in the conservators of the river Thames all the interest of the crown and of the lord mayor and corporation of the city of London in the bed and soil of the river. It does so for the purposes stated in that act, for the execution of which various powers are conferred upon the conservators. The conservators passed a resolution giving permission to C. to lay down moorings, attached to which they might place a derrick hulk, 510 feet from the river wall; the work of laying down these moorings was to be done to the satisfaction of the conservators, and was to remain "on condition that the accommodation be assessed, and the rent paid thereon; and that the hulk be not used for storing coals." The purpose of so mooring the hulk was that of fastening and holding coal vessels, while they were unloading and transferring their cargoes to barges and lighters. The derrick hulk was held in its position by chains and anchors set in large stones, and ballast placed in holes dug in the bed of the river, and the work of so placing the stones and ballast was performed by the conservators, the payment for the work being furnished by C. The conservators reserved to themselves power to remove the hulk at a week's notice. The derrick hulk could only be removed by being itself loosened from the chains attached to the stones and ballast; these holdings in the river continuing fixed as before:—Held, that C. was liable to be rated to the relief of the poor of the parish (within which lay that part of the river where the derrick hulk was moored) in respect of the profit derived by him from its employment, as he must be treated as a person in occupation of a part of the soil and bed of the river. *Cory* v. *Bristow*, 46 L. J., M. C. 273; 2 App. Cas. 262; 36 L. T. 595; 25 W. R. 383—H. L. (E.)

18. Piers and Harbours.

Occupation by Harbour Commissioners.]—By a local act, commissioners were appointed for improving the harbour of New Shoreham. By s. 26, the property of all the wharves, quays, buildings, . . . and of all works erected in and about the harbour, in pursuance of the act, was vested in the commissioners. By s. 27, the commissioners were required to deepen, cleanse and enlarge the channel of the harbour and to make new piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance into the harbour. By s. 83, after the piers had been made, there was to be paid by every person who should import or export any merchandise within the limits of the harbour, certain duties. The commissioners enlarged the channel so as to make a new entrance in the harbour, and built new piers, as authorised, and received duties on all merchandise brought into the harbour:—Held, that the soil in the channel was not vested by the statute in the commissioners, and they were not the occupiers so as to be rateable to the poor; that the soil on which the piers were built was vested in them, and that they were the occupiers of the piers, but their occupation was not so connected with earning the duties as to make them rateable in respect of the piers. *New Shoreham Harbour Commissioners* v. *Lancing Overseers*, 39 L. J., M. C. 121; L. R. 5 Q. B. 489; 22 L. T. 434.

Where harbour commissioners in whom the soil of the harbour is not vested, but who occupy the adjoining quays, are authorised to levy dues upon all ships entering the harbour, and the same dues are payable whether the quays are used or not,

the fact that many of the ships use and are attracted to the harbour by the existence of the quays does not so connect the dues paid by such ships on entering the harbour with the occupation of the quays as to entitle the rating authority to take such dues into account as enhancing the rateable value of that occupation. *Blyth Harbour Commissioners* v. *Newsham and South Blyth Overseers*, 63 L. J., M. C. 274; [1894] 2 Q. B. 675; 9 R. 618; 71 L. T. 34; 59 J. P. 4—C. A.

Part of Pier beyond Low-water Mark.]—A company received tolls for the use of a pier, which extended from the shore into the sea for several feet beyond low-water mark. The pier was constructed of a wooden deck resting on iron piles driven into the sands, so that the water flowed under it, and no alteration was made in the line of low-water mark:—Held, that the part of the pier beyond low-water mark, being beyond the realm, was not extra-parochial within 31 & 32 Vict. c. 122 (the Poor Law Amendment Act, 1868), s. 27, and as such annexed to any other parish, nor was it an accretion from the sea, and that, therefore, that section did not enable it to be rated. *Blackpool Pier Co.* v. *Fylde Union*, 46 L. J., M. C. 189; 36 L. T. 251.

Where a parish comes down to the bank of a river there is primâ facie evidence that it extends to the middle of the river. A pier leading from the bank into the river beyond the low-water mark, and consisting of a fixed platform supported on piles within two or three inches from the bank, and a floating barge moored close to but not attached to the platform, is to be held as being within the parish, and therefore rateable. *M'Cannon* v. *Sinclair*, 2 El. & El. 53; 28 L. J., M. C. 247; 5 Jur. (N.S.) 1302; 7 W. R. 567.

19. Docks and Wharves.

Occupation exclusively for Public Purposes—Benefit to particular Section of the Public.]—By local acts, commissioners were empowered to make and maintain docks in the river Tyne, and for that purpose to borrow money upon mortgage of the rates and dues to be levied under the acts; such rates and dues to be applied, first, in making and maintaining the docks; secondly, in paying the interest of the loan; and, lastly, in appropriating yearly a certain amount as a sinking fund for repayment of the principal. It was provided that if, after such appropriations, and before complete payment of the principal, there should remain any surplus, the commissioners should from time to time lower the rates and dues to the amount of such surplus. The commissioners were also empowered, after payment in manner aforesaid, to appropriate yearly a certain amount, the whole not to exceed 10,000*l.*, to be invested as a fund for extraordinary repairs and expenses; and if, after such accumulation, there should be any surplus, the commissioners were empowered to reduce the rates to the annual amount necessary for the maintenance and working of the docks. The docks were completed and used by ships frequenting the river Tyne, and the commissioners received an income of 10,000*l.* per annum from the rates and dues:—Held, that the commissioners were rateable in respect of their occupation of the docks; such occupation not being exclusively for public purposes, but producing a benefit only to a particular section of the public, and there being nothing in the acts expressly excluding, in the event of a surplus, the payment of poor-rates out of the funds in the hands of the commissioners before the rates were reduced. *Tyne Improvement Commissioners* v. *Chirton Overseers*, 1 El. & El. 516; 28 L. J., M. C. 131; 5 Jur. (N.S.) 865; 7 W. R. 242.

Docks were vested in trustees to be kept up by rates levied on vessels using the same; the moneys derived from the rates were to be applied, first, in paying interest on a debt which had been incurred; secondly, in maintaining the docks; and lastly, in reduction of the rates:—Held, that such trustees were beneficial occupiers of such docks within 43 Eliz. c. 2, and were consequently liable to the poor-rate in respect thereof. *Mersey Docks and Harbour Board* v. *Cameron*, 20 C. B. (N.S.) 56; 11 H. L. Cas. 443; 35 L. J., M. C. 1; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.

—— **Shares made Personal Property—Annual Profit.**]—Lands purchased by a company, and converted into a dock, according to an act which declares that the shares of the proprietors shall be considered as personal property, are rateable in proportion to the annual profits. *Rex* v. *Hull Dock Co.*, 1 Term Rep. 219.

In different Parishes—Mode of Assessment.]—A dock company were proprietors of several docks, made at different times and under successive acts of parliament. The docks communicated with each other and with the river Humber, and extended into several parishes. Every vessel paid a single toll which became due on entry into the docks, and was paid then, or on clearance outwards, and the vessel was entitled by such payment to go into any one or more of the docks at the will of her own master, or under the direction of the company's harbour-master, who had powers for regulating the position of vessels. All the payments, at whatever dock received, were carried to one general account:—Held, that the poor-rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipt in the parish, but to the proportion which the area of dock within the parish bore to the entire of the docks; for that in such a case an assessment on the acreage principle was unavoidable, though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits it. *Reg.* v. *Hull Dock Co.*, 18 Q. B. 325; 7 Railw. Cas. 836; 21 L. J., M. C. 153; 16 Jur. 543.

Under acts of parliament the docks in different parishes on both sides of the river Mersey were to constitute one estate under one management. Rates were charged to the vessels entering any one of the docks; and a vessel having paid for entering one of the docks, could use any of the docks of the same class on either side of the river, or of a higher class by paying the difference. The docks on the Liverpool side were much more frequented than the docks on the Birkenhead side:—Held, that in rating to the poor-rate the docks on the Liverpool side, they were not to be treated as one system of docks with those on the Birkenhead side; but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side. *Mersey Docks and Harbour Board* v. *Liverpool Overseers*, 41 L. J., M. C. 161; L. R. 7 Q. B. 643; 26 L. T. 868; 20 W. R. 827.

A dock company owning a series of docks, extending through several parishes, ought to be rated in each particular parish according to the

profit which it derives from the portion of its docks situated in that parish and not according to the water area therein, unless it is impossible to estimate what proportion of the whole profit has been earned in each parish. *Mersey Docks* v. *Liverpool* and *Mersey Docks* v. *Birkenhead* (L. R. 8 Q. B. 447) followed, *Reg.* v. *Kingston-upon-Hull Dock Co.* (18 Q. B. 325) commented on. A dock company which is prohibited from charging tolls for running powers over railway lines and tramways belonging to it, is not rateable in respect of the rent which a hypothetical tenant would give in respect of the lines if there were no such statutory restriction. *London County Council* v. *Erith Overseers* ([1893] A. C. 562) explained. *Sculcoates Union* v. *Hull Docks Co.*, 64 L. J., M. C. 49; [1895] A. C. 136; 11 R. 74; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612—H. L. (E.)

Rateability — Land Covered with Water.]—A dock company were owners and occupiers of a dock for the reception of ships, with quays, warehouses, cranes, weighing machines, and other works, and also of railways or tramroads for transporting traffic to and from the docks, and communicating with their warehouses and with other railways. The railways or tramroads were made under the powers of their act, and were free to the public on payment of certain tolls. By the Local Government Act (21 & 22 Vict. c. 98), s. 55, the general district rates shall be made and levied upon the occupier of all such kinds of property as are assessable to the poor-rate, subject to this, among other exceptions, that "the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any act of parliament for public conveyance," is to be assessed at one-fourth only of the net annual value:—Held, first, that the dock was land covered with water, within the exception, and therefore rateable at one-fourth only of the net annual value. *Newport Dock Co.* v. *Newport Local Board*, 2 B. & S. 708; 31 L. J., M. C. 266; 9 Jur. (N.S.) 73; 6 L. T. 456.

—— **Property other than Land.**] — Held, secondly, that the warehouses and other adjuncts to a dock are rateable at the net annual value. *Ib.*

Held, thirdly, that the railways or tramways were constructed for public conveyance, within the exception in 21 & 22 Vict. c. 98, s. 55, and therefore rateable at one-fourth only of the net annual value. *Ib.*

By 3 & 4 Will. 4, c. 90, s. 33, owners and occupiers of houses, buildings, and property (other than land) rateable to the poor in any parish, are to be rated at "a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated." By s. 34, every court-yard, yard or garden (such garden not being a market garden or nursery ground) shall be included in, and make part of, the assessment to be made on the house, buildings or other property to which they may be respectively attached. The Victoria London Docks cover an area of 165 acres, ninety-five of which form a wet dock, tidal basin and canal, all covered with water; the remaining area consists of jetties which intersect the wet dock and basin, and of warehouses and buildings on the jetties. The whole forms one inclosure, occupied by the dock company, who make different charges for the use of the wet dock and basin, and for the use of the warehouses and buildings. The whole area is lighted and watched at their sole expense. In a watching and lighting rate, imposed under the above act, the company was rated, in respect of the whole area, at a rate in the pound thrice greater than that at which the occupiers of land were rated. On an appeal in respect of the ninety-five acres, from a decision of sessions confirming the rate:—Held, by Lord Campbell, C.J., Wightman and Crompton, JJ., that the company was rateable at a higher rate in respect of the ninety-five acres, for that such acres were "property other than land," and ejusdem generis with houses and buildings; but by Erle, J., that the company was rateable at the lower rate, for that the ninety-five acres were land. *Peto* v. *West Ham Overseers*, 2 El. & El. 144; 28 L. J., M. C. 240; 7 W. R. 586.

—— **Manufactory and Workshops.**]—By a statute for regulating the poor of Southampton, every person who shall let out his house in separate apartments or ready furnished lodgings, or shall let tenements built on the ground appurtenant to his principal dwelling, shall, for the purposes of the act, be deemed to be the occupier thereof. The Southampton Dock Company were the owners, but not occupiers, of the custom-house, a manufactory, and several workshops. The manufactory and workshops were within the inclosure of the company, the custom-house was built on land of the company at a distance:—Held, that these words did not apply to any of the premises in question. *Reg.* v. *Southampton Dock Co.*, 6 Railw. Cas. 428; 14 Q. B. 587; 20 L. J., M. C. 155; 15 Jur. 268.

—— **Floating Dock attached to Building Yard.**]—M. occupied a shipbuilding yard adjoining a public tidal and navigable river, and opposite to it he had a floating dock for the purpose of repairing ships, which floated at high water and grounded on the bed of the river as the tide fell. To enable the workmen to get to their work, a plank went from the yard to the dock, to which it was fastened by a rope, to prevent it falling if it should happen to be accidentally pushed off the dock. The dock was moored by four chains to the bed of the river and to the yard; the chains could be easily slackened or cast off by the hand, and this was done every time a vessel was docked or undocked. The harbour-master had power to remove the dock when the convenience of the harbour so required. The dock, when moored, was alternately in the same parish as the yard, and in the respondent parish, the water being the boundary. M. was rated for the building yard, "with floating dock attached," at an amount which was the aggregate of the separate rateable values of the yard and of the dock. The sessions having affirmed the rate, on the ground that, though the floating dock was not rateable per se, it was so connected with the building-yard as to enhance the value thereof:—Held, that the rateable value of the yard could not be considered as enhanced by reason of the floating dock, which had no necessary connection with it. *Reg.* v. *Morrison*, 1 El. & Bl. 150; 22 L. J., M. C. 14; 17 Jur. 485.

—— **Floating Pontoons.**]—The T. P. company are occupiers and owners of about nine acres of land on the Tyne, which is here a tidal river. A creek was excavated on the land, and in it were placed two pontoons, into which ships

could be received for repairing purposes. They were attached to piles and "dolphins" by means of shackles which could be easily detached and joined to the land by a movable gangway. They could be towed out, but, as a matter of fact, had not been moved except for repairing purposes for ten and four years respectively. They were rated as being in occupation of land over which they floated, and to which they were attached, and also that the occupation of the land was enhanced by reason of their being attached and used in connection therewith:—Held, that they were rightly rated on the latter ground, and were within the principle of *Reg.* v. *Morrison* (1 El. & Bl. 150). *Tyne Pontoons Co.* v. *Tynemouth Union*, 76 L. T. 782.

—— **Use of Sheds not amounting to Exclusive Occupation.**]—A. & Co. used certain quay space and sheds appropriated to them by a board of management for ten years, paying the stipulated charges. The sheds, which were constructed on the quay, consisted of a range of quays covered by one roof, and subdivided by partitions reaching to the roof into a store or shed, a transit shed and two open sheds. The store shed was provided with doors and locks, and was used by A. & Co. for holding stores for their ships when in port. The transit shed was situate about the centre of the range of sheds, having open sheds at each end of it. There were sliding doors communicating at each end with the open sheds, and one on each side communicating with the roadway and the dock respectively. This shed was used for the reception of goods liable to duty, but upon which no duty had at the time been paid. Each door of the transit shed had two locks; the key of one lock was kept at the custom-house, and the key of the other by A. & Co.: whenever a vessel was discharging, and at all times during the day, the transit shed was open, and the servants of the board went in at their pleasure, for the purpose of examining the goods therein, or for any other purpose connected with their duties. When the shed contained goods or ship stores belonging to A. & Co., they were watched at night by watchmen employed by them:—Held, that the board had not parted with the occupation of any part of such sheds so as to render A. & Co. rateable in respect of such occupation. *Allan* v. *Liverpool Overseers*, 43 L. J., M. C. 69; L. R. 9 Q. B. 180; 30 L. T. 93; 22 W. R. 330.

—— **Warehouses — Separate Rateability.**]—The appellants were owners and occupiers of docks, and of warehouses, workshops, &c., connected with their docks, and were rated to the poor-rate separately for each, Nos. 1—8 being the warehouses, &c., No. 9 the docks. They were compelled by statute to keep up the docks; and the working expenses, &c., taken as a whole, exceeded the income, the chief expense being the keeping up the docks and basin No. 9. The premises in the other eight items were each capable of separate beneficial occupation apart from their connection with the docks; but each was enhanced in value by reason of its proximity to and connection with the docks:—Held, that the separate rating of items 1—8 was right; for that, as each subject was capable of beneficial occupation, it was therefore rateable, notwithstanding its connection with the docks, which, as a whole, produced no profit; and that they ought to be rated at the enhanced value, which was what a tenant from year to year would be expected to give for them. *Mersey Docks and Harbour Board* v. *Birkenhead Overseers*, 42 L. J., M. C. 141; L. R. 8 Q. B. 445; 29 L. T. 454; 21 W. R. 913.

—— **Duty on Ships Entering Docks.**]—By 14 Geo. 3, c. 56, the Hull Dock Co. were empowered to make a basin or dock on certain crown lands granted to them for that purpose in the parish of T.; certain duties were to be payable to the company for every ship "coming into or going out of the said harbour, basin, or docks within the port of Kingston-upon-Hull":—Held, on appeal against a poor-rate for the parish of T., (1) even assuming that the word harbour was synonymous with port, so that the duties attached on all ships entering the port, whether they came into the dock or not, still the company were rateable in respect of the duties on ships which actually did enter the dock, those duties being profits of the company's land in T. accruing there; (2) that they were not rateable in T. for the dock in respect of duties which were paid by ships not entering or using it. *Reg.* v. *Hull Dock Co.*, 7 Q. B. 2; 14 L. J., M. C. 114.

Wharves—What are.]—One side of a canal basin consisted of the natural ground where particular persons were allowed to land their timber, for which no acknowledgment was paid, but which considerably increased the tonnage dues:—Held, not to be a wharf within the meaning of the Regent's Canal Act, and therefore not liable as such to be rated. *Rex* v. *Regent's Canal Co.*, 9 D. & R. 763; 7 B. & C. 720; 5 L. J. (o.s.) M. C. 151.

—— **Rateability of Tenants.**]—The appellants were in the occupation of two wharves, at a yearly rent, as tenants, under the trustees of the Bute Docks. In respect of goods shipped from or upon the wharves, the appellants paid to the trustees a fixed sum, which by the Dock Act was authorised to be received in respect of all goods landed or loaded upon or from the wharf, in addition to the tonnage rates paid by the ship passing into or out of the dock. No dues were charged on goods brought upon the wharves, and not shipped into the dock:—Held, that the dues were paid in respect of the use of the wharves, that in assessing the wharves to the poor-rate they were to be taken into account in ascertaining the rateable value, and that the appellants were liable to be rated in respect of them. *Reg.* v. *Dowlais Iron Co.*, 10 B. & S. 208.

—— **Right to Distrain Warehoused Goods for Rates or Tolls.**]—See *Green* v. *St. Katharine Dock Co.*, 19 L. J., Q. B. 53; 13 Jur. 1116.

Deductions — Cost of Collection — Tenant's Profits.]—The Mersey Docks and Harbour Board are incorporated by certain acts, under which they hold docks and other property connected with the docks, and they are authorised to levy dock rates and duties from the owners of vessels and goods for the privilege of using the docks, and they are bound to apply the dock rates and all money received by them from the dock property according to the directions of the acts. There are no shareholders, and no person derives any personal advantage or emolument whatsoever from the money received by the corporation, and all the rates are appropriated in payment of all

expenses and charges of collecting the rates and the several other purposes specified in the acts, and the residue in repaying money borrowed. The corporation having been rated to the poor-rate:—Held, that the corporation was not entitled, in addition to the cost of collecting the rates, to a deduction for tenants' profits. *Mersey Docks and Harbour Board* v. *Liverpool Overseers*, 43 L. J., M. C. 33; L. R. 9 Q. B. 84; 29 L. T. 454; 22 W. R. 184.

—— **Tenant's Fixtures.**]—Cranes, steam engines, shears, and other heavy machinery attached to the freehold and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purpose of the tenant's trade, and usually valued as between incoming and outgoing tenants, are not an allowable deduction. *Allan* v. *Liverpool Overseers*, supra. S.P., *Reg.* v. *Southampton Dock Co.*, ante, col. 1588.

—— **Allowance for Direction.**]—A dock was constructed by public commissioners under an act of parliament which gave them no power to remunerate themselves out of the dock funds for their services:—Held, that a deduction (under the head of disbursements) of 500*l.* as "allowance for direction" ought not to be allowed. *Reg.* v. *Tyne Improvement Commissioners*, 6 L. T. 489.

—— **Watching.**]—A deduction of 150*l.* for watching which was done by a police boat provided and paid for out of other than dock funds ought not to be allowed. *Ib.*

—— **Movable Plant—Towage.**]—A deduction (under the head of movable plant) of 1,200*l.* for a steamboat used for towing barges when filled with mud out to sea and back was not allowable while the boat was used only for the work of constructing the dock; if it became necessary for permanent use in removing silt it would be a deduction in future rates. *Ib.*

—— **Capital—Cash Balance.**]—A deduction (under the head of capital for carrying on the dock) of 500*l.* for cash balance ought not to be allowed, but a deduction in respect of stores in hand ought to be allowed. *Ib.*

—— **Rates and Taxes.**]—The allowance in respect of rates and taxes should be upon the net rateable value of the property after the rates and taxes themselves have been deducted. *Ib.*

20. Ferries and Way-Leaves.

Ferry Boats—Tolls and Landing-places.]—A company was incorporated, and empowered to establish and maintain a ferry over the public tidal and navigable river Tyne; to take lands and erect ferry-houses and landing-places on either side of the river, and to receive certain tolls for the passage of the ferry. The landing-places on either side were in the parishes of North and South Shields respectively; but the ferry boats, when working, were always afloat and in the parish of N.; and they varied their course in crossing according to the state of the tide. The tolls (which were the only profit derived by the company from the ferry and landing-places) were collected at the South Shields landing-place. The company having been assessed in the parish of South Shields, as occupiers of a ferry, landing and tolls, at one-half the entire net profit of the tolls; on appeal from that rate:—Held, first, that the tolls could not be directly rated as landed property from their connection with the landing-places, nor indirectly by laying the rate on the landing-places, and treating the half of the entire net proceeds of the tolls as the direct profit of each landing-place; and that, therefore, the rate could not be supported. *Reg.* v. *North and South Shields Ferry Co.*, 7 Railw. Cas. 849; 1 El. & Bl. 440; 22 L. J., M. C. 9; 17 Jur. 181.

Held, secondly, that in rating the landing-places, the tolls should not be entirely excluded from consideration; but that the landing-places should be rated as land rendered more valuable by being available for the purpose of earning the tolls. *Ib.*

Held, also, that the mileage principle was not applicable, so as to assess a portion of the profits on the two landing-places according to the proportion which their dimensions bore to the length of the transit over the river. *Ib.*

Owner in another Parish—Landing-place a Public Highway.]—The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they are so collected, and where one of the termini of the ferry is situated, and on which shore the ferry-boats are secured by means of a post in the ground; the soil itself at the landing-places being the king's common highway; and the owner of the ferry having no property in or exclusive possession of it. *Williams* v. *Jones*, 12 East, 346; 11 R. R. 411.

Ferry not Real Property within 43 Eliz. c. 2.]—The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resiant within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry; for supposing a ferry to be real property, it is not such real property as is mentioned in 43 Eliz. c. 2, the occupancy of which subjects the party to the relief of the poor of the place. And all the cases where parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy), have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated. *Rex* v. *Nicholson*, 12 East, 330; 11 R. R. 398.

Way-Leaves—Liability of Lessee.]—If A. has an exclusive right of using a way-leave over land which he holds in common with B., paying B. a certain sum yearly, and has the privilege of using a way-leave occupied by C., paying him so much per ton for the goods carried over it, A. is not rateable in respect of either of such way-leaves. *Rex* v. *Jolliffe*, 2 Term Rep. 90; 1 R. R. 437.

A. having granted to B. a lease for years of way-leaves (for the purpose of carrying coals), and the liberty of erecting bridges, and levelling hills over certain lands; B. made the waggon-ways, inclosed them, thereby excluding all other persons, erected bridges, and built two houses on the land for his servants:—Held, that B. was liable to be rated for "the ground called the waggon-way." *Rex* v. *Bell*, 7 Term Rep. 598.

21. Lighthouses.

Erected on Shore.]—A lighthouse erected on the shore for conveying light to ships at sea is

not rateable in respect of the value of the tolls paid by the shipowners for the benefit so communicated, but simply as a building. *Rex* v. *Fowke*, 9 D. & R. 120; 5 B. & C. 814; 29 R. R. 417.

—— **Lease of Land belonging to.**]—The commissioners of Irish lights having let a portion of the lands held by them as such to a tenant from year to year at a yearly rent:—Held, that the land so in the occupation of the tenant was not exempt as being land held for public purposes. *Boal* v. *Buckle*, 16 W. R. 435.

Occupation of Public Trustees — Merchant Shipping Act, 1854, s. 430.]—The appellants appealed against a poor-rate made by the respondents in respect of a lighthouse, telegraph station, houses, buildings and land in the parish of Llanelian. The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act, 1857, and the property, powers, rights and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that, with the other receipts of the appellants applicable to conservancy purposes, they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property. The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, and also a room used for working a telegraph wire from Birkenhead to Holyhead, maintained by the postmaster-general for the exclusive use of the appellants under an agreement. The dwelling-house and other premises were occupied by servants of the appellants. The tower of the lighthouse had no occupation value except as a lighthouse and a telegraph station:—Held, that the tower was incapable of profitable occupation as a lighthouse, and was not rateable to the relief of the poor, but that, with respect to the adjoining houses, it having been found as a fact that their value was enhanced from being used in connection with the tower, the assessment on that footing was correct. *Mersey Docks and Harbour Board* v. *Llanelian Overseers*, 54 L. J., Q. B. 49; 14 Q. B. D. 770; 52 L. T. 118; 33 W. R. 97; 5 Asp. M. C. 358; 49 J. P. 164—C. A.

The 430th section of the Merchant Shipping Act is only applicable to lighthouses under the control of the general lighthouse authorities. *Ib.*, 51 L. T. 62; 5 Asp. M. C. 248; 48 J. P. 391.

Tolls in different Parishes.]—The tolls of a lighthouse situated in a township, which tolls were collected out of the township, in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable quâ tolls in the township. *Rex* v. *Tynemouth*, 12 East, 46; 11 R. R. 328.

Duties.]—Where a poor-rate was imposed upon a lighthouse, together with the duties payable for the same, and the duties were collected out of the parish:—Held, that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable. *Rex* v. *Coke*, 5 B. & C. 797; 8 D. & R. 666; 5 L. J. (o.s.) M. C. 8; 29 R. R. 408.

—— **Principle of Assessment — Structural Value.**]—Dues earned under statutory authority by the commissioners of a port in respect of a lighthouse erected within the limits of a particular parish are not to be taken into consideration in the assessment of the lighthouse to the poor-rate of that parish, and its structural value appears to be the only basis on which to found any assessment of its rateable value. *Lancaster Port Commissioners* v. *Barrow-in-Furness Overseers*, 66 L. J., Q. B. 90; [1897] 1 Q. B. 166; 75 L. T. 358; 61 J. P. 21.

22. RAILWAYS.

Mode of Rating—General Principles.]—The amount on which a railway, when the railway company are themselves the carriers, is to be assessed to the poor-rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the company from the conveyance of passengers, cattle and goods, under the powers of their acts, such lessee finding locomotive power, carriages, &c., and paying all expenses incidental to working the railway, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, and making allowance and deductions for the average annual cost of repairs, insurance, and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent. *Reg.* v. *L. & S. W. Ry.*, 2 G. & D. 49; 1 Q. B. 558; 2 Railw. Cas. 629; 11 L. J., M. C. 93; 6 Jur. 686.

—— **Leased Line when not to be treated as integral Part of leasing Company's System, but as independent Line.**]—A railway company constructed under the powers of their act a line which formed a connecting link between the lines of three other companies, and for some time retained possession of such line, taking tolls for the use of it by such other companies. Subsequently, by an agreement between the first-mentioned company, therein called "the lessors," and the three other companies, therein called "the lessees," which agreement was confirmed by and was to have the same effect as if its provisions had been enacted in an act of parliament, the line was leased to the lessees in perpetuity at an annual rent, and the lessees were by such act empowered to use, and they did use, such line in connection with their respective systems without payment of tolls. The existence of the said first-mentioned company was continued by the confirming act for certain purposes, such as the receipt of the yearly rent and its distribution among the shareholders, and there was a provision in the agreement which by necessary implication gave power to the lessees to let the line with the consent of the lessors under seal:—Held, that, having regard to the provisions of the agreement and of the act confirming it, the rateable value of the line for the purposes of the poor-rate was not to be ascertained as if it were an integral portion of the lines of the three companies using it, but was to be based upon the rent which a tenant from year to year might reasonably be expected to give for it as an independent line. *North and South-Western Junction Ry.* v. *Brentford Union*, 56 L. J., M. C. 101; 18 Q. B. D. 740; 57 L. T. 429; 35 W. R. 640; 51 J. P. 772—C. A.

—— **Railway not Constructed under Act of Parliament.**]—A railway constructed without

any parliamentary powers, eventually sold, enlarged and used, by act of parliament, for public conveyance, does not come within s. 55 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), as a railway constructed under the powers of any act of parliament; and is therefore rateable in the full nett annual value. *N. E. Ry.* v. *Leadgate Local Board*, 39 L. J., M. C. 65; L. R. 5 Q. B. 157; 22 L. T. 62; 18 W. R. 691.

—— **At Lower Rate — Within the term "Land."**]—By 3 & 4 Will. c. 90, s. 33, the owners and occupiers of houses, buildings and property (other than land) rateable to the relief of the poor in any parish shall be rated at and pay a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at for the purposes of this act (watching and lighting):—Held, that a line of railway was land within the meaning of the section; and was therefore only rateable at the lower rate. *Reg.* v. *Midland Ry.*, 44 L. J., M. C. 137; L. R. 10 Q. B. 389; 32 L. T. 753; 23 W. R. 921.

A local lighting act made "all houses, buildings, erections, works, tenements and hereditaments" liable to be rated, and excepted "land": —Held, that this exception extended only to land used for the purposes of agriculture or gardening, or any kind of mere vegetation, together with the roads and other matters which are ancillary to those purposes; and that hereditaments in which capital had been invested for habitation, or for purposes of profit from manufacturing or mechanical industry, were liable to be rated; and therefore that a line of railway was liable. *Midland Ry.* v. *Chesterfield Lighting Commissioners*, 1 Jur. (N.S.) 797. *S. C.*, nom. *Reg.* v. *Midland Ry.*, 4 El. & Bl. 958; 3 C. L. R. 682; 3 W. R. 415.

—— **Under Local Acts — No express Revocation.**] — Certain local government acts appointed improvement commissioners for sanitary purposes over a district which lay partly within and partly without the borough of Walsall. The commissioners had power to levy rates to defray the expenses they were bound to incur. The rate on any railway within the commissioners' district was, by a local act of 1848, to be limited to one-fourth of the rateable value of the railway. A part of a line of railway did run through the commissioners' district, and was so rated under the local act up to 1872. By the Public Health Act, 1872, urban authorities were constituted, and the mayor, aldermen and burgesses of the borough, in town council, became an urban authority for, among others, sanitary purposes in the borough. Both bodies—the commissioners and the town council—were given powers to make rates to defray the expenses incurred by them in the discharge of their respective duties. In the grant to the town council of rating powers nothing was said with regard to any limit of rating upon any particular kind of property. By the Public Health Act, 1875, the town council was invested with powers to assess a rate to defray the expenses incurred for sanitary purposes, and the powers of a local board were transferred to it as the urban authority; and it was provided that expenses incurred by the urban authority, if the council of a borough, were to be defrayed out of the borough fund, but if by the improvement commissioners, were to be defrayed out of the district rate. One section continued the limit of the act of 1848 as to rating railway property. By a local act of 1876 the limits of the borough were greatly extended, and the mayor, &c., of the borough became the sanitary authority for the extended borough. The act of 1848 was repealed with the exception of certain sections. Among the excepted sections that one which limited the amount of rateability of railways was not mentioned, but nothing was said specifically to put an end to that limited liability:—Held, upon the true construction of the various acts, public and local, that there having been no express revocation of the privilege granted in respect of rating the railway at only one-fourth of its rateable value, a borough rate calculated on its full rateable value could not be maintained. *Walsall Overseers* v. *L. & N. W. Ry.*, 48 L. J., M. C. 57, 65, 166: 4 App. Cas. 467; 41 L. T. 160; 28 W. R. 52—H. L. (E.)

—— **Sheds to Protect Engines.**]—A watching and lighting act authorised the commissioners to make a rate upon all persons inhabiting, using or occupying any houses, shops, mills, sheds or other buildings or tenements within the township: — Held, that sheds erected to protect engines for the more convenient working of a coal mine were rateable, although it was contended that they were exempt as being merely accessorial to the engines. *Brown* v. *Granville (Lord)*, 3 M. & Scott, 453; 10 Bing. 69.

—— **Sidings and Turntables.**]—By a borough improvement act, authorising a rate to be levied, it was enacted that the occupiers of any land used only as a canal or towing-path for the same, or as a railway constructed under the powers of any act of parliament, should be rated at one-fourth part only of the nett annual value. Sidings and turntables, occupying about ten acres of land, were used for loading trucks and carriages with goods, and also as a standing place for laden and unladen carriages, and were necessary for conducting the traffic of the railway:—Held, rateable at one-fourth only of their nett annual value. *Midland Ry.* v. *Birmingham Council*, 13 L. T. 404.

—— **Lines passing through Station — Contributing Directly to Company's Earnings.**]—Lines of railway constructed within the area of a railway station for the convenience of traffic, as supplementary to the original lines passing through the station, but diverging from and rejoining them, are for rating purposes to be treated, like the original lines, as part of the railway directly contributing to the company's earnings, and are assessable on the "parochial" system, notwithstanding that such supplementary lines be used for traffic destined to or coming from goods or coal yards, or for standing and unloading goods waggons, or for running goods trains, or for the standing of engines and passenger carriages, or, at times, for shunting, or as bay lines into which local trains when emptied are shunted preparatory to recommencing a journey. *Stockport Union* v. *L. & N. W. Ry.*, 66 L. J., Q. B. 781; 77 L. T. 244. Affirmed, 67 L. J., Q. B. 335; 78 L. T. 180; 62 J. P. 244—C. A.

Calculation of Profits—Rent.]—A rent, or a sum in the nature of a rent, paid for the occupa-

tion of a railway is not necessarily a criterion of its rateable value. The profits and advantages derived on a main line by the occupation of a branch line may be taken into account in estimating the rateable value of the branch, and not the local profits. *S. E. Ry.* v. *Dorking Overseers*, 3 El. & Bl. 491; 2 C. L. R. 633; 7 Railw. Cas. 877; 23 L. J., M. C. 84; 18 Jur. 672.

The Eastern Counties Railway Company were tenants of the Royston and Hitchin line at a rent of 16,800*l*. Taken by itself, the line was worked at a loss, but it was valuable as contributing to the gross earnings of the Eastern Counties Railway, by bringing the traffic of the district on that railway:—Held, that the sessions were wrong in point of law in adopting the 16,800*l*. as the basis of the calculation and absolute criterion without regarding the evidence of real value, or the fact of there being profit. *Reg.* v. *Eastern Counties Ry.*, 7 Railw. Cas. 900, n.; 18 Jur. 679, n.; 2 W. R. 160.

—— **Bringing Traffic to other Lines.**]—A railway connected with and rented by another railway in a different parish, cannot be rated at an increased amount, in respect of its contributive value in bringing traffic to the other line, but can only be rated upon its value within the rating parish. *G. W. Ry.* v. *Pontypridd Union*, 38 L. J., M. C. 93; L. R. 4 Q. B. 354; 20 L. T. 364; 17 W. R. 671.

The Ely Valley Railway, the greater part of which was within the rating parish, supplied traffic to the South Wales Railway, which was beyond the parish. The South Wales Railway was the property of the Great Western, which was also the occupier of the Ely Valley at a fixed rent:—Held, that the Great Western could not be rated as the occupier of the Ely Valley Railway at an increased amount in respect of its value as a feeder, and in supplying traffic to other parts of their line. *Ib.*

Long Lease of Line—Rent and Annuities.]—The Reigate Railway Company leased their line, which joined the South Eastern Railway Company, at a certain rent, for 1,000 years; and the South Eastern became, under the lease, the occupiers of the line, working it in connection with their own railway. The Reigate Company was afterwards incorporated with the South Eastern by act of parliament, under which the amalgamated company was to pay to the shareholders of the Reigate Company annuities equivalent to and in lieu of the above rent; and the Reigate line then became part of the South Eastern line. On an appeal against two poor-rates assessed upon the South Eastern as occupiers of so much of the Reigate line as passed through the parish of D.:—Held, that the rent in the one case, and the annuities in the other, were not to be taken as the sole or conclusive criterion of the rateable value. *S. E. Ry.* v. *Dorking Overseers*, 7 Railw. Cas. 877; 3 El. & Bl. 491; 2 C. L. R. 633; 23 L. J., M. C. 84; 18 Jur. 672.

General Earnings and Profits at Particular Stations.]—A railway company maintained at each of the stations and termini on their line a staff of servants and appliances which were employed chiefly for the purposes of the goods traffic, but partly for the accommodation of passengers. They made a gross charge of so much per ton to their customers for goods carried on the line, but from the amount so charged certain sums were deducted and set apart as the earnings of the staff and appliances at each station. To these sums the name of terminal charges was given:—Held, that these terminal charges were to be considered as part of the general earnings of the line, and not of the stations. *Reg.* v. *Eastern Counties Ry.*, 4 B. & S. 58; 32 L. J., M. C. 174; 9 Jur. (N.S.) 1339; 8 L. T. 419; 11 W. R. 694.

In calculating, therefore, the amount of the gross earnings and expenses of the line in a parish, the terminal charges must be included. *Ib.*

The rateable value of a portion of a railway, consisting of the nett annual profits from the traffic upon the portion rated, cannot be increased by any part of the profits earned by the same traffic upon other portions of the line. *G. E. Ry.* v. *Haughley Overseers*, 35 L. J., M. C. 229; L. R. 1 Q. B. 666; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.

Rateable Value of Line in different Parishes.]—A line of railway passed through a parish, and great accessions of traffic took place on another part of the line beyond the parish; in such case the railway company is assessable in the parish only for the earnings in the parish, i.e. the gross yearly earnings in the parish, subject to expenses and deductions fairly applicable to that part of the railway which is in the parish, and the profits on the other parts of the line are not to be taken into account as contributive value enhancing the value in the parish. *Ib.*

Part of a line of railway passed through a district where there were two other competing lines, for the carriage of passengers and goods. The gross earnings in the parish, a part of this district, were more than absorbed by the expenses chargeable for the working thereof, plus the deduction allowed by the Parochial Assessment Act; but on the basis of the receipts derived from the enhancement of the traffic on the other parts of the system, the rateable value of the line in the parish was equal to 45 per cent. of the gross receipts:—Held, that the railway company was rightly rated at this amount. *L. & N. W. Ry.* v. *Irthlingborough Overseers*, 35 L. T. 327.

The legal principle of rating by ascertaining the value of the land occupied in the parish, after the due allowances, is applicable to all cases where the same party, whether a company or an individual, occupies in different parishes land forming one entire property, though the profits may be earned in different proportions, and with a different rate of outgoings in each. *Reg.* v. *L. B. & S. C. Ry.*, 15 Q. B. 313; 6 Railw. Cas. 440; 20 L. J., M. C. 124; 15 Jur. 372.

In imposing the rate upon a railway company, the rateable value of the portion of the line occupied in any particular parish is to be deduced from a comparison between the particulars of profit and the outgoings arising in that parish, and not by treating the whole line of railway (trunk and branches) as one entire subject-matter, and the whole rateable value, however constituted, as entire, and then dividing it among the several parishes, according to the distance which the line passes through each. *Ib.*

Any expenses, wherever arising, which the company can shew to be necessary for keeping the hereditament which is the subject of the assessment at the value which is made the measure of such assessment, may properly be taken into

consideration, but not the amount at which the company is rated in another parish. *Ib.*

With regard to the rating in a particular parish, the line is to be rated, not in the proportion which the length of the line therein bears to the whole line, but in the proportion that the receipts in such parish for traffic bear to the receipts throughout the whole line. *Reg.* v. *L. & S. W. Ry.*, 1 Q. B. 558; 2 Railw. Cas. 692; 11 L. J., M. C. 93; 6 Jur. 686.

Increase of Earnings in one Parish—Occupation in another.]—The Reigate line brought a great deal of additional traffic to the main line of the South Eastern, and that company derived benefit from the Reigate line. If in the market, it might be an object of competition between the South Eastern and other railway companies, the traffic on the main lines of which would be increased by the possession and control of the Reigate line:—Held, that these were matters giving additional value to the occupation of the Reigate line in the parish of D., which, though lying in other parishes, ought to be taken into account in rating the line in that parish; but held, by Erle, J., that the earnings in other parishes, though increased by the occupation of the Reigate line in the parish of D., ought to be rated in those other parishes, and not in D. *S. E. Ry.* v. *Dorking Overseers*, supra, col. 1659.

—— **Liability to make good Deficiency in Rates by reason of Lands taken.**]—The East London Railway Act, 1865 (28 & 29 Vict. c. li.), authorised the making of several small railways, and the taking possession of lands for that purpose. Each of these railways passed through more than one parish. The 128th clause of the act declared, "That if and while the company is possessed under this act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railway or works; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated." A portion of one of these railways was completely constructed in one parish, and was worked there. Till its completion there, the directors had paid in that parish the deficiency rate as provided in this clause. On its completion there, they claimed that they should be relieved from the deficiency rate:—Held, that the rate was properly a parochial rate, and that, on the completion of that portion of the railway in that parish, the title of the parish officers to claim the deficiency rate there had ceased. *East London Ry.* v. *Whitechurch*, 43 L. J., M. C. 159; L. R. 7 H. L. 81; 30 L. T. 412; 22 W. R. 665.

By a railway act it was enacted that "while the company is possessed under this act of any lands assessed, or liable to be assessed, to any poor rate," and certain other rates, "they shall from time to time, until the railways or the works are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of these lands being taken or used for the purposes of the railway or other works by this act authorised; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon were rated at the time of the passing of this act." The company was empowered under the act to make certain railways and works forming one entire system, and they took and used land in a parish for making a part of the railways and works. The part of the railways and works in the parish were completed and opened for traffic; but other parts of the entire system were not completed. The assessment of the land with the railway and works to the poor-rates and other rates in the parish was below the assessment of the land with buildings thereon before the act was passed:—Held, that the company was liable to make good the deficiency in the assessment until the entire system of railways was completed. *Reg.* v. *Metropolitan District Ry.*, 40 L. J., M. C. 113; L. R. 6 Q. B. 698.

Effect of Branch Lines.]—A railway company had become possessed of a branch line communicating with its main line, on the terms that the shareholders of the company by whom the line was made should become stockholders in the company to an amount calculated at the expense of making the line. This branch line communicated with the lines of three other companies, and the company worked the branch at very low fares, in order to divert the traffic from the other lines on to its own line; the consequence was that the sum actually earned on the branch line was very small. If the branch line was in the market, either of the three other companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the company held it, and would then work it in a similar manner to that in which it was worked by the company:—Held, in assessing to the poor-rate a part of the branch line passing through the parish, that the fact that three other companies would be willing to pay what was equivalent to a large rent for it was to be taken into account as an element in ascertaining the rent at which it might reasonably be expected to let from year to year. *Reg.* v. *L. & N. W. Ry., Kempston Rate, In re*, L. R. 9 Q. B. 134; 29 L. T. 910; 22 W. R. 263. *S. C.*, nom. *Reg.* v. *Bedford Assessment Committee*, 43 L. J., M. C. 81.

—— **Increased Traffic on Main Line.**]—The rateable value of land in a parish may be increased by its producing a return to the occupiers out of the parish, as where a branch railway occupied by a company owning a main line into which it runs, produces a profit by virtue of the traffic which it causes over such main line. *L. & N. W. Ry.* v. *Cannock Overseers*, 9 L. T. 325.

—— **Right to Consider.**]—In assessing a branch line of railway, which branch is leased to the owners of a main line into which it runs, the parish authorities are not entitled to take into consideration in the assessment the value of the line to such owners of the main line, in addition to the nett profits as derived from the traffic passing through the parish. *G. W. Ry.* v. *Pontypridd Union*, 38 L. J., M. C. 93; L. R. 4 Q. B. 354; 20 L. T. 364; 17 W. R. 671.

—— **Payment made in Lieu of Profits.**]—The N. company, being empowered to make a branch line from their railway to join the E. railway, an agreement was entered into by the companies

(confirmed by act of parliament), by which it was mutually agreed that the N. company should complete the branch (which was likely to prove beneficial to the E. company), and that whenever, after the opening of the branch, the nett earnings of the N. company's whole line should not be sufficient to pay a divident of 3 per cent. per annum on their share capital, the E. company should pay to them such a sum (not to exceed 3,705*l.*) as would be sufficient to make up that dividend. There were stipulations for the interchange of traffic. The agreement to be in force for ninety-nine years from the opening of the branch. The branch was accordingly completed by the N. company, and worked by them at a loss; and, in a certain year, the nett earnings of their whole line falling short of a dividend of 3*l.* per cent., the E. company paid 3,705*l.* under the agreement to make up that dividend:—Held, that this payment of 3,705*l.* ought not to be taken into account in ascertaining the rateable value of the N. company's railways. *Newmarket Ry.* v. *St. Andrew-the-Less, Cambridge, Overseers*, 7 Railw. Cas. 858; 3 El. & Bl. 94; 2 C. L. R. 621; 23 L. J., M. C. 76; 18 Jur. 572; 2 W. R. 701.

Railways with Running Powers.]—Mere running powers enjoyed by one railway company over the line of another do not constitute an occupation, so as to subject the holders of the privilege to rateability. *Midland Ry.* v. *Badgworth Overseers*, 34 L. J., M. C. 25; 11 Jur. (N.S.) 14; 11 L. T. 303; 13 W. R. 202.

A line of railway connecting two towns belonged to two companies, each holding a moiety of the line in fee-simple, and enjoying running powers over its entire length. The overseers of a parish through which that portion of the railway belonging to one company passed, having rated the other company:—Held, that the rate was bad. *Ib.*

The principle is not altered by the circumstance that other parties also are carriers on the railway, some providing for themselves locomotive power, carriages, stations and watering-places, and paying tolls only to the company, and others finding carriages only, and hiring power, &c., from the company. *Reg.* v. *Grand Junction Ry.*, 4 Q. B. 18; 4 Railw. Cas. 1; D. & M. 237; 13 L. J., M. C. 94; 8 Jur. 508.

—— **Fixed Rent.**]—The special act which authorised the making of a railway by the C. company, provided that the L. company should have the right to run their traffic over a part of the line, on payment of a fixed annual rent to the C. company. The rent was much less than the actual value of the traffic passed over that part of the line by the L. company:—Held, that the C. company could not be rated for poor-rate in respect of that traffic at a higher sum than the fixed rent. *Altrincham Union* v. *Cheshire Lines Committee*, 15 Q. B. D. 597; 50 J. P. 85—C. A.

—— **When no Payments made.**]—A railway was constructed from G. to C.; half belonged to the Great Western, and half to the Midland; each company had running powers over the half belonging to the other company, but neither company was liable to pay tolls to the other. The Midland Company's traffic over the railway was much larger and more profitable than that of the Great Western. The Great Western being rightly assessed to the poor-rate of B. as sole occupier of the part of their half of the railway in that parish, the rateable value of this occupation was arrived at by taking the amount of the Great Western's profits in the parish, and adding the sum which the Midland, if they had not had the right of running free, would have had to pay to the Great Western in respect of that part of the railway:—Held, that this was wrong, and that the rateable value of the Great Western's occupation in B. was the amount of their own profits in that parish, enhanced only by the value to them of their right to run free over the Midland Company's half of the railway. *G. W. Ry.* v. *Badgworth*, 36 L. J., M. C. 33; L. R. 2 Q. B. 251; 15 W. R. 579.

—— **Deduction of Sums received for another Railway.**]—By an agreement between two separate railway companies (forming together a continuous line), it was stipulated that the former should be at liberty to convey such of their passengers as had taken tickets for the entire distance, over the line of the latter, paying for each passenger a certain sum by way of toll to the latter company:—Held, that in estimating for the purposes of a poor-rate the gross receipts earned by one railway company, in respect of portions of their line running through different parishes, the company was at liberty to deduct such sums as had been received by them and paid over to the other company in pursuance of the agreement; and that the residue, after such deduction, was the rateable value of the line. *Reg.* v. *St. Pancras Vestry*, 3 B. & S. 810; 32 L. J., M. C. 146; 9 Jur. (N.S.) 1102; 8 L. T. 273; 11 W. R. 615.

—— **Rent for Station let to another Company.**]—The Eastern Counties Railway Company, owners of a station at P., in 1848 entered into an agreement with the North-Western Railway Company, by which the latter company was for 999 years to have the joint use of the station for their traffic, they binding themselves to pay for such use of the station according to certain terms stipulated in the agreement. Another railway having been opened, a considerable portion of the traffic of the North Western line was in consequence abstracted, and the station became of so much less value to the North Western Railway Company, that the rent which they would be willing to pay for the use of the station would barely amount to a third part of the sum actually paid. Upon appeal against a poor-rate, and a case, which stated that the Eastern Counties Railway Company were to be deemed to be the persons rateable in respect of the whole occupation of the station:—Held, that in estimating the value of the occupation to the hypothetical tenant contemplated by the 6 & 7 Will. 4, c. 96, the continuance of those circumstances which constituted the value to the existing occupiers was to be assumed, and thenceforth the sum of money payable to the appellants by the North Western Railway Company under the agreement ought to form part of the rateable value of the station. *Reg.* v. *Fletton Overseers*, 3 El. & El. 450; 30 L. J., M. C. 89; 7 Jur. (N.S.) 518; 3 L. T. 689; 9 W. R. 309.

The Eastern Counties Railway Company were the sole owners of a railway station, and in 1848, by an agreement by deed, the North Western Railway Company were for 999 years to have exclusive use of part of the station, and the joint

use with the Eastern Counties Company of another part, at a certain sum per annum. The occupation of the station afterwards became of much less value to the North Western Company than the annual sum to be paid by them to the other company under the agreement:—Held, that the effect of the deed (as regarded the part of the station jointly occupied) was only to give to the North Western Company the right to the joint occupation, and that the Eastern Counties Company were rateable as the sole occupiers of this part of the station, and that in rating them for such occupation, the sum paid by the North Western Company must be considered as part of the profits. *Reg.* v. *Sherard*, 33 L. J., M. C. 5.

—— **Payment under Working Agreement.**]—A payment to one railway company by another, under agreement, of such a sum, if any, as may be necessary to make up a certain dividend on the cost of the line, in consideration of the making of a part of it, and of working it for the benefit of the latter company, is not a profit arising out of the occupation of the railway, and is not to be taken into account in assessing its rateable value. *Newmarket Ry.* v. *St. Andrew, Cambridge, Overseers*, 3 El. & Bl. 94; 2 C. L. R. 621; 7 Railw. Cas. 858; 23 L. J., M. C. 76; 18 Jur. 572; 2 W. R. 701.

Deductions—General Principle—Estimate of Expenses.]—A company formed a line of railway, of which they were owners. They were also lessees of two branch lines, but were not liable to repair them; by each of these branch lines the company incurred an annual loss, but these lines caused an increase of traffic on the main line. The company had been in the exclusive occupation of these three lines as carriers. In order to ascertain the sum at which the company was to be rated, i.e. the rent which a tenant might be found to give from year to year, the parish officers ascertained the gross receipts of one mile in a parish, where there was no station, and deducted therefrom the expenses of the three lines, under the following heads, viz.:—1. Maintenance of way; 2. Locomotive account; 3. Carrying account; 4. Charges for salaries of superintendents and clerks, advertising, stationery, &c.; 5. Repairs and alterations of stations; 6. Compensation for fire and other accidents; 7. Government duty on passengers; 8. Rates and taxes of all kinds actually paid (other than the property tax); 9. Direction and office expenses; and also a sum for the annual depreciation of the plant necessary for working the railway. Further allowances were made of a percentage as interest on the first cost of the plant, and as a tenant's profits, including profits of trade. The balance was taken to represent the rateable value of one mile in the parish, and was found so to do by the sessions. The stations and buildings on the three lines were rated separately from the railway. The company claimed the following additional deductions:—1. The rateable value of the stations and buildings appurtenant to the three lines, and necessary for their profitable enjoyment; 2. The depreciation and wear and tear of the rails and sleepers on the main line, hitherto defrayed out of the capital; 3. A percentage on the sum expended in forming the company, obtaining the act, and raising the capital; 4. The income tax paid by the company; 5. Additional parochial assessments which might become payable; 6. The annual total loss on the two branch lines:—Held, that a further deduction ought to be made for the stations and buildings, but not on account of any of the other claims made by the company. *Reg.* v. *G. W. Ry.*, 2 New Sess. Cas. 205; 6 Q. B. 179; 15 L. J., M. C. 80; 10 Jur. 134.

A railway company is entitled to a deduction from the rateable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of the assessment; and such deduction is not provided for by a deduction under the head of "working expenses." *Reg.* v. *L., B. & S. C. Ry.*, 15 Q. B. 313; 6 Railw. Cas. 440; 20 L. J., M. C. 124; 15 Jur. 372.

A company is not disentitled to such deduction because it has not incurred the expense, nor laid by from its receipts any sum to meet it when it should arise, although it ought to set apart the sum which it claims to deduct; and whenever the time comes for actually making the restoration, it will be estopped from claiming more than that deduction. *Ib.*

—— **Allowance for Depreciation.**]—In estimating the amount of allowance for depreciation of the rolling stock, the proper mode is not to value the stock at the beginning and end of each year, and deduct the difference, but to assume that the stock will last its natural life; in other words, it may be reasonably assumed that the tenancy will continue for several years, and so that the depreciation in that view will be less than if the tenancy was to last only one year. *G. E. Ry.* v. *Haughley Churchwardens*, 35 L. J., M. C. 229; L. R. 1 Q. B. 666; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.

—— **Annual Repair and Ultimate Renewal.**]—A railway company was assessed for two miles and a half of railway in a parish, being part of a line originally intended to form an independent and entire railway, but purchased by the company and incorporated with their line. This branch was worked by the company as part of their entire railway; but a certain number of engines and carriages was appropriated to it, and a certain number of officers and servants employed exclusively on it. No separate account of receipts and expenditure in respect of it was kept. The branch could be worked as a separate railway under independent management, but that would require a larger movable stock and a greater expenditure. The actual expenses were not in the proportion of the actual gross receipts, either on the branch or throughout the entire railway; nor were such gross receipts or such expenses at one uniform rate per mile throughout the entire railway. The profits of the company were wholly derived from the carriage of passengers and goods; and none but the company's engines and carriages ran on the line. The overseers and the company agreed as to the total gross annual receipts from the whole line, including both trunk and branch, and as to the total gross annual receipts from the two miles and a half. As to the deductions to be made, in order to ascertain the net rateable value of the whole line:—Held, that the company, in addition to deductions for annual repair of rails and framework, and of movable stock, was entitled to be allowed two specific sums for their ultimate renewal and reproduction, where the allowance for annual repairs did not equal in

amount the sum of the allowances which the company claimed under the two heads of "annual repair" and "ultimate renewal." *Reg.* v. *G. W. Ry.*, 7 Railw. Cas. 130; 15 Q. B. 1085; 21 L. J., M. C. 84; 16 Jur. 217.

—— **Expenses of small Portion of Line.**]—In order to ascertain the net rateable value of the two miles and a half, the deductions from the total gross revenue, which constitute the difference between it and the total net rateable value, are to be apportioned on the parochial principle. But this principle does not preclude a consideration of charges and expenses, wherever arising locally, which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment. And when such charges and expenses apply equally to every mile of a railway, it is a convenient and allowable mode to arrive, by a mileage division, at the proportionable part to be assigned to the miles in any particular parish. *Ib.*

—— **Division of Expenses on Mileage Principle.**]—The company separated the branch from the trunk, except as to a small portion of the general expenses of the entire railway, being those of central superintendence, printing and advertising, and then dividing the expenses of the branch thus separated on the mileage principle:—Held, that such division was not necessarily a departure from the true principle of apportionment; but that, there being nothing to distinguish the branch from the trunk, the mode of ascertaining the rateable value by considering it as a distinct whole was incorrect. *Ib.*

Held, also, incorrect to take the deductions at the same rate for every mile of the railway. *Ib.*

—— **Interest on Capital and Tenants' Profits.**]—In assessing a railway company in respect of their line of railway, and the stations, buildings and sidings, the percentage amount to be allowed for interest on capital and tenants' profits is to be calculated upon the actual value of the rolling stock at the time when the rate is made, and not upon its cost price. *Reg.* v. *North Staffordshire Ry.*, 3 El. & El. 392; 30 L. J., M. C. 68; 7 Jur. (N.S.) 363; 3 L. T. 554; 9 W. R. 235.

—— **Movable Articles.**]—A railway company was obliged to provide, in addition to their rolling stock, turn-tables, cranes, weighing machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture, and gasworks used for supplying the stations with gas:—Held, that the company was entitled to a deduction in respect of such of these articles as were movable, but not in respect of such as were so attached to the freehold as to become part of it; nor in respect of such as though capable of being removed, were yet so far attached as that it was intended that they should remain permanently connected with the railway, or the premises used with it, and remain permanent appendages to it as essential to its working. *Ib.*

—— **Floating Capital to provide against Emergencies.**]—It was also necessary that the company should have in hand, at command, a sum of money, by way of floating capital, for the purpose of providing surplus stores, to be used in case of accident on the line or other emergency, and partly in paying the wages of servants of the company, and in other current expenses:—Held, that whether the company was entitled to a deduction for interest and tenants' profits, or either of them, upon this floating capital, must depend on whether, on the whole capital employed, a greater delay occurred in realising the returns than was ordinarily incidental to the employment of capital. *Ib.*

—— **Station Buildings and Sidings.**]—Held, also, that the deduction to be allowed in respect of stations, buildings and sidings along the line of railway must be calculated on the actual value at which they ought to be assessed, and not on the original cost of construction. *Ib.*

Partial Exemption—Public Health Act.]—By s. 88 of the Public Health Act, 1848, the occupier of land "used only as a railway" is to be assessed only at one-fourth of the net annual value:—Held, that this partial exemption extends to the line of railway, and to so much of any platform, &c., as constitutes the side of the railway and to land used as sidings, turn-tables, &c., but that stations, offices, and warehouses, which are ancillary to the railway properly so called, although necessary for the convenient working of traffic upon it, ought to be assessed at their full net annual value. *South Wales Ry.* v. *Swansea Board of Health*, 24 L. J., M. C. 30; 3 C. L. R. 18; 1 Jur. (N.S.) 326; 3 W. R. 23.

Deficiency in Course of Undertaking—Lands Occupied but not Used.]—The promoters of a line of railway purchased lands beyond the limits of deviation afterwards authorised by the company's special act, in order to get rid of the opposition of the owners to the passing of the act:—Held, in an action by overseers to recover deficiencies in the poor-rates under the 133rd section of the Lands Clauses Consolidation Act, 1845, that the promoters could not escape their liability by setting up their illegal act in purchasing the lands without statutory powers, and that they must be taken for this purpose to have become possessed of the lands by virtue of their act, and were liable to make good the deficiencies. *Putney Overseers* v. *L. & S. W. Ry.*, 60 L. J., Q. B. 438; [1891] 1 Q. B. 440; 64 L. T. 280; 39 W. R. 291; 55 J. P. 422—C. A.

Some of the lands were unoccupied at the time they were purchased by the promoters:—Held, that, as the deficiency was, by the section, to be ascertained according to the rental at which the lands were valued or rated at the time of the passing of the special act, and did not, on the true construction of the section, depend upon the amount of the rates which were being paid at the time, the non-occupation of the lands at the time they were purchased did not relieve the promoters from liability for deficiencies of poor-rates in respect of them. *Ib.*

—— **"General Purposes Rate," Meaning of.**]—Sect. 14 of the London and South Western Railway Act, 1883, provides that, while the company are possessed of any land assessed or liable to be assessed to any sewers rate, main-drainage rate, or general purposes rate, they shall from time to time, until the railway or the works thereof are completed and assessed or liable to be assessed to the respective rates, be liable to make good the deficiency in the assessment for the respective rates:—Held, that the expression "general purposes rate" in this section was intended by the legislature to apply to all rates made for general purposes, viz., for

purposes in which the great majority of parishioners have a common interest, and that under this term the company were bound to make good the deficiency in the assessment for the metropolitan consolidated rate, the lighting rate, and the public libraries rate respectively. *Burrup* v. *L. & S. W. Ry.*, 64 L. T. 112.

23. TRAMWAYS.

Rateability—Occupation of Road.]—A tramway company, formed under the Tramways Act, 1870 (33 & 34 Vict. c. 78), laid down a tramway in a highway, the soil of which was vested in the district board. Sect. 34 gives the exclusive use to the company of the tramway for carriages with flange wheels or other wheels suitable only to run on the rail. By s. 57, the company is not to acquire any right other than that of user of any road in which their tramways are laid; and by s. 62, nothing in the act is to abridge the right of the public to pass along or across every part of any road in which the tramways are laid with carriages not having flange wheels or wheels suitable only to run on the rail; and by s. 25, the rails must be laid level with the road:—Held, that the company was rateable to the poor-rate in respect of their occupation of the road by their tramways. *Pimlico Tramway Co.* v. *Greenwich Union*, 43 L. J., M. C. 29; L. R. 9 Q. B. 9; 29 L. T. 605; 22 W. R. 87.

Mode of Assessment in regard to different Parishes.]—In assessing the rateable value of tramways, the annual gross traffic receipts earned over the entire system must be taken as the basis of the estimate of the rent, and the net receipts in each parish as the criterion of the rateable value in each parish. *London Tramways Co.* v. *Lambeth Assessment Committee*, 31 L. T. 319.

When a tramway route begins and ends in the same parish, the net receipts of that route is the value upon which the tramway owners must be rated. *Ib.*

When a tramway route extends through two or more parishes, the fairest practicable mode of apportioning is by dividing the receipts from each distinct service route in proportion to the lineal mileage of such route in each parish respectively. *Ib.*

The general expenses, except horse expenses, allowed proportionately to the number of miles run over by the cars in each parish, upon each of the several distinct service routes therein. *Ib.*

24. TELEGRAPH AND TELEPHONE COMPANIES.

Posts fixed in the Ground—Occupation.]—An electric telegraph company, incorporated by statute for transmitting messages between distant places by means of electric currents, laid down along the lines of a railway company an apparatus for that purpose, on terms agreed on between the companies. This apparatus consisted of posts fixed in the ground, with telegraphic wires suspended from post to post, the posts being, however, subject to removal to some other place at the option of the railway company, if their working or position interfered with the operations of the railway:—Held, that the telegraph company was rateable in the parish in which the posts were fixed. *Electric Telegraph Co.* v. *Salford Overseers*, 11 Ex. 181; 24 L. J., M. C. 146; 1 Jur. (N.S.) 733; 3 W. R. 518.

Telephone Company's Wires—Occupation of Land by Company.] — A telephone company were possessed of an exchange by means of which subscribers could communicate by telephone with each other, and also of wires and telephone apparatus unconnected with the exchange for the use of persons renting them. For the purpose of this business they laid wires from their office to the business premises of their subscribers, and also erected wires for the use of those who rented them. All these wires were overhead wires and were carried from the office of the company to the different premises, being supported and steadied either by poles fixed in the ground, or by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments were made in the case of a single wire by an iron spike driven into the building, or by a bolt screwed into the ridge, or by an iron bracket nailed to the corner of the chimney to which the wire was attached, or in the case of a number of wires by means of standards or ridge-saddles attached to the roofs of the buildings and fastened by iron bolts or stays. The consent of the owners or occupiers of the land or buildings was given by agreements in which the company undertook to pay an annual rent and remove the wires and attachments, upon a certain notice. The company had no key of the outside doors, and could only obtain access to the roofs by the permission of the occupiers:—Held, that upon these facts there was proof of an occupation of land by the wires of the company, and that they were rateable. *Lancashire Telephone Co.* v. *Manchester Overseers*, 54 L. J., M. C. 63; 14 Q. B. D. 267; 52 L. T. 793; 33 W. R. 203; 49 J. P. 724—C. A.

Telegraph Wires — Exclusive Occupation — Licence of Exclusive Use.] — By agreement between a telegraph company and the postmaster-general, the latter covenanted with the company that he would provide, and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company certain telegraph wires, called in the agreement "special wires," between the landing-place of a foreign telegraphic cable near the Land's End and an office of the company at Penzance, and thence to their office in London, with the necessary translators for working them, and a pneumatic tube; such wires, &c., to remain the property of the postmaster-general—the postmaster-general to repair all accidental defects or interruptions to the working of the wires, &c., but to be paid for making good any damage to the wires occasioned by the neglect or default of the company or their servants; the company not to use the wires for the transmission of any except certain specified messages. And, in consideration of the appropriation and maintenance by the postmaster-general of the wires, translators, batteries, and pneumatic tube, the company covenanted to pay him certain rents; and they also covenanted not to part with the possession of the special wires or any of them, or underlet or assign the benefit of the agreement, without the consent of the postmaster-general; and that, in the event of their doing so, the postmaster-general was to be at liberty to determine the contract by notice; and it was further provided that, upon the expiration or determination of the agreement, it should be lawful for the postmaster-general to resume the possession of the special wires, &c.

The telegraph posts remained the property of the postmaster-general, and carried between Penzance and London several wires beyond those appropriated to the use of the company:—Held (Lord Coleridge, C.J., doubting), that this agreement did not give the company such an exclusive occupation of the special wires as to make them rateable to the relief of the poor in respect thereof, even in the parish where the special wires were the only wires affixed to the posts. *Paris and New York Telegraph Co.* v. *Penzance Union*, 53 L. J., M. C. 189; 12 Q. B. D. 552; 50 L. T. 790; 32 W. R. 859; 48 J. P. 693.

Telegraph Acts—Posts and Wires—Liability of Postmaster-General.]—A vestry applied by mandamus to compel the postmaster-general to pay poor-rates upon the rateable value of telegraph posts and wires, as fixed by an assessment committee. The postmaster-general had tendered a smaller amount, proportionately to an assessment fixed by the commissioners of the Treasury, which the vestry had refused:—Held, that by the Telegraph Acts, 1868 (31 & 32 Vict. c. 110) and 1869 (32 & 33 Vict. c. 73), no duty is cast upon the postmaster-general to pay the rates imposed by those acts; and that there is no remedy by mandamus against him to enforce the payment of rates fixed by an assessment committee. *Reg.* (or *Marylebone Vestry*) v. *Postmaster-General*, 28 L. T. 337; 21 W. R. 459.

Purchase of Premises by Postmaster-General—Rateable Value at Date of Purchase.]—The Telegraph Act, 1868, empowers the postmaster-general to purchase, for the purposes of the act, the undertaking (including land and property) of any telegraph company, and s. 22 provides that all land, property, and undertakings so purchased shall be assessable and rateable to parochial rates at sums not exceeding the rateable value at which such land, property and undertakings were properly assessed at the time of such purchase. In 1870 the postmaster-general purchased the undertaking of a telegraph company, including a house held by the company under a lease for twenty-one years from September, 1867. At the time of the purchase a portion of the house was subject to an underlease granted by the company to H. for the remainder of the term less one day, and containing a covenant by the company to pay all parochial rates. The postmaster-general occupied and used, for telegraphic purposes only, the portion of the house not comprised in the underlease until the year 1878, when he demised that portion to others, and thenceforth no part of the house was occupied or used for telegraphic purposes. The rateable annual value at which the portion comprised in the underlease could properly have been assessed, as a separate tenement at the time of the purchase, was 108*l.* In 1880 the assessment committee of the district separately assessed that portion in respect of parochial rates at the rateable annual value of 334*l.*:—Held, that s. 22 applied notwithstanding that all use of the house for telegraphic purposes had ceased, and therefore that the occupier of the premises comprised in the underlease was not liable to be assessed in any sum exceeding the rateable value at which these premises could have been properly assessed at the time of the purchase. *St Gabriel, Fenchurch* v. *Williams*, 55 L. J., M. C. 14; 16 Q. B. D. 649; 54 L. T. 270; 34 W. R. 256; 50 J. P. 533.

25. Mines and Quarries.

What are Rateable.]—Iron mines are not rateable under 43 Eliz. c. 2, s. 1, coal mines being the only mines mentioned in the statute. *Morgan* v. *Crawshay*, 40 L. J., M. C. 202; L. R. 5 H. L. 304; 24 L. T. 889; 20 W. R. 554.

Iron mines are not rateable; and being rated conjointly with coal mines, the coal whereof was raised by the owner of the lands for his own use in smelting the iron, an order of sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *Rex* v. *Cunningham*, 5 East, 478.

The express mention in 43 Eliz. c. 2, s. 1, of coal mines, is a virtual exclusion of all other mines, and consequently other mines are not rateable. *Rex* v. *Sedgley*, 2 B. & Ad. 63; 9 L. J. (o.s.) M. C. 61.

Lead mines are not rateable. *Lead Co.* v. *Richardson*, 3 Burr. 1341; 1 W. Bl. 389. S. P., *Rowls* v. *Gells*, Cowp. 453; 1 Dougl. 304; and *Talargoch Mining Co.* v. *St. Asaph*, post, col. 1676.

Where, on a question as to the rateability of a freestone work, the sessions in a case called it a quarry, but stated all the facts respecting the mode of working for the opinion of the court, without determining the question whether it was a mine or not, the court sent the case back to be reheard, saying that the question of mine or no mine was a question of pure fact, which the sessions ought to determine. *Rex* v. *Dunsford*, 4 N. & M. 349; 2 A. & E. 568; 1 H. & W. 93; 4 L. J., M. C. 59.

The method of working, and not the nature of the substance obtained, is the criterion to determine the question of mine or no mine, so as to exempt from poor-rates. *Ib.*

Lime works are rateable in the hands of the occupier, though there be risk and expense in the working, and the profits are uncertain. *Rex* v. *Alderbury Overseers*, 1 East, 534.

Where limestone was obtained and raised by sinking shafts perpendicularly down to the stratum, which lay forty or fifty yards below the surface of the ground, and the stratum was worked by roads and gateheads, and the stone, raised to the surface by machinery, or carried under ground to a tunnel:—Held, that the property was a limestone mine, and therefore not rateable. *Rex* v. *Sedgley*, 2 B. & Ad. 63; 9 L. J. (o.s.) M. C. 61.

So, where glass-house, pot clay, and fire-brick clay were extracted from the earth by perpendicular shafts, in the same method that is used in coal mines:—Held, that the works were clay mines, and therefore not rateable. *Rex* v. *Brettell*, 3 B. & Ad. 424; 1 L. J., M. C. 46.

The occupier of a manganese mine is not liable to be rated. *Rex* v. *Tremayne*, 1 N. & M. 194; 4 B. & Ad. 162; 2 L. J., M. C. 17.

The occupier of a clay pit is rateable for the same. *Rex* v. *Brown*, 8 East, 528.

A slate work (or, as improperly called, a slate mine) is rateable. *Rex* v. *Woodland*, 2 East, 164.

Lighting and Watching Rate—"Houses, Buildings, and Property other than Land."]—Coal mines are not "land," but are "property (other than land) rateable to the relief of the poor," within the meaning of s. 33 of the Lighting and Watching Act, 1833, and are, therefore, liable to be rated under that section at the higher rate. *Thursby* v. *Brierecliffe with Entwistle Overseers*, 64 L. J., M. C. 66; [1895]

A. C. 32; 11 R. 38; 71 L. T. 849; 59 J. P. 180—H. L. (E.)

Liability as Owner or Occupier.]—The lessee under the crown of lead mines is rateable for the profits arising from lot and cope; which are duties paid him by the adventurers, without any risk on his part. *Rowls* v. *Gells*, Cowp. 451; 1 Dougl. 304.

The lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated as occupiers of land in the parish where the manor lies, none of them being resident in the parish. *Rex* v. *Baptist Mill Co.*, 1 M. & S. 612.

The lords of the manor's lessee granted liberty to enter a tin mine and to dig and carry away tin on payment of a shilling in the pound on the value of the tin gotten:—Held, that the shilling reserved was rent and not a share in the produce of the mine, and that the lord's lessee was not rateable in respect of it as occupier. *Reg.* v. *Crease*, 11 A. & E. 677; 9 L. J., M. C. 38.

Where, however, a person receives without risk part of the produce extracted from the bowels of the earth, he is an occupier of land. *Ib.*

The Duke of Cleveland, being owner of the waste in the township of Middleton, and of the mines and minerals under the same, demised unto a company all the mines, veins, &c., opened or to be opened, together with all houses, &c., thereto belonging, with full power to enter and do all things necessary for working the mines, saving and reserving to himself, his heirs and assigns, full liberty, &c., to enter for the purpose of viewing the same, to have and to hold the same for twenty-one years, yielding and paying, rendering and delivering, during the continuance of the demise, to the duke, one full fifth part, share and proportion of all the ore won or gotten out of and from the demised premises, well and sufficiently cleansed, dressed, washed, and made merchantable and fit for the smelting mill, at the costs and charges of the company:—Held, that the duke was rateable as an occupier of the ore. *Reg.* v. *Todd*, 4 P. & D. 335; 12 A. & E. 816; 1 Arn. & H. 100; 10 L. J., M. C. 14; 5 Jur. 407.

The Duke of Cornwall being entitled as lord of a manor to tin ore, raised by the bound owners within the manor, which was rendered by them to him in an unmanufactured state, demised this toll:—Held, that the lessee, though not an inhabitant of the parish in which the tin was raised, was rateable to the poor-rate there, as occupier of the tin toll under 43 Eliz. c. 2, s. 1. *Crease* v. *Sawle*, 2 Q. B. 862; 2 G. & D. 812—Ex. Ch.

The rate being made upon him as occupier of the toll, the court refused to inquire, in an action for levying the rate by distress, whether a part of the rate was or was not for tin toll not in the lessee's occupation, some tin toll appearing to be in his occupation, and the amount being only matter of appeal. *Ib.*

In an action by the galee of iron mines in the Forest of Dean, against the overseers of the parish, for having seized his goods as a distress for a poor-rate:—Held, that the galee was an occupier, and not a mere licensee of the mines, the 24 & 25 Vict. c. 40, s. 1, having enacted that a gale of these mines shall be deemed to confer "an interest of the nature of real estate" on the grantee. *Morgan* v. *Crawshay*, 40 L. J., M. C. 202; L. R. 5 H. L. 304; 24 L. T. 889; 20 W. R. 554.

The owners granted for twenty-one years, to certain grantees, full liberty, licence and power to dig shafts, and work and raise, and make saleable, and sell, the minerals under certain limits, and to erect within the limits such sheds and other buildings as should be necessary for the above purposes. A cost-book mine company was established under the grant, and certain buildings, machinery, tramways, &c., were erected on part of the surface within the limits:—Held, that it was immaterial what title, if any, was conferred by the grant; the partners in the company were, by their servants and agents, the sole occupiers of that part of the surface on which the buildings were erected, and were rateable to the poor-rate in respect of such occupation. *Kittow* v. *Liskeard Union*, 44 L. J., M. C. 23; L. R. 10 Q. B. 7; 31 L. T. 601; 23 W. R. 72.

A cost-book company, not being incorporated, is a mere partnership; and consequently, any of the shareholders in the company may be entered upon the rate-books. *Ib.*

The lessee of a coal mine is rateable though he derives no profit from the mine. *Rex* v. *Parrott*, 5 Term Rep. 593.

—— **Reservation of Rent or Ore.**]—A landlord and owner of soil not residing within a parish, having granted a licence by indenture for twenty-one years to certain adventurers, to dig for tin and other ore under a close, reserving to himself one-eighth share of the ore, in an improved and merchantable state, and granting to the adventurers the exclusive occupation of the mine for the purpose of procuring the ores, is rateable for the relief of the poor of the parish in which the mine is situate, in respect of such reserved proportion or eighth share; and in respect thereof, is to be considered as an occupier of the lands by the hand of the adventurers; the reservation operating as an exception out of the demise, and not being in the nature of a rent. *Rex* v. *St. Austell*, 1 D. & R. 351; 5 B. & Ald. 693; 24 R. R. 534.

Where a rate was imposed upon an owner of the lead ore in certain lead mines, in respect of the duty lead reserved in a lease of the mines, being one-fifth share of the lead to be smelted from the ore raised from the mines:—Held, that this reservation was in the nature of a rent, and therefore not rateable. *Rex* v. *Pomfret* (*Earl*), 5 M. & S. 139.

The trustees under the will of a person seised in fee of two third parts of a manor, subject to certain leases to a company of adventurers of the mines of lead, tin, and copper ore, and other minerals under the moors, commons or wastes of the manor, at a rent certain, are not rateable for such rent. *Rex* v. *Welbank*, 4 M. & S. 222.

A person entitled to toll tin and farm dues (which are certain portions of the tin raised by the adventurers in the tin mines) is liable to be rated in respect thereof. *Rex* v. *St. Agnes*, 3 Term Rep. 480.

A lead mine was held under three leases, two of which granted the minerals to the lessees for the purpose of being worked. Within the land comprised in one of them, the shafts were sunk which communicated with the surface and the underground workings, and ore was gotten from underneath such land, and the royalty or dues were reserved in kind, or at the option of the lessors, in lieu thereof the full value in money.

No ore was got from under the land comprised in the other lease, of which the reservation was a dead rent, in addition to a like reservation to the one above mentioned. The lessors were different persons. The minerals comprised in the two leases adjoined one another. The lessees were rated in respect of the engines, machinery, workshops and buildings, and surface of land connected with the mine, and the lessor of the land whereon the shaft was opened and whereunder the minerals were worked was rated for a lead mine, whereof the royalty or dues were reserved wholly in kind:—Held, that the Rating Act, 1874, s. 13, which provided that nothing in that act should apply to a mine of which the royalty or dues were for the time being wholly reserved in kind applied to this case, and rendered the old law applicable; that the mine as rated was a mine distinct from the holding under the latter lease, and that the reservation of the royalty or dues was wholly in kind, notwithstanding the lessor's option; that the rate therefore was correct. *Van Mining Co.* v. *Llanidloes Overseers*, 45 L. J., M. C. 138; 1 Ex. D. 310; 34 L. T. 692.

An owner of the soil granting a lease or let of a manganese mine, reserving a money render per ton of mineral raised, it is not rateable as an occupier. *Rex* v. *Tremayne*, 1 N. & M. 194; 4 B. & Ad. 162; 2 L. J., M. C. 17.

Landlords not resident within the parish, having leased lead mines, and other minerals, with liberty to the tenants to dig, &c., reserving a certain annual rent, and also certain proportions of the ore which should be raised, are at any rate not assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be raised. *Rex* v. *Rochester* (*Bishop*), 12 East, 353.

Mode of Assessment.]—An owner of iron mines rented two acres and a-half of surface land partly over and partly adjoining the mines; he occupied the mines and land together, using the surface for the purpose of working the mines and getting the ore, and he had erected thereon buildings, machinery, workshops and tramways. The surface land, buildings, &c., without the mines, would be practically valueless:—Held, that he was rateable to the poor-rate in respect of the surface land with the buildings, machinery, workshops, and tramways, although they were occupied in connection with a non-rateable subject-matter, viz. an iron mine. That the way to ascertain the rateable value was to assume the mines and surface to be in different hands, and then to calculate what rent the occupier of the mine would have to pay for the surface with the buildings erected thereon. *Guest* v *Eastdean Overseers*, 41 L. J., M. C. 129; L. R. 7 Q. B. 334; 26 L. T. 422; 20 W. R. 332.

The lessee and occupier of a coal mine is rateable for the full annual value of the mine, though increased by improvements, such as the erection of engines made at his own expense. *Rex* v. *Granville* (*Lord*), 4 M. & Ry. 171; 9 B. & C. 188; 7 L. J. (O.S.) M. C. 89.

An engine erected and used by the owner and occupier of an iron-stone mine, solely for the purpose of drawing water from the mine, is parcel of the mine itself, and not rateable. *Rex* v. *Bilston*, 8 D. & R. 734; 5 B. & C. 851; 5 L. J. (O.S.) M. C. 32.

The owner and occupier of coal mines is rateable at the sum for which the mine would let, subject to outgoings; the lessee of coal mines is rateable for the amount of royalty or rent which he pays; and in neither case is any allowance to be made for money expended on rendering the mines productive. *Rex* v. *Attwood*, 6 B. & C. 277; 9 D. & R. 328; 5 L. J. (O.S.) M. C. 47; 30 R. R. 280.

—— **Actual Profits.**]—The occupiers of cement works and also of a chalk pit situated close by were assessed separately as to their works and their pit. There were other equally good chalk pits in the neighbourhood, the chalk from which was used only for ballast and other purposes not so profitable as that of manufacturing cement, for which the occupiers used theirs. They appealed against the assessment of the chalk pit, and the counsel who supported the rate proposed to ask their manager as to the profits they obtained from the chalk, but the quarter sessions refused to admit evidence upon that subject:—Held, that the quarter sessions were right, and that although the convenience and situation of the chalk pit were to be considered in estimating what rent a tenant would reasonably pay, the actual profits derived by the occupiers were not material in forming that estimate. *Reg.* v. *Aylesford Union*, 26 L. T. 618.

—— **Use of a Watercourse.**]—A company for the purpose of working the machinery connected with a lead mine, diverted a stream from its natural course, paying the owners for such diversion, and paying certain small sums for the occupation of the land by the watercourse. The watercourse was about a mile and a half in length, being partly open, partly tunnelled, and for about 350 yards in pipes:—Held, that the company was rateable to the poor-rate in respect of the occupation of the watercourse at the value of the land enhanced by its capability of conveying water; and that it was not exempt from rateability by reason of its connection with a lead mine, though that is not rateable under 43 Eliz. c. 2. *Talargoch Mining Co.* v. *St. Asaph Union*, 9 B. & S. 210; 37 L. J., M. C. 149; L. R. 3 Q. B. 478; 18 L. T. 711; 16 W. R. 860.

—— **What Works Included.**]—A company occupied a lead mine held under a lease, which comprised land and works in a neighbouring union, the mine and most of the works being out of that union. After the ore was crushed and washed, it was taken by a tramway about half a mile to a smelting house, occupied under the same lease, in the neighbouring union, where the ore was converted into lead for sale. The company was rated under the Rating Act, 1874, s. 7, for their mine in the union at the amount of the whole of the dues payable in respect of the mine under the lease during the previous years. They were separately rated for part of the tramway to, and a chimney from, the smelting house, which were situated in the union; and were also rated by the neighbouring union for the land, works and smelting house there situated:—Held, that all these crushing, washing and smelting works were included under the definition in s. 7, as in connection with and for the purposes of the mine; and that a deduction should be made from the gross dues in respect of the rateable premises out of the union, in order to obtain the rateable value of the mine in the union. *Snailbeach Mine Co.* v. *Forden Guardians*, 35 L. T. 514.

—— **When Mine Unproductive.**]—Where a coal mine, becoming unproductive, ceases to be worked, the lessee is no longer liable to be rated, although he may be still bound by his covenant to pay the rent reserved to his landlord. Aliter, where the mine is itself productive, although worked at a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner. *Rex* v. *Bedworth*, 8 East, 387; 9 R. R. 476.

A coal company was the owner and occupier of a coal mine which had been drowned out some years back, and was wholly unproductive. They constructed an engine and boilers, together with an engine house and boiler sheds, on lands they had taken for that purpose, and also made a railway on part of such lands for conveying coals for the boilers. The whole of the boilers, engines and plant were used only for the purpose of endeavouring to pump out the water from the mine; but since 1870 the water had remained at about the same level, and no coal had as yet been worked:—Held, that though the company was rateable to the relief of the poor for the surface lands they occupied, they were not so rateable for the buildings, boilers, engine and plant, and railway, as these were only part of a valueless colliery, and were not shewn to have any value apart from such colliery. *Tyne Coal Co.* v. *Wallsend Overseers*, 46 L. J., M. C. 185; 35 L. T. 854.

The lessee of a coal mine is rateable though he derives no profit from the mine. *Rex* v. *Parrott*, 5 Term Rep. 593.

—— **In different Parishes.**]—A coal mine lying in several parishes is rateable in each of those parishes, although the adit and the machinery are in one parish only. *Rex* v. *Foleshill*, 4 N. & M. 360; 2 A. & E. 593; 1 H. & W. 71; 4 L. J., M. C. 63.

By an inclosure act it was declared, that all the allotments to be set out to the several persons having right of common upon a moor should be deemed to be situate within the same townships and places respectively wherein the land lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of P. to certain coal mines under the moor:—Held, that the first clause affected only those portions of the soil which were allotted to the commissioners, and not the coal mines under those allotments, and therefore, that such coal mines were rateable in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *Rex* v. *Pitt*, 5 B. & Ad. 565; 3 L. J., M. C. 4.

Deduction by Tenant—Covenant to Pay Rates.]—A covenant, in a lease of iron mines, to pay a certain rent "free of all rates, taxes and deductions whatsoever, parliamentary, parochial or of any other nature," is not a "specific contract to pay the poor-rate, in the event of the abolition of the exemption," of iron mines, within s. 8 of the Rating Act, 1874 (37 & 38 Vict. c. 54); and the lessee is therefore entitled under that section to deduct half the poor-rate from the rent. *Devonshire (Duke)* v. *Barrow Hæmatite Steel Co.*, 46 L. J., Q. B. 435; 2 Q. B. D. 286; 36 L. T. 355; 25 W. R. 469—C. A.

A lease of an iron mine, made in 1855 (not being then liable to poor-rate), contained covenants for the payment of certain rents and royalties, and these payments were to be made free and clear of all rates and taxes imposed by parliament or otherwise . . . "free from all deductions whatsoever"; and there was a covenant to pay "all manner of taxes, &c., which now are or which shall at any time hereafter, during the continuance of this demise, be imposed," landlord's property tax excepted. By the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3, the 43 Eliz. c. 2, was extended to mines "of every kind not mentioned in the recited act"; but s. 8 provided that where the lessee of a mine was, at the commencement of the act, exempt from the payment of poor-rate, which was afterwards made payable, he might deduct one-half from the rent (unless he had specifically contracted to pay such rate in the event of the abolition of the said exemption):—Held, that under this section the tenant here might deduct half of the rate from his rent, for that he had not, within the words of the section, "specifically contracted" to pay such rate. *Chaloner* v. *Bolckow*, 47 L. J., C. P. 562; 3 App. Cas. 933; 39 L. T. 134; 26 W. R. 541—H. L. (E.)

26. Gas Works.

General Principle.]—The profits arising from the sale of gas, manufactured from coal, and conveyed through pipes and trunks under the pavement for the purpose of lighting a town, are not rateable, but the company is only rateable in a sum equal in amount to that for which the premises would let to other persons willing to carry on the same business. *Rex* v. *Birmingham Gas Light and Coke Co.*, 2 D. & R. 735; 1 B. & C. 506; 25 R. R. 483.

Rateable Occupation—Pipes.]—Fixing pipes in the ground for the conveyance of gas to light a town, is a rateable occupation of land, and the occupiers are rateable to the extent of the increased value of the land so used, as long as it is applied to the purposes of a pipe-way. *Rex* v. *Brighton Gas Light and Coke Co.*, 8 D. & R. 308; 5 B. & C. 466; 4 L. J. (O.S.) K. B. 213; 29 R. R. 290.

By an act for paving, lighting and watering, the trustees for carrying it into effect were empowered to rate the tenants and occupiers of all the houses, shops, malt-houses, granaries, warehouses, coach-houses, yards, gardens, grounds, stables, cellars, vaults, wharfs and other buildings and hereditaments within certain limits, meadow and pasture excepted:—Held, that this exception shewed the word "hereditaments" to be used not merely with reference to things ejusdem generis with those before enumerated, but in a more extended sense, comprehending land in general; and therefore that a gas-light company was rateable under the act for the ground occupied by their pipes and other apparatus. *Rex* v. *Shrewsbury Gas Co.*, 3 B. & Ad. 216; 1 L. J., M. C. 18.

Mains and Pipes—Exclusive Use—Easement.]—A corporation was empowered to supply gas within a certain township, the local board of which had the exclusive right of laying gas mains in the township, and were compelled to keep the gas mains in repair, and to allow the corporation to use them for the supply of gas within the township:—Held, that the corporation was not in occupation of, but had a mere easement in, the mains, and was, therefore, not liable to be rated in respect of them. *Southport Corporation*

v. *Ormskirk Assessment Committee*, 63 L. J., Q. B. 250 ; [1894] 1 Q. B. 196 ; 9 R. 46 ; 69 L. T. 852 ; 42 W. R. 153 ; 58 J. P. 212—C. A.

Articles Rateable—Meters Excluded.]—A gas company was rated in respect of the following articles : meters soldered to the leaden service-pipes on the premises of consumers, but not fixed in any way so as to interfere with their removal ; retorts, or instruments for the production of gas, distinct and severable from the foundation or basement floor of the company's premises, but attached to the floor by hardened fire-clay ; purifiers, or massive iron vessels standing on a brick base, but not fixed to it, though connected on one side with pipes passing through the soil from the retorts ; steam-engines fastened by screw bolts to a stone base, fixed in the soil and capable of being detached by unscrewing the bolts ; boilers set in brickwork fixed in the soil ; gas-holders, or vessels of plate-iron for storing gas, not fixed in any way, but placed so as to rise and fall in circular tanks excavated beneath the soil, and easily moved for the purpose of repairs. According to the practice and course of business in letting gas-works, the tenant would have to take to and find capital for all the articles above enumerated : — Held, that the retorts, purifiers, steam-engines, boilers, and the movable part of the gas-holders, appeared to be attached to the inheritance for the permanent improvement of it, and ought to be included in the value of the premises for the purpose of rating, but that the meters must be excluded, as they could not be considered as part of the gas-works, and never were so attached to the houses as to lose the character of chattels. *Reg.* v. *Lee*, 35 L. J., M. C. 105 ; L. R. 1 Q. B. 241 ; 12 Jur. (N.S.) 225 ; 13 L. T. 704 ; 14 W. R. 311.

—— **Fixed Machinery, Pipes and Gas-Holders.**] — By a local act, the guardians of a parish were directed to value all houses, tenements and hereditaments within the parish, for the purpose of rating to the relief of the poor. By the customary mode of rating under this act, fixed machinery, erected for the purposes of manufacture, was not rated, nor were buildings containing it rated according to their value as increased by that machinery. A gas company supplying the town with gas, but having their gas manufactory out of the parish, was rated "for their gas-holder and premises in the street, and mains and pipes within the parish." The company had no property in the soil of the streets under which their mains and pipes were laid, but a mere licence from the commissioners for paving and lighting the town, in whom that property was vested. The gas-holder was valued, for the purpose of the rate, as a warehouse or a building, at what it was worth to let by the year. The mains and pipes, and the land they occupied, were valued by ascertaining the quantity of land through which they were laid, and valuing that land with reference to the value of the adjoining lands, taking into consideration the purposes for which it was used. The mains and pipes were also valued separately, at an annual rental to let, in the same manner as the houses, with an allowance for wear and tear :—Held, that such a rate was bad for inequality, on the ground of omission to rate other property of a similar nature. *Rex* v. *Birmingham and Staffordshire Gas Light Co.*, 1 N. & P. 691 ; 6 A. & E. 634 ; 6 L. J., M. C. 92.

Mode of Assessment.]—The works of a gas company are to be rated upon an estimate of the rent which would be given for them by a hypothetical tenant, after proper deductions, even though such principle may not be theoretically right, and it may be practically impossible to apply it satisfactorily to that kind of property. *Sheffield United Gas Light Co.* v. *Sheffield Overseers*, 4 B. & S. 135 ; 32 L. J., M. C. 169 ; 9 Jur. (N.S.) 623 ; 8 L. T. 692 ; 11 W. R. 1064.

—— **Pipes in Several Parishes.**]—When the mains and pipes of a gas company are distributed through several parishes, the proper criterion for the assessment of the company to each parish is not the amount of receipts for gas supplied therein, but a proportional part of the rent at which, after deduction for the wear and tear of machinery, the works of the company would let, calculated according to the improved value of the land, from the apparatus and works of the company laid down therein. *Reg.* v. *Cambridge Gas Light Co.*, 3 N. & P. 362 ; 8 A. & E. 73 ; 7 L. J., M. C. 50.

A gas company in a town, which consisted of several parishes, in which were situated numerous colleges, which were extra-parochial, supplied gas in mains and pipes to these colleges, and was rated, therefore, to the parishes in which the colleges were locally situated :—Held, that the rate was bad, the company being rateable in respect, not of its receipts, but of the land occupied. *Ib.*

—— **Deduction.**]—The proper deduction to be made from the rent of a company's works to form the basis of an assessment, is such an annual sum as will be sufficient to replace the works when worn out. *Ib.*

Exemption for "Public Purposes."]—Commissioners who are authorised by acts of parliament to supply gas, provided that the profits be applied to the purposes of the acts, are not rateable to the poor-rate in respect of such profit. *Rex* v. *Beverley Gas Works*, 6 A. & E. 695 ; 1 N. & P. 646 ; 6 L. J., M. C. 84.

The corporation of Limerick having, under the powers of their special act, purchased the Limerick gas works, manufactured and sold gas ; and the surplus profits, after providing for certain charges and expenses, were applied, in pursuance of the provisions of the special act, in reducing the town improvement rate :—Held, that the gas works were not occupied for a "public purpose," and were not, therefore, exempt from being rated. *Limerick Corporation* v. *Valuation Commissioner*, Ir. R. 6 C. L. 420.

27. Stock in Trade and Personal Property.

Rateability.]—The 6 & 7 Will. 4, c. 96, did not alter the law as to the rateability of personal property ; therefore a poor-rate made after that statute, and omitting stock in trade which yielded a profit in the parish, was liable to be quashed on appeal. *Reg.* v. *Lumsdaine* or *Lamsdaine*, 2 P. & D. 219 ; 10 A. & E. 157 ; 1 W. W. & H. 587 ; 8 L. J., M. C. 69 ; 3 Jur. 360.

Stock in trade, if the property of the person in possession, and productive, was rateable. *Rex* v. *Darlington*, 6 Term Rep. 468. S. P., *Reg.* v. *Bridgewater*, 2 P. & D. 586 ; 10 A. & E. 711 ; 8 L. J., M. C. 72.

Notwithstanding it had never been rated in the parish, unless there were some circumstances to take it out of the general rule. *Rex* v. *Ambleside*, 16 East, 380.

Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, were not liable to be rated in that respect, as for their stock in trade. *Rex* v. *Sherborne*, 8 East, 537.

Fixtures—Tanks and Heavy Articles in a Distillery.]—The premises of a distillery contained tanks which formed the roofs of rooms and houses, boiling backs and mash tuns, lying on brick piers against the walls, which formed the floors of some of the rooms and were connected by pipes to other houses, reservoirs, and other articles necessary for the process of distilling. They were all heavy, and either unattached, except by the communicating pipes, to the walls or piers upon which they stood, or fastened only by screws for the purpose of being steadier. Each was to be bought and sold as a separate article, and if all were removed the premises might be used for other manufacturing purposes:—Held, that these articles were not fixtures, and could not be property rated in the assessment of the premises to the poor-rate. *Chidley* v. *West Ham Overseers*, 32 L. T. 486.

—— **Machinery.**]—A house and an engine for carding cotton, which are rented as one entire subject and described by the general name of an engine-house, are rateable. *Rex* v. *Hogg*, 1 Term Rep. 721; 1 R. R. 375.

The profits of a weighing-machine house are rateable. *Rex* v. *St. Nicholas, Gloucester*, 1 Term Rep. 723, n.

In assessing shipbuilding premises to the poor-rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their rateable value where such machinery, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose. *Laing* v. *Bishopwearmouth Overseers*, 47 L. J., M. C. 41; 3 Q. B. D. 299; 37 L. T. 781; 26 W. R. 351.

Ships.]—Where, by a local act, the guardians of the poor of a town were authorised to levy rates "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all stock and estates in the town, in equal proportions, according to their respective worths and values":—Held, that all personal property, including shipping, was rateable, whether the owners were or were not resident within the town. *Rex* v. *Hull Dock Co.*, 5 D. & R. 359; 3 B. & C. 516.

The owners of a coasting vessel were liable to be rated in respect of the profits accruing therefrom, in that parish where they themselves resided, and where the ship was registered, and where her cargoes were usually received and delivered, and her freight paid, and which was the home of the vessel when unemployed, although at the time of making the rate the ship was not actually within the parish. But they were not liable to be rated for a ship which was never locally within the parish, although the profits were there received by the owners. *Rex* v. *Shepherd*, 1 B. & Ald. 109.

Household Furniture.]—Household furniture is not rateable. *Rex* v. *White*, 4 Term Rep. 771.

28. Woods and Woodlands.

Saleable Underwoods.]—Saleable underwoods are rateable annually in proportion to their value, though they should happen not to be cut down more than once in twenty-one years; and their annual value may be estimated according to the value they may be worth to rent for a lease of the duration of their intended growth. *Rex* v. *Mirfield*, 10 East. 219.

Saleable underwood, under 43 Eliz. c. 2, means such shoots from old stools as are capable of reproduction, and of being treated by the wood-owner so as to yield a succession of profits, and the circumstances to determine this question are matters of fact for the sessions. *Reg.* v. *Narberth*, (*North*), 1 P. & D. 590; 9 A. & E. 815; 8 L. J., M. C. 46.

Timber—Exemption of.]—If beech is timber by the custom of the country, it is not rateable. *Rex* v. *Minchin*, 3 Burr. 1308.

Where fir and larch were planted with oak and ash trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time, as such oak and ash required more room to spread, and when once cut did not spring again:—Held, that although when sold they yielded a profit, they were not saleable underwood, as the primary object in planting them was not to derive a profit by sale; and consequently not rateable. *Rex* v. *Ferrybridge*, 2 D. & R. 634; 1 B. & C. 375; 25 R. R. 411.

The test of saleable underwood is not whether the tree is timber, either by the general law or the custom of the country, but whether it is managed in such a way as to produce a renewable profit, though it may not be available for many years. *Fitzhardinge* (*Lord*) v. *Prichett*, 8 B. & S. 216; 36 L. J., M. C. 49; L. R. 2 Q. B. 135; 15 L. T. 502; 15 W. R. 640.

Herbage and Prunage.]—It is not settled whether the herbage and prunage of a forest are rateable. *Jones* v. *Mawnsell*, 1 Dougl. 302.

Woods Rateable as Waste Lands.]—B. was rated in respect of woods and shooting in his occupation. Appeal against the rate on the ground of its being excessive. According to the Rating Act, 1874, the woods ought to have been rated as if the land was let and occupied in its natural and unimproved state, that is, as mere waste, irrespective of the value of the right of sporting thereon:—Held, that the objections were valid, and rate accordingly decreased. *Baker* v. *Beyford Overseers*, 33 L. T. 755.

Woodlands were assessed by quarter sessions at their rateable value if occupied in their natural and unimproved state, but it was found as a fact that they might be rendered worth a much larger sum to a tenant from year to year if a certain expenditure was incurred for grubbing up woods, draining, and road-making:—Held, that the quarter sessions were right, and that under the Rating Act, 1874, s. 4, woods were not to be rated on any assumption of their improved

value upon alteration into land of a different description. *Westmoreland (Earl)* v. *Southwick Overseers*, 36 L. T. 108.

29. RIGHTS CONNECTED WITH LAND.

Incorporeal Hereditaments generally.]—An incorporeal hereditament cannot be made rateable by virtue of a local act, except by clear and express words. *Colebrooke* v. *Tickell*, 4 A. & E. 916; 6 N. & M. 483; 2 H. & W. 23; 5 L. J., K. B. 180.

Sporting Severed from the Land.]—The owner of a tenement with dwelling-house and other buildings, containing about nineteen acres, leased to a person occupying the same, excepting plantations and all timber, and all mines, "and also excepting all manner of game, hares, rabbits, and wild fowl, with liberty of hunting, fowling and fishing, over and through the premises at all times during the term":—Held, that this lease reserved to the owner a right of sporting which was severed from the occupation of the land, and therefore rateable within the Rating Act, 1874 (37 & 38 Vict. c. 54) ss. 2 & 6. *Rogers* v. *St. Germans Union*, 35 L. T. 332.

Under 37 & 38 Vict. c. 54, s. 6, sub-s. 2, where the owner of land lets the right of sporting over part of the land which he retains in his own occupation, the lessee may be rated in respect of the right of sporting. *Kenrick* v. *Guilsfield Overseers*, 49 L. J., M. C. 27; 5 C. P. D. 41; 41 L. T. 624; 28 W. R. 372. See also *Eyton* v. *Mold Overseers*, 6 Q. B. D. 13; 43 L. T. 472; 29 W. R. 122; 45 J. P. 54.

An incorporeal hereditament, as a right of shooting, is not in itself the subject of a poor-rate. It can only be brought into account when it improves and enhances the value of the land to which it belongs. *Hilton and Walkerfield Overseers* v. *Bowes Overseers*, 35 L. J., M. C. 137; L. R. 1 Q. B. 359; 13 L. T. 512; 14 W. R. 368.

An owner of land who is himself the occupier, but lets the right to take game to another, is assessable in respect of his occupation, as being enhanced in value by the right to take game. *Reg.* v. *Battle Union*, 8 B. & S. 12; 36 L. J., M. C. 1; L. R. 2 Q. B. 8; 15 L. T. 180; 15 W. R. 57.

A yearly tenant occupied pasture land under a parol demise, the lessor reserving to himself the right to enter and kill and take the game. The rateable value of the land, assuming it to be held as pasture land only, was 11*l.* 5*s.* 8*d.*, and assuming that the occupier exercised the right to kill and take the game, was 26*l.* 19*s.* 8*d.* On an appeal by the tenant against a poor-rate, in which he was rated upon the greater amount, the sessions reduced the rate to a rate upon the lesser amount:—Held, that the reduction was right, the effect of the reservation in the demise, taken together with 1 & 2 Will. 4, c. 32, being to separate the right of killing and taking the game from the lessee's occupation. *Reg.* v. *Thurlestone*, 1 El. & El. 502; 28 L. J., M. C. 106; 5 Jur. (N.S.) 820; 7 W. R. 192.

Right of Common.]—A mere right of common is not rateable; therefore, where certain persons, as burgesses of a town, and occupiers of ancient messuages within it, had a right to turn cattle upon certain lands, at certain periods of the year, to the exclusion of the owners of the soil:—Held, that they had a mere right of common, in respect of which they were not rateable. *Rex* v. *Churchill*, 6 D. & R. 635; 4 B. & C. 750; 28 R. R. 473.

Where a corporation was seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same, they paying 19*s.* 4*d.* to each of the other burgesses who did not stock:—Held, that the stocking of the lands was rateable. *Rex* v. *Watson*, 5 East 480; 2 Smith, 144. And see *Rex* v. *Tewkesbury Corporation*, 13 East, 155; *Rex* v. *Sudbury Corporation*, 2 D. & R. 651; 1 B. & C. 389; 25 R. R. 423.

Where freemen, and the widows of deceased freemen, of a municipal corporation enjoyed the right of depasturing on an uninclosed moor, of digging turfs, clay, sand, and marl, of cutting whins and furzes, of getting limestones and slates from the quarries, and sowing grass-seeds on the moor, according to regulations framed by the corporation, and the corporation had inclosed a part of the common one hundred years back, which they still retained in severalty; but it appeared that the rights of the freemen originated in grants of right of common and turbary, and that there was no evidence to shew that any larger right had ever been granted to them, and that a rent of 2*s.* per annum, which had been reserved on the grant of the right of turbary, was still paid to the lord of the manor:—Held, that the freemen only possessed a right of common, though with large and unusual enjoyments, and that therefore it was an incorporeal tenement, not rateable. *Reg.* v. *Alnwick (Chamberlains)*, 1 P. & D. 343; 9 A. & E. 444; 8 L. J., M. C. 50.

Right of Fishing.]—The lessee of all those fishing or the halves and halvendoles, with the appurtenants to the halves due and accustomed within the river Severn, between certain limits within a manor bordering on the river, and of all royal fishes taken between the limits, put and wheel fishing excepted, under an annual rent, is liable to be rated for such fishery. *Rex* v. *Ellis*, 1 M. & S. 652.

Fishery—"Expenses necessary to command Rent."]—By a local fishery act, passed for the preservation and increase of salmon, commissioners were empowered to raise a rate from every owner of a fishery in a large district for the purposes of the act. The appellant was tenant of a fishery, for which he paid a rent of 305*l.*, and a rate of 61*l.* to the commissioners:—Held, that in ascertaining the rateable value of his property, the amount of the rate should be deducted, for that it was an "expense necessary to maintain the property in a state to command such rent," and so allowed to be deducted under s. 1 of the Parochial Assessment Act, 1834. *Reg.* v. *Smith*, 55 L. J., M. C. 49; 54 L. T. 431; 50 J. P. 215.

Land Improved by a Spring.]—Land, of which the annual value is improved by a spring rising within it, may be rated at such improved value, although the owners of the land, who are also occupiers, do not receive any of the profits derived from the spring, nor does any part become due in the parish where the land lies. *Rex* v. *New River Co.*, 1 M. & S. 503; 14 R. R. 514.

If one rents a quantity of land, together with a mineral spring thereout arising, at a gross yearly

rent, he is rateable in respect of the whole of such rent; though in fact the annual value of the land, independently of the spring, is only in proportion of two to eight of the reserved rents. *Rex* v. *Miller*, Cowp. 619.

Profits of a Manor.]—Neither quit-rents, nor heriots, nor other casual profits of a manor are rateable. *Rex* v. *Vanderwall*, 2 Burr. 991; 1 W. Bl. 212.

30. Tithes, Corn and Commuted Rent-charges.

Tithe—Mode of Assessment.]—Tithes are hereditaments within the 6 & 7 Will. 4, c. 96, and a tithe-owner is rateable at their annual value, i.e. such a sum as the tithes might reasonably be expected to let for from year to year, free of the usual tenant's rates and taxes, and deducting the amount of ecclesiastical dues payable in respect thereof. *Reg.* v. *Capel*, 4 P. & D. 87; 12 A. & E. 382; 9 L. J., M. C. 65; 4 Jur. 886.

Corn-rents.]—By an inclosure act, allotments were made to the parson, as a compensation for the uninclosed glebe lands of his rectory, and for all rights of common belonging to the rectory; and it was enacted, that the commissioner for inclosure should ascertain the yearly value of all the tithes on the lands to be inclosed, and the ancient inclosed lands, and that the tithes should be deemed equal in value severally to one-fifth, one-seventh, and one-eighth of the annual net value of different classes of lands respectively, and a corn-rent be assigned to the parson, equivalent to the annual value of the tithes:—Held, that the parson was rateable in respect of such corn-rent. *Rex* v. *Wistow*, 5 A. & E. 250; 6 N. & M. 567; 2 H. & W. 95; 5 L. J., M. C. 122.

Where the tithes of a parish were extinguished by act of parliament, and in lieu thereof certain annual corn-rents issuing out of the lands in the parish were substituted, payable to the rector quarterly with a power of distress and sale to enforce payment:—Held, that the money when paid, was rateable in the hands of the rector. *Rex* v. *Boldero*, 6 D. & R. 557; 4 B. & C. 467; 28 R. R. 330.

—— **Mode of Assessment.**]—A corn-rent in lieu of tithes should be rated upon the same principle as a farm, the criterion being "for how much a year would it let to a tenant." Allowance should be made for the trouble and expense of collection, and the danger of loss by insolvency, and for the ecclesiastical dues payable by the incumbent to the bishop, but not for the expense of providing for the performance of the church duties. *Rex* v. *Joddrell*, 9 L. J. (O.S.) M. C. 26.

Rent-charge.]—An act enacted that the tithes of a parish should be held in fee by A., who was owner of part of the lands in the parish, and that all A.'s lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who, by an agreement recited in the act, was to receive such annuity in lieu of all his vicarial dues:—Held, that the vicar was not rateable for such annuity, as the tithes were not extinguished. *Rex* v. *Great Hambleton*, 1 A. & E. 145.

An act of the legislature imposed a rate on lands "and other real estate":— Held, that although these words were large enough to include a rent-charge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the act that it was not intended to apply to incorporeal rights. *Kerr* v. *Wilkie*, 6 Jur. (N.S.) 383; 1 L. T. 501; 8 W. R. 286—H. L.

By an inclosure act it was enacted, that an annual rent of 90*l.* should be vested in the rector, charged upon all the land to be inclosed, and should be paid "free and clear of and from all deductions, defalcations or abatements for or in respect of reprises or outgoings whatsoever," other than such proportion of the land-tax as the annual rent of 90*l.* should be to the yearly value of the lands charged with it. It also enacted, that the annual rent of 90*l.* should be in lieu and satisfaction of, and compensation for, all tithes arising within the fields to be inclosed, and all other tithes and payments to the rector, except in respect of two orchards, and all the houses to which no lands in the common fields belonged:—Held, that the rector was not rateable in respect of the annual rent-charge. *Reg.* v. *Shaw*, 3 New Sess. Cas. 170; 12 Q. B. 419; 17 L. J., M. C. 137; 12 Jur. 651.

By an inclosure act, reciting that A., as lay impropriator, was entitled to the great, and B., as vicar, to the small tithes: the commissioners were empowered to set out certain lands as the value of and which should be taken as a full satisfaction and compensation for the tithes both great and small, and, out of the lands so to be set out in lieu of tithes, they were to allot thirty acres to B., and all the remainder to A., subject to the payment of a corn-rent (to be ascertained in the usual way), which should, with the thirty acres, in their judgment be a fair compensation for the vicarial tithes and payments in lieu of tithes payable to the vicar, which rent or sum of money should be payable and paid to the vicar and his successors quarterly, clear of all parochial taxes, rates, dues and assessments whatsoever; and it was enacted that the tithes in lieu whereof the thirty acres of land were so directed to be allotted, and such rent was to be paid, should cease and be for ever extinguished:—Held, that the land so allotted to A. in lieu of the vicarial tithes, and so charged with such rent, was liable to be assessed. *Hackett* v. *Long Bennington Overseers*, 16 C. B. (N.S.) 38; 33 L. J., M. C. 137; 9 L. T. 769; 12 W. R. 433.

—— **Mode of Assessment.**]—A tithe rent-charge is to be assessed to the poor-rate, like all other property, according to the sum for which it might reasonably be expected to let from year to year, and in deciding upon such an amount it must be considered whether in each particular case anything over the expenses for collecting and the allowances for bad debts and legal and other expenses would be necessary to induce a tenant to take it. *St. Asaph (Dean)* v. *Llanrhaiadr-yn-Mochnant Overseers*, 66 L. J., Q. B. 267; [1897] 1 Q. B. 511; 76 L. T. 42; 45 W. R. 374; 61 J. P. 213—C. A.

Commutation for fixed annual Payment—Payment in Lieu of Tithes.]—By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London and their successors of a rate made upon the inhabitants and calculated upon the rent of the houses in the city. In this and

several subsequent statutes these payments were described as tithes. A special act passed in 1881 provided that all tithes and sums of money in lieu of tithes arising or growing due in a parish in London should cease and be extinguished, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum, to be levied and collected in the same manner as the poor-rates. Neither the above-mentioned tithes nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor :—Held, that the owner was not rateable to the poor-rate in respect of this fixed annual sum, as such sum was a personal payment, and was not a payment in lieu of tithes rateable under 43 Eliz. c. 2. *Esdaile* v. *City of London Union*, 56 L. J., M. C. 149; 19 Q. B. D. 431; 57 L. T. 749; 35 W. R. 722; 51 J. P. 564—C. A.

By a local act the parish of F. was constituted a separate parish, and it was provided that the parson should receive the tithes within the limit of the parish. It was further provided that the corporation of the town of F., which was in the parish, should levy a rate called "the rector's rate" on all houses, shops, warehouses, cellars, and outhouses, with the appurtenances, then being, or which should at any time thereafter be built in the town, after the rate of sixteenpence in the pound, and pay the same to the parson of the parish. When houses, shops, warehouses, cellars, and outhouses, with the appurtenances, had been built on land liable to tithe, tithe had not been collected in respect thereof. The defendant, the parson of the parish, was rated to the relief of the poor in respect of the rector's rate :—Held, that although under 43 Eliz. c. 2, a parson is rateable as an inhabitant in respect of tithes and money payments in lieu of tithes, yet the defendant was not liable in respect of the rector's rate, which was not a payment in lieu of tithes, inasmuch as it was levied on land which would not, on default of payment of the rector's rate, be liable to tithes. *Reg.* v. *Christopherson*, 55 L. J., M. C. 1; 16 Q. B. D. 7; 53 L. T. 804; 34 W. R. 86; 50 J. P. 212—C. A.

Quære, whether a rector who lets his tithes by parol to the occupiers of the lands in respect of which the tithes arise, and receives a half-yearly composition in the nature of rent can be treated as the occupier of tithes within the meaning of the General Highway Act, 13 Geo. 3, c. 78, s. 34, and rateable to the highways of the parish. *Rex* v. *Buckinghamshire JJ.*, 2 D. & R. 689; 1 B. & C. 485.

Tithes for which compositions have been entered into by the respective occupiers may be rated in the hands of the rector in one entire sum. *Rex* v. *Sussex JJ.* or *Hasler*, 3 N. & M. 263; 3 L. J., M. C. 56.

Grant by Deed—Security in Land.]—A rector of a parish granted to the incumbent (and his successors) of a district formed under 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; and 19 & 20 Vict. c. 104, out of several parishes, of which his parish was one, "one clear yearly rent-charge of 150*l.*, to be payable half-yearly, issuing out of and charged upon or being part of the rectory or parsonage, and the glebe lands, tithes or tithe commutation rent-charge, hereditaments, and all other emoluments to the rectory or parsonage belonging." The deed gave power to the grantee, in case it should be in arrear, to enter upon the rectory and parsonage, glebe lands, hereditaments, or any part thereof, and to distrain, or to receive and take the tithes or rent-charge in lieu of tithes, until satisfaction of such arrears. This power had never been exercised, the money having been regularly paid. The grantee did not reside in the parish :—Held, that he was not rateable to the poor-rate in respect of the annual sum granted by the deed. *Frend* v. *Tolleshunt Knights*, 1 El. & El. 753; 28 L. J., M. C. 169; 7 W. R. 454.

Deductions—Rent-charge on a Tithe Rent-charge.]—An incumbent, owner of a tithe rent-charge, who voluntarily endows a district parish formed, for spiritual purposes, out of a part of his own parish, by granting to the minister of such new district parish a rent-charge on the tithe rent-charge, is not entitled to claim a deduction from the total amount of tithe rent-charge in respect of the portion which he has thus granted away. *Lawrence* v. *Tolleshunt Knights Overseers*, 2 B. & S. 533; 31 L. J., M. C. 148; 10 W. R. 620.

The Archbishop of Canterbury, being owner of the impropriate rectory and tithe rent-charge of a parish of H., and of land thereto appertaining, granted, under 29 Car. 2, c. 8, and 1 & 2 Will. 4, c. 45, to the perpetual curate of P. (a separate and distinct parish from H.), an annual rent of 40*l.*, to be charged upon and yearly issuing out of the rectory, tithe rent-charge and land. Subsequently to this grant, the archbishop leased the rectory, tithe rent-charge, and land to G., a clergyman, for twenty-one years, G. to pay yearly, during the term, to the archbishop, 9*l.* 13*s.* 4*d.*, and also 6*l.* 16*s.* for redeemed land-tax; and also to the perpetual curate of T. the sum of 40*l.* in augmentation of the revenues of the curacy :—Held, that in assessing G. to the poor-rate of H., as occupier of the tithe rent-charge of H., no allowance was to be made to him in respect of his yearly payment of the 40*l.*, for that the whole of the rent-charge was included in the demise to him, and the 40*l.* was part of the rent paid by him for the occupation of the whole, not so much of the whole withdrawn from his occupation. *Reg.* v. *Groves*, 2 El. & El. 793; 29 L. J., M. C. 179; 6 Jur. (N.S.) 1014; 8 W. R. 434.

—— **Expenses of Collection.**]—A deduction is allowed for expenses of collection including law expenses and losses by ultimate nonpayment. *Reg.* v. *Goodchild*, El. Bl. & El. 1; 27 L. J., M. C. 233; 6 W. R. 800.

—— **Rates and Taxes.**]—And for poor-rate, tenant's property tax and ecclesiastical dues, but not for landlord's property tax or land tax. *Ib.*

—— **Tenant's Profits.**]—A deduction by way of tenant's profits is not necessarily to be made. *Ib.*

—— **Repair of Chancel.**]—Upon an appeal to quarter sessions by the owners of a rectorial tithe rent-charge from the decision of an assessment committee as to the rateable value thereof, the court of quarter sessions allowed deductions from the gross estimated rental in respect of the remuneration of a collector, legal costs and out-of-pocket expenses, bad debts, and irregularity in payments, and tenant's taxes, and also for tenant's profits and for the repair of the chancel of the parish church :—Held, on appeal—first, that in the absence of a finding of fact that the

amount allowed for the expenses of collection, bad debts, and legal and other expenses was insufficient to induce a tenant to take the tithe rent-charge without a further allowance, the court of quarter sessions were wrong in allowing a deduction for tenant's profits; and, secondly, that, as it did not appear that a tenant could be charged with the repair of the chancel of the church, the deduction upon that ground was also wrong. *Reg.* v. *Goodchild* (El. Bl. & El. 1; 27 L. J., M. C. 233) followed. *St. Asaph (Dean)* v. *Llanrhaiadr-yn-Mochnant Overseers*, 66 L. J., Q. B. 267; [1897] 1 Q. B. 511; 76 L. T. 42; 45 W. R. 374; 61 J. P. 213—C. A.

—— **Money for Queen Anne's Bounty.**]—In assessing the commutation tithe rent-charge and parsonage-house of a benefice, no deduction is to be allowed in order to ascertain the rateable value in respect of a sum paid annually by the incumbent to the governors of Queen Anne's Bounty as interest and part principal of money borrowed by him to rebuild the house, such payment being secured by a mortgage on the profits of the benefice. *Reg.* v. *Hawkins*, El. Bl. & El. 2; 27 L. J., M. C. 248; 6 W. R. 367.

—— **Stipend to Curate.**]—Lay impropriators of the tithes of a parish, B., granted a lease of their tithe rent-charge, at a nominal rent, to W., for twenty-one years, if he should so long remain the vicar of the adjoining parish, he covenanting to serve the cure of B., either by himself or a curate. In order to the proper discharge of the duties of the two parishes, it was necessary to employ a curate for B.:—Held, that in assessing W. to the poor-rate of B., as occupier of the tithe rent-charge, he was not entitled to any deduction in respect of the stipend which he paid the curate. *Wheeler* v. *Burmington Overseers*, 1 B. & S. 709; 31 L. J., M. C. 57; 8 Jur. (N.S.) 304; 5 L. T. 345; 10 W. R. 57.

Where a beneficed clergyman is compellable by his bishop to appoint a curate, or under a sense of religious, independent of legal obligation, appoints one, he is entitled in assessing his tithe commutation rent-charge to the poor-rate under 6 & 7 Will. 4, c. 96, to deduct the salary of the curate from the amount of the rent-charge. *Williams* v. *Llangeinwen Overseers*, 1 B. & S. 699; 31 L. J., M. C. 54; 8 Jur. (N.S.) 313; 5 L. T. 309; 10 W. R. 14. S. P., *Reg.* v. *Goodchild*, El. Bl. & El. 1; 27 L. J., M. C. 233; 6 W. R. 800.

Where the income of the incumbent of a parish is made up of a tithe rent-charge glebe land and interest of a sum invested in the public funds, and the incumbent necessarily employs a curate to assist him in assessing the rent-charge to the poor-rate, the salary of the curate must be set against the whole income, and a proportionate sum only deducted from the amount of the rent-charge. *Scriven-with-Tentergate Overseers* v. *Fawcett*, 32 L. J., M. C. 161; 11 W. R. 689.

—— **Benefice of Three Parishes.**]—The vicar of one benefice composed of three parishes was rated in each parish in respect of his vicarial tithe commutation rent-charge; he received that rent-charge for the three parishes as well as the other profits arising within the same. For one of the parishes he appointed a curate, who resided there and was licensed by the bishop, and received from the vicar an annual stipend for discharging the ecclesiastical duties of it. In another the like arrangement subsisted. The vicar himself performed the duties and resided in the third:—Held, that in ascertaining the rateable value of the tithe commutation rent-charges of the several parishes he was not entitled to be allowed a deduction in respect of the stipends paid to the curates. *Reg.* v. *Sherford*, 8 B. & S. 596; 36 L. J., M. C. 113; L. R. 2 Q. B. 503; 16 L. T. 663; 15 W. R. 1035.

Exemptions.]—*See* sub tit. STATUTORY EXEMPTIONS, infra, col. 1697.

31. TOLLS.

Rateability of Toll-house—Exemption.]—Tolls are not rateable in themselves, but a toll-house is increasedly rateable by reason of the facilities which it affords for the collection of the tolls. *Williams* v. *Bedminster Assessment Committee*, 45 L. J., M. C. 117; 34 L. T. 795.

W. was lessee of a toll-house, and of certain tolls levied on passengers over a bridge on the site of an ancient ferry. The value of the tolls was about 800*l.* per annum; the value of the toll-house as a building was 12*l.* A rate was laid generally on the toll-house and tolls, stating the "gross estimated value, 800*l.*," and "rateable value, 700*l.*":—Held, that although the tolls were not themselves rateable, yet the toll-house was; and in assessing the latter, its value, as enhanced by the facility it afforded for collecting the tolls, was to be taken into account. *Ib.*

A toll-house erected for the purpose of taking tolls at a gate across a highway which has never been used by the public except on paying a certain sum for passing through is liable to be rated according to the amount of the tolls received; and the expressed amount of the rate is to be divided in proportions between the parishes in which the road is situated over which the right of passage is acquired, by payment of such toll. *Reg.* v. *St. George the Martyr, Southwark*, 3 W. R. 515.

Canal Tolls.]—Canal tolls, per se, are not rateable. *Rex* v. *St. Mary's, Leicester*, 6 M. & S. 400.

Tolls of a Lock upon a Canal.]—An act having empowered the Duke of Bridgewater to erect a lock upon the Rochdale canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharves at Manchester, which were sacrificed for the public benefit in that navigation:—Held, that a poor-rate on his trustees, occupiers of the "Rochdale canal, lock, tunnel, dues or rates" (which dues or rates were only other names for the lock rated therewith), was good. *Rex* v. *Macdonald*, 12 East, 324; 11 R. R. 396.

Tonnage Dues of a Dock.]—By an act the dock company at Hull received a grant of land from the crown, and of 15,000*l.* from the revenues of the customs, and were empowered to make a basin or a dock, wharves, &c.; and, in consideration of the expense of making and maintaining the same, dues were made payable to them for every ship or vessel coming into, or going out of, the harbour, basin, or docks, within the port of Hull, or unlading or lading any of their cargo within the port. By another act the company was empowered to increase their docks. The port of Hull consisted of the river Hull, or harbour, and of a portion of the river Humber,

neither of which was the property of the dock company, and of three docks and a basin, which were the property of the company. All vessels frequenting the port of Hull passed through that portion of the river Humber which is within the port of Hull, paid tonnage duties, and might be divided into five classes: first, those which discharge their cargo in the river Humber without entering the river Hull, basin or docks; secondly, those which discharge their cargo in the river Hull without entering the basin or docks; thirdly, those using the basin without going into the docks; fourthly, those passing through the river Hull into the docks; and fifthly, those passing through the basin into the docks. The tonnage dues were all collected at the custom-house:—Held, that the company was not rateable for their tonnage dues upon the first and second classes, but that they were rateable for the remaining classes. *Reg.* v. *Hull Dock Co.*, 1 New Sess. Cas. 621; 7 Q. B. 2; 14 L. J., M. C. 114; 9 Jur. 442.

Harbour Dues—Additional Duty for Use of Wet Dock.]—Commissioners were appointed by a local act of parliament for the improvement of a harbour, with power to impose tonnage dues upon all ships using the harbour, and other dues called shore dues on goods shipped from or landed on the quays. The soil of the harbour did not belong to the commissioners, but that of the quays was vested in them, and they were accordingly rated to the poor-rate in respect of the shore dues, but not in respect of the tonnage dues. By a subsequent act the commissioners were empowered to construct a wet dock, and fresh dues were substituted for those previously authorised, the shore dues on goods being much the same as those which previously existed, except that additional dues were payable on completion of the wet dock on goods loaded or discharged in the dock, or exported or imported in vessels of a tonnage of 100 tons or upwards, and new tonnage dues for vessels entering or leaving the harbour; those for vessels under 100 tons being practically the same as those previously imposed, and those for vessels above 100 tons being higher, and it was also provided that for every vessel entering the wet dock there should be an additional tonnage duty:—Held, that in assessing the commissioners to the poor-rate in respect of the dock the additional dues paid by ships entering the dock ought only to be taken into account, and not the harbour duty payable by such vessels exclusive of the additional dues. *Reg.* v. *Kingston-upon-Hull Docks* (7 Q. B. 2) distinguished. *Reg.* v. *Berwick Assessment Committee*, 55 L. J., M. C. 84; 16 Q. B. D. 493; 54 L. T. 159; 5 Asp. M. C. 532; 50 J. P. 71.

Not paid in respect of the Use of Land.]—A borough extended along a part of the shore of the harbour. On the shore, within the borough, were quays and wharves, (1) occupied by, and the property of the corporation; (2) the property of the corporation, occupied by their lessees under an indenture, reserving to the corporation the right to enter and take all dues payable to the corporation, with a covenant by the lessee not to allow the landing or shipping of goods until the dues payable to the corporation should be satisfied; and (3) property of B. The only mode of landing goods in the borough, or shipping them from the borough, was by using one of these three classes of quays or wharves. For all goods so landed or shipped, by means of quays or wharves of any of the three classes, the corporation received, by immemorial usage, the origin of which was not known, dues, sometimes called town dues and quayage, sometimes quayage only:—Held, that it appeared that the dues were not paid in respect of the use of land, but were incorporeal and in gross, and that neither the corporation nor any one to whom the dues were let by the corporation was rateable in respect of any part of the dues. *Lewis* v. *Swansea Overseers*, 5 El. & Bl. 508; 25 L. J., M. C. 33; 1 Jur. (N.S.) 1108; 4 W. R. 13.

A port began at the bar at the mouth of a river, extended to a bridge, comprehended the whole space of the river from low-water mark on the north side to low-water mark on the south side, and was in five contiguous parishes or townships on both sides, usque ad medium filum aquæ. The soil and freehold of the port between low-water mark on each side were in the Bishop of Durham, and the party rated held under a lease from the bishop for twenty-one years. Every ship entering the port might have to cast anchor therein, or to be moored to some moorings affixed in the river, or on the shores adjacent. The bishop and his lessees maintained the beacons and moorings in the river. Before the appointment of the ecclesiastical commissioners the port was managed by the bishop and his lessees, and by them beacons were set up, mooring buoys, posts, and rings were placed and fixed within the port for the use and benefit of ships entering the port, and other works were done for the maintenance of the port, and the use and benefit of the ships resorting thereto. The tolls rated had been paid immemorially to the bishop and his lessees, and were called anchorage and beaconage tolls, being 1*s.* 2*d.* for every ship which entered the port:—Held, that as the use of the soil was part of the consideration for the payment of the tolls, the tolls were connected with the occupation and use of the soil, and not being tolls in gross, were rateable. *Reg.* v. *Durham* (*Earl*), 2 El. & El. 230; 28 L. J., M. C. 232; 5 Jur. (N.S.) 1306; 7 W. R. 732.

Held, also, that the tolls were rateable in all the townships and parishes in which any part of the port was situate, and into which ships paying the tolls came; and that they ought to be rated upon a calculation of the number of ships paying the tolls, and coming into those parts of the port which were in the townships respectively. *Ib.*

—— Quays in Occupation of Harbour Commissioners—Dues payable irrespective of Use of Quays—Land occupied for Gratuitous Use of Persons paying Tolls.]—Where harbour commissioners in whom the soil of the harbour is not vested, but who occupy the adjoining quays, are authorised to levy dues upon all ships entering the harbour, and the same dues are payable whether the quays are used or not, the fact that many of the ships use and are attracted to the harbour by the existence of the quays does not so connect the dues paid by such ships on entering the harbour with the occupation of the quays as to entitle the rating authority to take such dues into account, as enhancing the rateable value of that occupation. *Blyth Harbour Commissioners* v. *Newsham and South Blyth Overseers*, 63 L. J., M. C. 274; [1894] 2 Q. B. 675; 9 R. 618; 71 L. T. 34; 59 J. P. 4—C. A.

—— **Dues reserved to Landlord.**]—The owners of docks and wharves let the wharves to a railway company. The company was the sole occupier of the wharves, but by the agreement wharfage dues payable on all goods shipped or unshipped at the wharves were reserved to the landlords, and were paid direct to them by the owners or consignees of the goods :—Held, that the railway company, as a sole occupier of the premises, was liable to be assessed to the poor-rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of benefit which the company itself derived from the occupation. *Reg.* v. *Rhymney Ry. Co.*, 10 B. & S. 198 ; 38 L. J., M. C. 75 ; L. R. 4 Q. B. 276 ; 17 W. R. 530.

Rateable Occupation of Tramway.] — The respondents rated the appellants to the relief of the poor of the borough of Plymouth, as occupiers of the harbour or pool of Sutton, and as receivers of the tolls, profits, and dues in respect thereof : —Held, upon a claim made by the respondents to take into account, in ascertaining the rateable value of Sutton Pool, the rent received by the appellants from the railway for the use of certain tramways constructed by the appellants, but worked, managed, and maintained exclusively by the railway company, subject to the berthing, loading, and unloading, of ships by the appellants alongside the quay, and the lawful duties of the harbour-master for the time being, that the railway were the proper persons to be rated, and not the appellants. *Sutton Harbour Co.* v. *Plymouth Union*, 63 L. T. 772 ; 55 J. P. 232.

Tunnel—Railway Company—Toll in fact not taken.]—A railway company empowered by act of parliament to take a toll upon certain goods passing through a tunnel did not take the toll lest the carriage of the goods should be altogether lost to them :—Held, that as the toll was not in fact taken, the company could not be assessed to the poor-rate in respect of it. *Reg.* v. *Stockton and Darlington Ry.*, 8 L. T. 422.

Market Tolls.]—Where a local act directed a rate to be levied in respect of messuages, dwelling-houses, warehouses, or other buildings, or of any other tenements :—Held, that a rate in respect of market sites, streets, lands, and tenements, and the tolls due in respect thereof, was bad. *Rex* v. *Mosley*, 3 D. & R. 385 ; 2 B. & C. 227 ; 26 R. R. 328.

The lessee of market tolls in gross not incident to the soil is not rateable in respect of his occupancy. *Rex* v. *Bell*, 5 M. & S. 221 ; 17 R. R. 315.

—— **Liability of Owner as Occupier.**]—By a paving and lighting act, the tenants and occupiers of all messuages, houses, &c., and other tenements situate within certain towns respectively, were liable to be rated for the purposes of the act :—Held, however, that the lord of the manor, being owner of the markets kept in the streets of that town, was not liable under the act to be so rated in respect of his occupation thereof and the tolls arising therefrom, as the occupier of a tenement. *Rex* v. *Mosley*, 3 D. & R. 385 ; 2 B. & C. 227 ; 26 R. R. 328.

—— **Distinguished from Stallage.**] — Tolls authorised to be taken by an act of parliament in respect of cattle brought into a market for sale which became due as soon as the cattle were brought into the market-place, and before the cattle were put into a pen or tied up, are mere market tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil, and in assessing the lessee of the market and tolls to the poor-rate in respect of the occupation of the market-place such tolls cannot be taken into account as enhancing the value of the occupation. *Caswell* v. *Wolverhampton Overseers*, 41 L. J., M. C. 108 ; L. R. 7 Q. B. 328 ; 26 L. T. 574 ; 20 W. R. 624.

Where an open market is divided under the provision of an act of parliament into parts, each of which is appropriated to a special purpose, such as potato stands, fruit market, and flower stands, and by the act tolls or rents are reserved to the owner of the market from those who use the several divisions of the market, such tolls arise out of a use of the soil, and are in the nature of stallage tolls, so as to be rateable for the relief of the poor. *Bedford (Duke)* v. *St. Paul, Covent Garden*, 51 L. J., M. C. 41 ; 45 L. T. 616 ; 30 W. R. 411 ; 46 J. P. 581.

—— **Tolls on Goods Sold.**]—Appellants were rated on the "market-house, with the grounds belonging, used and occupied for the tolls of the markets and fairs." It was admitted that under this description they were in fact rated not only for the market-house, but also for the tolls on merchandise sold in the market, and for payments made to the lord and his lessees for goods not sold but exposed for sale on stalls and otherwise, which payments, from time immemorial, were charged according to the situation of the stalls and other circumstances, according to the discretion of the lord and his lessees ; and also for payments made for leave to use temporary theatres and shows. None of the stalls, &c., were in any way affixed to the soil. The lord was owner of the soil of the market. The appellants were lessees for a term of years under the lord :—Held, that the tolls on the goods sold were not the subject of a rate, and that the fact that such tolls were paid in the market-house made no difference ; but that the other payments were in the nature of compensation for the use of the soil, and that they and the market-place were properly rated. *Roberts* v. *Aylesbury Overseers*, 1 El. & Bl. 432 ; 22 L. J., M. C. 34 ; 17 Jur. 236.

—— **Tolls for Admittance.**]—P. was rated as the occupier of tolls, lands, and buildings situated in the Ashford cattle market ; and among the gross receipts upon which the valuation was estimated were items for the sheep, cattle, pigs, and horses admitted into the market during the year at a fixed sum per head. In 1671, Charles II. granted by charter to Lord Strangford, his heirs and assigns, a market to be holden every alternate Tuesday within or near to the town of Ashford, together with the tolls and profits thereof. No evidence was to be found of the actual establishment of a market under this charter ; but in 1784 a stock market was established, and for some time afterwards held upon every fourth Tuesday. From 1793 to 1856 a stock and cattle market was held on every alternate Tuesday in the main street of Ashford, the lord of the manor and the inhabitants receiving certain payments for the use of such pens as either of them supplied respectively, but no tolls appeared to have been levied upon animals sold at the market. After many mesne assignments,

in 1856, P.'s lessors, incorporated as a limited company, obtained a conveyance in fee of a piece of land in the manor, and "all the tolls, stallages, dues, profits, or emoluments whatsoever arising from all markets and fairs held in the town of Ashford," except the meat, fish, and vegetable market. In 1874, P. hired from the company, at a fixed annual rent, certain fixed tolls of the cattle market, the lands belonging thereto, and the fairs and other perquisites. The land occupied by the market was fenced in, and kept locked when not used for market or other purposes. Some pens in the market were appropriated to particular owners and salesmen, and others were free for any animals in the market. All animals, however, paid toll for admittance to the market:—Held, that the tolls for admittance to the market were incident to the soil so as to be taken into consideration as increasing the value of the occupation, and were not mere market tolls which could not be rated. *Percy* v. *Ashford Union*, 34 L. T. 579.

—— **Deduction for Annual Rent.**]—By a local act a company was incorporated and authorised to regulate the market-places belonging to the corporation of Brecon, and to receive all tolls payable therefrom, which were thereby vested in them. They were, however, by another section, to pay to the corporation 210*l.* a year, to be charged on the scheduled tolls, markets, and market-places, by the act vested in the company, and to be a first charge on those tolls next after the expense of recovering them. This annual sum was to be devoted by the corporation to the payment of incumbrances incurred by the building of the old market-place. The company, under the authority of the act, constructed new market-places on land vested in them, and collected tolls from the old and new markets:—Held, that the company was not entitled to a deduction of this 210*l.* from the net annual value of their tolls in their assessment to the poor-rate. *Brecon Markets Co.* v. *St. Mary's, Brecon*, 36 L. T. 109.

—— **Tolls for Foreign Animals landing at a Market Wharf.**]—By the Contagious Diseases (Animals) Act, 1869, ss. 2, 3, 24, and 25, it was provided that the local authority might provide wharves, lairs, sheds, market-houses, and places for the landing, reception, sale, and slaughter of foreign animals, such place to be deemed a market, and might charge for the use of such wharf, &c., such sums as by by-laws they might appoint. By the Contagious Diseases (Animals) Act, 1878, s. 4, the act of 1869 was repealed, saving all existing acquired rights; but by s. 39 the provisions of ss. 23–25 of that act were practically re-enacted, adding that the said charges should be deemed "tolls." In 1871 the corporation of London, as the local authority, built a market at D. for the reception, &c., of foreign animals. By certain by-laws, a fixed charge per head for wharfage, lairage, market dues, and charges was levied on all animals landed, such charge becoming due on the animals being landed. These charges included lairage until the animals were slaughtered. No consignee of any animals had any right to put his animals in any particular part of the market. The appellants were rated in respect of these charges as tolls in respect of the use and occupation of the soil. They appealed against such assessment, and contended that the tolls were only taken in respect of the franchise of the market:—Held, on appeal, that such charges were tolls made in respect of the user and occupation of the soil, and so were rateable. *London Corporation* v. *Greenwich Union*, 48 L. T. 437; 47 J. P. 420.

Turnpike Tolls.]—A lessee of toll traverse, and of a toll-house (which he occupies), is not rateable for the tolls, but for the toll-house only. *Rex* v. *Snowden*, 1 N. & M. 459; 4 B. & Ad. 713; 2 L. J., M. C. 60.

The 3 Geo. 4, c. 126, s. 51, which exempts all persons from assessment to the poor-rate in respect of tolls or toll-houses, applies to the trustees of the tolls of a road made under a local act, although they are beneficially interested in the receipt of the tolls, and although some of the provisions of the local act are inconsistent with the general act. *Rex* v. *Great Dover Street Road Trustees*, 1 N. & P. 157; 5 A. & E. 692; 2 H. & W. 423; 6 L. J., M. C. 25.

—— **Exemption.**]—The General Turnpike Act, 3 Geo. 4, c. 126, which took away the liability of tolls to be rated for the relief of the poor, did not extend that exemption to a road which was expressly excluded from the operation of the act. *Reg.* v. *Commercial Road Trustees*, 2 W. R. 423.

Pier Tolls.]—*See* ante, col. 1646.

Railway Tolls.]—*See* ante, col. 1656.

32. Other Cases.

Ambassador—Attaché—Liability for Rates on Private Residence.]—An attaché to an ambassador of a foreign state residing in this country is not liable for rates assessed on his private residence. *Parkinson* v. *Potter*, 55 L. J., Q. B. 153; 16 Q. B. D. 152; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470.

Officers' Pay.]—The pay of officers in the navy, or of merchants' ships, is not rateable. *Rex* v. *White*, 4 Term Rep. 771.

Nor are the salaries of officers of the customs, or of merchants' clerks. *Ib.*

Profits of a Profession.]—Nor is an attorney in respect of the profits of his profession. *Rex* v. *Startifant*, 7 Term Rep. 60.

Nor a person on account of salary only. *Rex* v. *Shalfleet*, 4 Burr. 2011.

Money.]—Neither is money, whether at interest or not. *Ib.*

Stocks.]—Stocks or annuities in the public funds are not rateable. *Rex* v. *St. John, Maddermarket*, 6 East, 182; 2 Smith, 270.

33. Statutory Exemptions.

Rule of Construction.]—It is not necessary, in order to create a statutory exemption from poor-rates, that the act should, in express terms, exempt from such particular rates; but it is sufficient, if, by fair construction of the words of the act, the exemption clearly appears. *Rex* v. *Barnby Dun*, 4 N. & M. 436; 2 A. & E. 551; 1 H. & W. 89; 4 L. J., M. C. 78.

—— **Local Act.**]—When certain lands and buildings were under a local act to be used for

the benefit of the poor of Worcester and were, for the purposes of that act, to be free from all assessment beyond the amount at which the land was assessed at the time of the purchase :—Held, that purchasers of these lands and premises from the purchasers under the local act were not entitled to the exemptions under the local act. *Reg.* v. *Worcester Guardians*, 1 W. R. 146.

By 7 Geo. 3, c. 51, s. 85, the trustees of the river Lea are to apply their funds in certain ways therein specified, and to no other purpose or object whatsoever :—Held, that these words do not justify the trustees in refusing to pay a poor-rate levied upon them in respect of such funds. *Reg.* v. *River Lea Trustees*, 3 W. R. 210.

Under a private act the Warwick canal was made and was cut into the Birmingham canal, the proprietors whereof were authorised to take tolls on goods passing into that branch. The act proceeded to make provisions for tolls on the Warwick canal, and in a subsequent section enacted that the said tolls and duties should be exempted from the payment of all assessments : —Held, that the tolls receivable by the Birmingham canal were exempt from poor-rates. *Reg.* v. *Birmingham Canal Co.*, 7 L. J., M. C. 57.

Local and General Act.]—A partial exemption from the payment of rates for borough improvement purposes, conceded by a local act, is not taken away by the mere passing of public general acts for similar purposes. *Reg.* v. *L. & N. W. Ry.*, 35 L. T. 626 ; 25 W. R. 59.

"Free and Clear of all Rates."]—By an inclosure act, the tithes of a parish were abolished, and in lieu a yearly money payment by way of compensation (to be calculated with reference to the annual value of the tithes and the price of corn for a certain number of bygone years) directed to be made to the vicar quarterly, "free and clear of all rates, taxes and deductions whatsoever" :—Held, that these latter words exempted the vicar from poor-rates in respect of the money so directed to be paid to him. *Chatfield* v. *Ruston*, 5 D. & R. 675 ; 3 B. & C. 863.

A corn-rent given to the rector by an inclosure act in lieu of tithes, payable "free from all taxes and other deductions whatsoever, except the land tax," is exempt from payment of poor-rates. *Mitchell* v. *Fordham*, 9 D. & R. 335 ; 6 B. & C. 274 ; 5 L. J. (O.S.) M. C. 79.

An exemption in a private statute of lands given to charitable purposes "from all public taxes, charges, and assessments whatsoever, civil or military," extends to the poor-rate. *Rex* v. *Scott*, 3 Term Rep. 602.

Where a statute empowered the proprietors of a canal to make rates in respect of vessels navigating the same, and expressly exempted such rates from the payment of all taxes, rates, &c. :—Held, that the land occupied by the canal was also thereby exempted. *Rex* v. *Calder and Hebble Navigation Co.*, 1 B. & Ald. 263. S. P., *Erewash Canal* v. *Eastwood*, 4 W. R. 494.

Houses built on lands, embanked from the Thames, in pursuance of 7 Geo. 3, c. 37, which vests those lands in the owners, "free from all taxes and assessments whatsoever," are not rateable. *Rex* v. *London Gaslight and Coke Co.*, 2 M. & Ry. 12 ; 8 B. & C. 54 ; 6 L. J. (O.S.) M. C. 113.

Where, by a local act, property situate in M. and held in trust for the benefit of the township of M., is made not liable to the poor-rate :—Held, that a section in the act enabling the trustees to apply part of the profits of such property to the advantage of the borough of which M. forms a part does not render the property rateable to the township of M. *Manchester Corporation* v. *Manchester Overseers*, 2 W. R. 64.

Agricultural Rates Act, 1896 — Market Gardens — Glasshouses.]—By s. 1, sub-s. 1, of the Agricultural Rates Act, 1896, "the occupier of agricultural land in England shall be liable, in the case of every rate to which this act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments" ; and by s. 9 of the same act "the expression 'agricultural land' means any land used as . . . market gardens." The owner and occupier of a certain market garden of about four acres in extent had upon them about two acres of glasshouses, which were used for the purpose of producing fruit and vegetables. The question raised was whether these houses were "agricultural land," and so subject to the exemption under the act :—Held, that they were so exempt, being land used as a market garden. *Worthing Overseers* v. *Richmond*, 77 L. T. 161 ; 61 J. P. 710.

Certificate of Exemption.]—The certificate of a barrister that a society is entitled to the benefit of 6 & 7 Vict. c. 36, s. 1, although a condition precedent to the claim of exemption, is not conclusive proof of a right thereto. *Reg.* v. *Phillips*, 3 New Sess. Cas. 134 ; 8 Q. B. 745 ; 17 L. J., M. C. 83 ; 12 Jur. 431.

After a society has obtained a certificate of the barrister, and the society is afterwards rated to the poor-rate, the remedy is by appeal to the quarter sessions. *Birmingham Overseers* v. *Shaw*, 10 Q. B. 868 ; 18 L. J., M. C. 89.

C. PROCEEDINGS.

1. COLLECTION.

Amount Payable—Fraction of a Farthing.]—When, owing to the mode in which a poor-rate has been made, the assessment is carried out so as to include in the sum demanded the fraction of a farthing, the ratepayer is not bound to pay the whole farthing. *Morton* v. *Bremmer*, 8 C. B. (N.S.) 791 ; 29 L. J., M. C. 218 ; 7 Jur. (N.S.) 211 ; 2 L. T. 600.

Payment to Collector—Acceptance of Bill in Satisfaction.]—At the hearing of a summons for nonpayment of poor-rate against B., he set up the defence of payment to the assistant overseer by accepting bills of exchange, and on an account stated, though the assistant overseer had never paid over the proceeds to the overseers :—Held, that this was not a legal payment of poor-rates. *Smith* v. *Barham*, 51 J. P. 581.

Proof in Bankruptcy.]—Arrears of poor-rates due from a bankrupt before his bankruptcy are provable under the fiat, and the certificate is a bar to the levying the amount under 43 Eliz. c. 2, by distress and sale of his subsequently-acquired goods. *Wetherell, In re*, 19 L. J., M. C. 115. *S. C.*, nom. *Burwash Overseers, Ex parte*, 1 L. M. & P. 60 ; 4 New Sess. Cas. 93.

Preferential Payments in Bankruptcy.]—The Preferential Payments in Bankruptcy Act, 1888,

does not give any priority to parochial or other local rates as against debenture holders or other secured creditors. *Richards* v. *Kidderminster Overseers*, 65 L. J., Ch. 502; [1896] 2 Ch. 212; 74 L. T. 483; 44 W. R. 505.

From whom collected—Change of Occupation—Company—Debentures—Receiver.]—Where a receiver enters into possession and carries on the business of a company on behalf of debenture-holders under the express provisions of a covering deed authorising his appointment, there is a change of occupation of the company's premises within the Poor-rate Assessment and Collection Act, 1869, s. 16, although the covering deed expressly provides that "the receiver shall be deemed to be the agent of the company, and shall as such agent for all purposes be deemed to be in exactly the same position as a receiver duly appointed by the mortgagee under the Conveyancing Act, 1881." *Ib.*

The appointment of a receiver and manager of the property of a company by an order which does not direct the company to give up possession does not create a change of occupancy within s. 16 of the Poor-rate Assessment and Collection Act, 1869. *Richards* v. *Kidderminster Overseers*, supra, distinguished. *Marriage, Neave & Co., In re*, 65 L. J., Ch. 839; [1896] 2 Ch. 663; 75 L. T. 169; 45 W. R. 42; 60 J. P. 805—C. A.

—— **Tithe Rent-Charge.**]—Where the owner of a tithe rent-charge does not pay the rates to which he is assessed in respect thereof, the amount is recovered from one or more of the occupiers of the land out of which such rent-charge issues, and not from the owner of such rent charge. *Lamplough* v. *Norton*, 52 J. P. 505. Affirmed, 58 L. J., Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422; 53 J. P. 389—C. A.

Equitable Jurisdiction.]—A person assessed to a rate may file a bill on behalf of himself and all others assessed to the rate for the purpose of preventing payment of it from being enforced if the propriety of enforcing the payment of the rate is in itself the subject of equitable jurisdiction. *Att.-Gen.* v. *Heelis*, 2 Sim. & St. 67; 2 L. J. (o.s.) Ch. 189; 25 R. R. 153.

Recovery of Rates from Company—Restraining Proceedings for.]—*See* COMPANY.

2. DISTRESS.

Enforcement of Rates by Distress.]—An inclosure act which empowered commissioners under it to perform certain works, required them to direct by their award "by whom and at whose expense, at what time and in what manner," such works were to be made and thereafter repaired and maintained. The award directed that the works should be repaired, &c., "by means of a rate or an assessment to be levied or recovered by such ways and means as parish rates or assessments are by law recovered within the same parish," viz., by distress:—Held, that an action did not lie to recover the amount of a rate assessed under the award. *Danby* v. *Watson*, 46 L. J., M. C. 179; 36 L. T. 412; 25 W. R. 464.

When the purpose for which a rate was imposed by a local statute, and leviable by distress, has long fallen into disuse, and is not intended to be renewed, the rate is no longer leviable. *Clay* v. *Rotundo Lying-in Hospital*, Ir. R. 6 C. L. 105.

A distress made for several rates, some of which are leviable and others not, is not illegal. *Ib.*

If a distress is made for several rates, some of which are leviable and others not, and the party distrained tenders the sum actually due for the rates which are leviable, the distrainors are liable for the detention of the goods subsequent to the tender. *Ib.*

As long as any one of several purposes for which a rate was imposed is capable of accomplishment, the legal right to levy continues, although the other purposes have ceased to exist. *Ib.*

Summons to enforce Demand.]—A demand of payment of a poor-rate by a collector, appointed by the overseers and assistant overseer for the purpose of assisting in collecting the poor-rate, is sufficient to entitle the collector to proceed by summons before a magistrate, to enforce payment in the usual mode by distress. *Yewdall* v. *Craven*, 11 L. T. 368.

Under a local act, power was given to summon for nonpayment of rates if parties should neglect to pay for fourteen days after demand in writing. Whilst a rate was due a demand was made, but the date when the rate was made was misdescribed in the demand:—Held, that the misdescription was immaterial. *Reg.* v. *Stretfield*, 32 L. J., M. C. 236; 11 W. R. 736.

An act required that before any action should be brought to recover certain rates, a demand in writing should be made at the place of abode of the persons charged, or left on the premises charged:—Held, that a demand served on the chairman of a public company at a duly convened meeting was good, or a demand fixed on the premises charged. *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 314; 5 L. J. (o.s.) M. C. 314.

Sufficiency of Demand.]—A demand note for a year's rates was served upon the respondent, who objected to pay the whole, on the ground that the house in respect of which he had been rated had been let to him for a term not exceeding three months. He paid the amount of the rate due for one quarter:—Held, that a second demand note in respect of the succeeding quarter was not necessary, and that a distress warrant ought to issue. *Walton-on-the-Hill Overseers* v. *Jones*, 62 L. J., M. C. 123; [1893] 2 Q. B. 175; 5 R. 422; 69 L. T. 319; 42 W. R. 32; 57 J. P. 552.

Tender.]—If a landlord tenders the poor-rate for his tenant the overseers must receive it, and a warrant ought not to be granted to distrain upon the tenant. *Rex* v. *Cosens*, 2 Dougl. 426.

Where, after a rule nisi for a mandamus to justices to issue a distress warrant for a poor-rate had been obtained, a tender of the amount was made by a third party to the overseers and refused:—Held, that it was no ground for discharging the rule. *Rex* v. *Wilson*, 5 N. & M. 119; 1 H. & W. 507.

If a distress is made for several rates, some of which are leviable and others not, and the party distrained tenders the sum actually due for the rates which are leviable, the distrainors are liable for detention of the goods subsequent to the tender. *Clay* v. *Rotundo Lying-in Hospital*, Ir. R. 6 C. L. 105.

Jurisdiction of Justices—Rate good upon the Face of it.]—Under two local acts, by which the rates of a parish were regulated, an appeal was given against any rate to the next quarter sessions, and it was to be enforced by summons before two justices, who were to order the payment, and (if necessary) grant a warrant of distress, if the person summoned "did not prove to them that he was not chargeable with or liable to pay such rate":—Held, that this only gave the justices a power similar to that in enforcing a poor-rate, and that they had no jurisdiction to inquire into the validity of a rate good on the face of it, and that they had no jurisdiction to determine anything in a summary way, within 20 & 21 Vict. c. 43, so as to give them power to state a case under that act. *May, Ex parte*, 2 B. & S. 426; 31 L. J., M. C. 161.

—— **Neglect to Appeal.**]—An appellant against a distress warrant, issued to enforce payment of poor-rates, cannot, under 17 Geo. 2, c. 38, s. 7, avail himself of any objection which he might have urged against the rate itself on appeal to the sessions. Nor will the court grant a mandamus to justices to hear such appeal against the warrant, if the application discloses no grounds of appeal other than the grounds which might have been urged against the rate. *Reg.* v. *Kent JJ.*, 16 L. T. 672.

—— **Question of Amount.**]—The owner of several small tenements was assessed to a poor-rate of 4*d.* in the pound; the exact amount of the assessment on the aggregate of the several rateable values as they appeared on the rate would have been 10*s.* 11¾*d.* and a fraction of a farthing, instead of which 11*s.* was entered on the rate. This larger sum was demanded, and not being paid, a warrant was granted and a distress levied for that amount on his goods, on which he brought an action against the persons executing the warrant:—Held, that an action would not lie, as the sum demanded was the sum appearing on the rate, and the objection, if any, was that the party was overrated, for which an appeal was the proper remedy. *Bavin* v. *Hutchinson*, 31 L. J., M. C. 229; 6 L. T. 504; 10 W. R. 807—Ex. Ch.

By a local act of 1827 the owners of certain abbey lands in Essex were empowered to make rates in respect of their lands, and to apply them to the repair of the roads, causeways and bridges which they had to maintain. They might enforce rates charged or imposed by virtue of the act by distress warrant upon a defaulter provided he was first summoned to appear before a justice to shew cause for his neglect or refusal to pay such rates. They might make a composition with the neighbouring trustees of roads for the payment of a certain sum of money annually or otherwise for repairing so much of the said roads as were in their district. Any person aggrieved by the rates might appeal to quarter sessions, and justices might amend without quashing the rate. By a local act of 1876 these owners were empowered to pay a large sum of money to a local board for the future repair of the roads in its district; and upon such payment and that of all other liabilities the owners were to be discharged from their duties to repair these roads, and the previous act was to be repealed. A month before the passing of the last act, the owners made a rate for an amount to cover certain liabilities under the act of 1827, and also the money to be paid to the local board; but there was nothing in the rate itself to shew it included this latter sum of money. The demand for payment referred to both the local acts, but did not give the date of the latter. The rate was not appealed against, but justices refused to issue a distress warrant against a defaulter on the ground that the rate was invalid:—Held, that the objection to the rate was not one which the justices could entertain, and that mere excess in amount was, under the circumstances, no ground for refusing a warrant. *Reg.* v. *Essex JJ.*, 36 L. T. 554.

—— **Retrospective Rate.**]—An objection that a rate is retrospective is ground of appeal; and, where the party objecting has not appealed, cannot be urged as an objection to a rule calling on justices to shew cause why they should not issue their warrant of distress for the rate. *Reg.* v. *Stretfield*, 32 L. J., M. C. 236; 11 W. R. 736.

A poor-rate, good on the face of it, had not been appealed against. On an application before justices to issue a distress warrant to enforce payment of the rate, it was made to appear that there were substantial grounds for contending that the rate was retrospective and therefore bad. The justices refused to issue their warrant. On an application to the court for a rule to command them to issue the warrant:—Held, that the justices were not justified in inquiring whether there was a ground of appeal against the rate, and refusing their warrant on that ground, and the court made the rule absolute. *Reg.* v. *Kingston-upon-Thames JJ.*, El. Bl. & El. 256; 27 L. J., M. C. 199; 4 Jur. (N.S.) 758; 6 W. R. 551.

—— **Statutory Exemption.**]—A poor-rate made upon the occupier of the premises used by a literary society, exempt from payment of rates by virtue of 6 & 7 Vict. c. 36, was duly published and allowed, but no appeal was made by the party rated:—Held, that he could not set up the statutory exemption as a ground for refusing to pay the rate, and that the magistrates were bound to issue a warrant to enforce payment of it. *Birmingham Overseers* v. *Shaw*, 10 Q. B. 868; 3 New Sess. Cas. 445; 18 L. J., M. C. 89; 13 Jur. 357.

—— **Local Act.**]—Ratepayers, liable under a local act to the payment of rates in respect of houses and gardens, cannot, when summoned before justices for nonpayment, resist the issue of distress warrants, because, at the making of the rate, warehouses and other property, not rateable under the act, were improperly included in the assessment. The proper remedy is by appeal to the sessions, where the error can be corrected, and, if this is not adopted, the rate may be enforced. *Reg.* v. *Twopeny*, 17 L. T. 266.

A local act empowered a select vestry, chosen from the inhabitants, to make a rate, and gave power to four justices to issue their warrant to levy the rates by distress. The act gave to any person who should find himself aggrieved by any assessment or distress a right of appeal to the quarter sessions within three months after such distress made. A rate was made by a vestry consisting of thirteen persons, all of whom occupied shops in the parish, but nine of them slept in another parish. On an application to the justices to issue their warrant, it was objected that the rate was invalid, as the vestrymen were not inhabitants, and that the objection might be taken before the justices as no appeal was given till after distress made:—Held, that the appeal to

the quarter sessions was given either before or after distress, and therefore the justices had no jurisdiction to inquire into the validity of the rate. *Wilson* v. *Sunderland Overseers*, 13 W. R. 85.

A local act gave power to commissioners to raise money for paving, lighting and watching a town, by rating and assessing the proprietors of houses according to the value at which the houses were taxed to the poor. It also empowered them to assess and levy a rate on certain proprietors, for the purpose of certain improvements, such rate to be levied and assessed in the same manner as the other rates. In default of payment, a justice was authorised to issue a distress warrant. The act also provided that in case any person thought himself aggrieved by any rate or assessment, he might appeal to the commissioners, who were authorised to give relief, and further, that anyone who thought himself aggrieved by anything done in pursuance of the act, might appeal to the quarter sessions. The commissioners assessed a proprietor to a rate, levied for the purpose of the improvements, at an annual value above that at which he was assessed to the poor:—Held, that, on his refusing to pay, a justice might be required by mandamus to issue a distress warrant, the proprietor not having appealed. *Rex* v. *Trevothick*, 2 A. & E. 405.

—— **Publication of Rate—Evidence of.**]—When proceedings are taken before justices for the nonpayment of a highway rate, the mere production of the book purporting to contain the rate is no evidence of the due publication of such rate. *Bird* v. *Adcock*, 47 L. J., M. C. 123; 26 W. R. 634.

—— **Occupier—Evidence to contradict Rate-book.**]—When a person whose name appears on the rate-book is summoned to shew cause why a distress warrant should not issue against him for nonpayment of rates, evidence to shew that he was not the occupier is admissible. *Reg.* v. *Simmonds*, 62 L. J., M. C. 106; 5 R. 546.

—— **"Occupation" of Property—Power of Justices to inquire as to Quantum.**]—On a summons before justices to enforce a poor-rate of a parish, the justices have jurisdiction, before issuing a warrant of distress, to inquire whether the person affected by the rate is in reality the principal person in occupation of the rated property. *Reg.* v. *Bagshawe*, 75 L. T. 513.

—— **Nature of Occupation.**]—If, at the hearing by justices of a summons against A. for nonpayment of a poor-rate, it appears that the rate is good on its face and unappealed against, and that A. is actually the occupier of the rated property in the rated parish, the justices are bound to issue a distress warrant to enforce the rate; and have no jurisdiction to inquire whether A.'s occupation is or is not beneficial, the nature of the occupation being ground only for appeal to the quarter sessions against the rate. *Reg.* v. *Bradshaw*, 2 El. & El. 836; 29 L. J., M. C. 176; 6 Jur. (N.S.) 629; 8 W. R. 435.

Exemption on the ground that the occupation is not beneficial is a ground for appeal to quarter sessions and an action of replevin for a levy made to enforce the rate cannot be maintained. *Mersey Docks Trustees* v. *Cameron*, 4 L. T. 53.

On an application for a summons for nonpayment of a poor-rate, the overseer engaged before the justices to procure evidence of a beneficial occupation. On the hearing, he failed to do so, and the justices, deciding against the validity of the rate on that ground, refused to issue a distress warrant:—Held, that without a further application, after stating that the occupation need not be beneficial, a mandamus could not be granted. *Rex* v. *Wilson*, 5 N. & M. 119; 1 H. & W. 507.

A company acquired certain land which they laid out for exhibition purposes. On part of the land buildings were erected. The exhibition was opened in June, 1895, and remained so until it was closed in the following October. A provisional list under the Metropolis Valuation Act, 1869, was approved by the assessment committee of the parish, in which list the company were rated at gross 13,833*l.* and rateable value 10,000*l.*, and payment of the rates made on October 26th, 1895, was demanded, and the rates were paid as if made on that basis, for the proportion of the time till the closing of the exhibition in October. On the closing of the exhibition the company separated off certain portions of the premises which they did not intend to use during the winter months, and they gave notice to the overseers to prepare a fresh provisional list on the basis that they were not in rateable occupation of the unused portion of the premises. This the overseers did, but the assessment committee refused to approve the list. The overseers thereupon demanded payment of the remaining portion of the rate made on October 26th, 1895, not already paid, and failing to obtain payment, took out a summons for a distress warrant. The justices refused to grant a distress warrant, on the ground that there was no beneficial occupation of the separated-off part of the premises:—Held, that the justices were wrong; that the assessment having been made, and not appealed against, the duty of the magistrates was purely ministerial. *Reg.* v. *Sinclair*, 60 J. P. 551.

—— **Lands not in Occupation of Person assessed.**]—Upon a summons before justices to enforce a poor-rate against a railway company, it appeared that property occupied by the company had been assessed by the description "offices and land with rails," but that in estimating the amount of the rate the overseers had treated certain buildings as being in the occupation of the company which were not in fact in their occupation. The company had not appealed against the rate:—Held, that the objection being matter of appeal and the rate good on the face of it, the justices were bound to issue a distress warrant. *Crease* v. *Sawle* (2 Q. B. 862) followed. *Reg.* or *Manchester Overseers* v. *Headlam*, 57 L. J., M. C. 89; 21 Q. B. D. 96; 52 J. P. 517.

Distress Warrant—Property claimed to be in two Parishes.]—J. was rated as occupier of premises in the D. parish, and also in G. parish, and paid the rates to D. He did not appeal against the rate made by G. parish, and on an application by the G. overseers for a distress warrant, the justices having declined, and a rule being moved by way of mandamus under 11 & 12 Vict. c. 44, s. 5:—Held, that the rule must be made absolute, but without costs, and that J.'s proper course was to appeal against the next rate to quarter sessions, when the question of boundary could be decided conclusively. *Reg.* v. *Jefferson*, 48 J. P. 393.

—— **Rating Authority not properly Constituted.**]—The court will grant a mandamus to

compel a justice to grant a warrant for the payment of a rate made by a local board of health when payment of the rate is refused on the ground that the board is not properly constituted. *Reg.* v. *Derbyshire JJ.*, 4 W. R. 118.

—— **Name Inserted after Rate made.**]—Where a poor-rate was made for a parish, and the name of a party who occupied lands for which he was rated in another parish was inserted after the rate was made, the court refused to grant a mandamus to magistrates to issue a summons and grant a distress warrant for nonpayment of the rates. *Reg.* v. *Cardiganshire JJ.*, 1 H. & W. 274.

—— **Rates Recoverable by other Means.**]—The court will not issue a mandamus to compel magistrates to issue a distress warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding. *Rex* v. *Hall*, 4 N. & M. 546; *S. C.*, nom. *Rex* v. *Dyer*, 2 A. & E. 606.

—— **Application for Mandamus—Form of.**]—Although there are more than two magistrates at petty sessions, all of whom take part in a decision by which the issuing of a distress warrant to levy poor-rates is refused, it is not necessary that, upon application for a mandamus, all who were present and took part in the decision should be included in the rule; but if the court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined. *Reg.* v. *Ellis*, 2 D. (N.S.) 361; 12 L. J., M. C. 20; 7 Jur. 108.

—— **Where Magistrate a Trustee.**]—Where, upon an application for a mandamus to justices, to issue their warrant of distress to levy a poor-rate, it appeared that the property in respect of which the rate was sought to be obtained was trust property left by a testator for the purpose of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate:—Held, that, notwithstanding his character of such trustee, he was liable to a mandamus. *Ib.*

Recovery of Arrears—Demand and Payment of less than proper amount—Mistake—Allowance in Account.]—The provisions of the Public Libraries Act, 1855, having been adopted by the parish of Wandsworth, a rate of 1*d.* in the pound was duly made and demanded of the London and South Western Railway Company, assessed upon the full rateable value of certain lands occupied by them in the parish for railway purposes. The railway company thereupon claimed under s. 13 of that act to be assessed on only one-third of the rateable value, on the ground that the property was "land." The vestry clerk omitted to observe that only "lands used as arable, meadow, or pasture ground, or as woodlands or market-gardens or nursery-grounds," were exempted under this section from assessment at more than one-third of their full rateable value, and allowed the abatement; he also entered in the rate-book the amount of rate assessed on the remaining two-thirds of the company's property as "irrecoverable." The same abatement was given and a similar entry was made for three years. The new overseers of the parish, having discovered the mistake that had been made, demanded the arrears of rate on the two-thirds of the full rateable value; but these the company declined to pay, and upon the hearing of the summons taken out by the overseers the justices declined to issue a distress warrant for the amount:—Held, upon an application for a mandamus to the justices to issue their warrant, that the sums unpaid on the two-thirds of the full rateable value of the railway company's property were recoverable as arrears, and that the overseers were entitled to obtain a distress warrant for the loss of these arrears under 17 Geo. 2, c. 38, ss. 7 and 11, notwithstanding that a mistake of law had been made in the original demands and in the entry in the rate-book. *Reg.* v. *Blenkinsop*, 61 L. J., M. C. 45; [1892] 1 Q. B. 43; 66 L. T. 187; 40 W. R. 272; 56 J. P. 246.

—— **Contribution to Rural Sanitary Authority—Precept of Guardians to Overseers.**]—The guardians of a union claimed and received sums from the overseers of a township under precepts based upon the then existing valuation list. It was subsequently decided, on an appeal against a rate by colliery owners, who represented two-thirds of the township, that the valuation list was too high. The overseers did not appeal against the valuation list under the 32nd section of the Parochial Assessment Act, 1862, but having refunded the amount overpaid by the colliery owners, claimed credit for the excess paid by them to the guardians:—Held, that the guardians might give credit for the sums overpaid by the overseers, even though the latter had not appealed against the valuation list; and that justices might refuse to enforce by distress warrant the guardians' precept for a general rate based on the old valuation list when it appeared that such sums had already been paid in excess by the overseers. *Tynemouth Union* v. *Backworth Overseers*, 57 L. J., M. C. 53; 59 L. T. 178; 52 J. P. 357.

Hearing.]—The granting of warrants of distress for a poor-rate by magistrates to churchwardens is a judicial, and not a ministerial act; and they ought first to summon the party and hear what he has to say in his defence. *Harper* v. *Carr*, 7 Term Rep. 270; 4 R. R. 440.

—— **When Bonâ fide Objections taken.**]—The jurisdiction of justices to enforce payment of a rate made for the repayment of money under 5 Geo. 4, c. 36, is the same as with respect to a church-rate; they therefore have no power to order payment when the party assessed, and refusing to pay, takes bonâ fide objections before them to the validity and legality of the rate. *Batkin, In re*, 25 L. J., M. C. 126.

—— **Power to State Case.**]—Under s. 13, sub-s. 11, of the Interpretation Act, 1889, which repeals and re-enacts s. 7 of the Summary Jurisdiction Act, 1884, justices sitting to hear an application for the issue of a distress warrant for the nonpayment of poor-rates are not necessarily exercising a ministerial duty, but are authorised to inquire into the validity of the objections taken by the party summoned, and to state a case for the opinion of the high court. *Fourth City Mutual Building Society* v. *East Ham*, [1892] 1 Q. B. 661; 56 J. P. 440.

—— **Summary Jurisdiction Act not Applying.**]—The Summary Jurisdiction Act, 1879 (42 & 43

Vict. c. 49), does not affect or apply to proceedings for the recovery of poor-rates and other rates recoverable in the same manner as poor-rates; and a distress warrant in respect of such rates may be issued as before the act. *Reg.* v. *Price*, 49 L. J., M. C. 49; 5 Q. B. D. 300; 42 L. T. 439; 28 W. R. 615; 44 J. P. 248.

—— **Before what Justices.**]—By an act for lighting the parish of B., rates might be imposed on the occupiers of tenements within B.; and it was enacted that the "rates shall be paid by such occupiers, and they are required to pay the same." By a subsequent section, rates not paid might, on proof before a justice for the county of S., be levied by distress. At the time when the local act passed, the parish of B., which is in the county of S., was partly within the borough of B. (in the charter of which is a non-intromittant clause), and partly in the county at large; under the operation of the 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, the whole parish of B. was included in the borough, which obtained a separate court of quarter sessions:—Held, that the nonpayment of rates was an offence within 7 Will. 4 & 1 Vict. c. 78, s. 31; and that the jurisdiction to hear complaints as to such nonpayment was transferred by that statute from the justice of the county of S. to the justice of the borough. *Reg.* v. *Sutcliffe, Bathwick, In re*, 13 Q. B. 833; 3 New Sess. Cas. 634; 18 L. J., Q. B. 301; 13 Jur. 840.

Form of Warrant.]—Before 25 & 26 Vict. c. 82, a warrant of distress was issued for 104*l.* 17*s.*, due for several rates, one of which was quashed on the ground that the party was not an occupier within the parish where he was rated:—Held, that as one of the rates was quashed the warrant was void, and that the precise sum due for poor-rates should have been demanded from him previously to issuing the warrant. *Hurrell* v. *Wink*, 2 Moore, 417; 6 Taunt. 369; 20 R. R. 485.

—— **Where some Rates Irregular.**]—Where some poor-rates had not been duly published on the Sunday following the allowance, according to 17 Geo. 2, c. 3, s. 1, and a warrant of distress issued for a single sum made up of these rates, and of others which were regular:—Held, that the warrant was wholly bad, and that replevin lay for a distress taken under it. *Sibbald* v. *Roderick*, 11 A. & E. 38; 3 P. & D. 106; 9 L. J., M. C. 76.

—— **Statements in Warrant.**]—A warrant of distress for poor-rates need not in terms state that the refusal to pay the rate was proved upon oath; it is enough to state that it was duly proved. *Ormerod* v. *Chadwick*, 16 M. & W. 367; 2 New Sess. Cas. 697; 16 L. J., M. C. 143; S. P., *Reg.* v. *Bidwell*, 1 Den. C. C. 222; 2 Car. & K. 564; 17 L. J., M. C. 99.

The misrecital in a warrant of distress for poor-rates, of the date of the rate, is not material. *Ib.*

A warrant of distress for a church-rate which does not specify the time at which the distress is to be sold, is bad, and the rescue of a distress taken under such warrant is no criminal offence. *Reg.* v. *Williams*, 2 Car. & K. 1001; 4 New Sess. Cas. 137; 1 Den. C. C. 529; T. & M. 235; 19 L. J., M. C. 126; 14 Jur. 115.

A defect in the enumeration of some of the property in a poor-rate is no ground for refusing a mandamus to justices to issue a distress warrant. *Rex* v. *Wilson*, 5 N. & M. 119; 1 H. & W. 507.

Execution—Power of Justices to Delay.]—Justices, in issuing a distress warrant for the recovery of poor-rates, have no power to order that there shall be any delay in the execution of the warrant. *Reg.* v. *Handsley*, 7 Q. B. D. 398.

—— **Resistance—Authority of Debtor's Wife.**]—A constable in executing a distress warrant for a general district rate went to the door of the debtor's house. The debtor's wife resisted his entry and assaulted him when entering against her will:—Held, that the wife had implied authority to admit or exclude a constable executing civil process, and was justified in using force to exclude him. *Rossiter* v. *Conway*, 58 J. P. 350.

Persons Liable—Tenants in Common.]—A distress warrant may issue against any one of a number of tenants in common refusing to pay the amount of a rate assessed on all of them. *Paynter* v. *Reg.*, 10 Q. B. 908; 16 L. J., M. C. 136; 11 Jur. 973—Ex. Ch.

—— **Churchwarden.**]—The goods of one churchwarden are liable to be seized under a distress made by order of the other churchwarden and the overseers, for a poor-rate due from him, where the rate has been legally demanded and payment of it refused; but if such churchwarden has charged himself in his account with the rate as received to apply it to parochial purposes, the justices (who act judicially in such cases), in the exercise of their discretion, may refuse to grant a warrant. *Skingley* v. *Surridge*, 11 M. & W. 503; 12 L. J., M. C. 122; 7 Jur. 773.

—— **Lodger.**]—By a local act, the rates directed by that act to be made should and might, on refusal or neglect to pay the same by any person or persons liable thereto, be recovered in such manner as the rates made for the relief of the poor are directed to be recovered; and it was provided that any person, whether landlord or tenant, who should let out his or her house in separate apartments or ready-furnished to a lodger or lodgers, should be deemed to be the occupier thereof, and might be rated or assessed accordingly, and should be liable to the payment of the sum so rated; and that the goods and chattels of each and every person renting or occupying any separate part or apartment in such house or building, or renting or occupying any ready-furnished house, or any part thereof, should be liable to be distrained and sold for the payment of the said rates:—Held, that under that act the goods of a lodger were liable to be distrained and sold for poor-rates assessed upon and due from the landlord, under a warrant directing the churchwardens and overseers to take the goods of the landlord. *Peppercorn* v. *Hofman* or *Hopman*, 9 M. & W. 618; 12 L. J., Ex. 270.

—— **Owner of Tithe Rent-Charge.**]—Poor-rate assessed upon the owner of tithe rent-charge under 1 Vict. c. 69, s. 8, is not recoverable by distress warrant against such owner. *Lamplough* v. *Norton*, 58 L. J., Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422; 53 J. P. 389—C. A.

—— **Administrator.**]—An administrator is not liable to pay a poor-rate for the intestate;

at least he is not distrainable without a summons. *Stevens* v. *Evans*, 1 W. Bl. 284; 2 Burr. 1152.

—— **Servant of Ambassador.**]—When a British-born subject employed as first chorister at the Portuguese ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor-rate:—Held, that his goods were not protected by 7 Ann. c. 12, even assuming that he was the domestic servant of an ambassador. *Novello* v. *Toogood*, 2 D. & R. 833; 1 B. & C. 554; 1 L. J. (O.S.) K. B. 181; 25 R. R. 507.

—— **Liquidator of Company.**]—The liquidator of a company was inserted in the rate-book as owner and occupier. He did not appeal against the rate:—Held, that in default of payment the justices were right in issuing a distress warrant against him, as the rate was good on the face of it. *Dent* v. *Commondale Overseers*, 56 J. P. 519.

—— **Company—Equitable Charge.**]—The goods of a company on which debenture-holders have an equitable charge are still the goods of the company, and are liable to be distrained on for the company's rates. *Marriage, Neare & Co., In re*, 65 L. J., Ch. 839; [1896] 2 Ch. 663; 75 L. T. 169; 45 W. R. 42; 60 J. P. 805—C. A.

—— **Priority.**]—Rates are payable out of the proceeds of sale of a distress in priority to equitable charges on the property distrained upon. *Ib.*

Property Liable.]—Money may be distrained as well as goods. *East India Co.* v. *Skinner*, 1 Bott's P. L. 249.

Averiæ carucæ are distrainable. *Hutchins* v. *Chambers*, 1 Burr. 579; 2 Ld. Ken. 204.

Second Distress for same Rates.]—A beanstack of the plaintiff being distrained for rates due from the defendant was afterwards sold by auction, and a valid contract of sale effected, but on the purchaser subsequently proceeding to remove it, he was forcibly prevented by the plaintiff, and never had an opportunity of taking it away. The purchaser not having paid for the stack, a second distress was made for the rates and other things distrained under it:—Held, that such second distress was lawful. *Lee* v. *Cooke*, 3 H. & N. 203; 27 L. J., Ex. 337; 4 Jur. (N.S.) 168; 6 W. R. 284—Ex. Ch.

By whom Executed.]—The overseer of a township may execute by deputy a warrant directed to him to levy a rate, such an act being purely of a ministerial character. *Walsh* v. *Southworth*, 6 Ex. 150; 2 L., M. & P. 91; 20 L. J., M. C. 165.

A joint warrant to two persons to distrain for drainage-rates, under an act for draining fens and improving the navigation of a river, may be well executed by one of them. *Lee* v. *Vessey*, 1 H. & N. 90; 25 L. J., Ex. 271; 4 W. R. 554.

Warrants of Commitment—Adjudication.]—A warrant of commitment for nonpayment of a poor-rate should shew an adjudication by the same justices before whom the complaint is heard. *Ramsden, In re*, 3 D. & L. 748; 1 B. C. Rep. 133; 2 New Sess. Cas. 427; 15 L. J., M. C. 113; 10 Jur. 879.

—— **Nature of.**]—A commitment by justices for nonpayment of poor-rates is in the nature of civil process, and the proper prison for a person so committed by the justices of Middlesex is the prison in Whitecross street. *Reg.* v. *Whitecross street (Governor)*, 6 B. & S. 371; 34 L. J., M. C. 193; 11 Jur. (N.S.) 970; 12 L. T. 543; 13 W. R. 1017; 10 Cox, C. C. 134.

—— **Married Woman — Rated as Owner — Agreement.**]—A married woman rated as owner of hereditaments under s. 4 of the Poor Rate Assessment Act, 1869, is liable to be imprisoned on nonpayment of parochial rates, in default of sufficient goods being found whereon to levy distress. The notice given by an owner under s. 4 does not constitute an agreement between such owner and the overseers. *Allen (Elizabeth), In re*, 63 L. J., M. C. 267; [1894] 2 Q. B. 924; 10 R. 514; 43 W. R. 141; 59 J. P. 229.

Costs and Charges.]—The 43 Eliz. c. 2, s. 4, which gave a remedy for the levying of money assessed for poor-rates, did not extend to costs. *Clark* v. *Woods*, 2 Ex. 395; 17 L. J., Ex. 189.

—— **To whom Payable.**]—Under this statute, the party applying for the warrant is the person to whom the costs of such application are to be paid. *Walsh* v. *Southworth*, 6 Ex. 150; 2 L., M. & P. 91; 20 L. J., M. C. 165.

—— **Amount.**]—The broker's charges only are the damages to be trebled under 43 Eliz. c. 3, s. 19, in replevin, on a distress made for a poor-rate. *Newman* v. *Bernard*, 3 M. & Scott, 728; 10 Bing. 274.

On a distress for arrears of a poor-rate, under 50 Geo. 3, c. 45, s. 3:—Held, that, although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it, and that one shilling was a reasonable sum in that behalf. *Clarke* or *Davies* v. *Pedley*, 4 M. & Scott, 321; 3 L. J., C. P. 120.

Remedy for Wrongful Levy.]—A distress for a poor-rate for lands not in the occupation of the plaintiff may be replevied, notwithstanding the sessions on an appeal confirmed the rate: for determining that a man may be assessed for what he does not occupy, is an excess of jurisdiction. *Milward* v. *Caffin*, 2 W. Bl. 1330.

When one assessment is made in respect of property of which part is occupied and part is not occupied by the person rated, the question can be raised in replevin. *L. & N. W. Ry.* v. *Buckmaster*, 44 L. J., M. C. 180; L. R. 10 Q. B. 444; 33 L. T. 329; 24 W. R. 16.

An apothecary, being an inhabitant, was rated in respect of his stock-in-trade:—Held, that being liable to be rated as an inhabitant, his mode of impeaching the validity of the rate was by appeal to the sessions, not by replevin. *Marshall* v. *Pitman*, 2 M. & Scott, 745; 9 Bing. 595; 2 L. J., M. C. 33.

Where a party is rated in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress taken for such poor-rate. *Bristol Overseers* v. *Wait*, 3 N. & M. 359; 1 A. & E. 264; 3 L. J., M. C. 71.

So, if part of the premises included in the rate is not occupied by him. *Ib.*

But if one distress is taken under a warrant to

levy the amount of a rate, void by reason of such non-occupation, and also under a separate warrant to levy another good rate, the validity of such distress cannot be questioned in an action of trespass or replevin. *Ib.*

If more goods are seized than would be a reasonable distress for the good rate, the remedy of the distrainee is an action for an excessive distress. *Ib.*

The Statute of Marlbridge extends to goods distrained for a poor-rate. *Sabourin* v. *Marshall*, 3 B. & Ad. 440.

—— **Trespass.**]—If a person rated has any objection to the rate (e.g.) that it is made for six months, he must appeal to the next sessions; and if he does not appeal, he cannot bring trespass against those who distrain on him for nonpayment of the rate. *Durrant* v. *Boys*, 6 Term Rep. 580; 3 R. R. 268.

—— **Delay by Reference to Arbitration.**]—An assessment committee made a poor-rate upon the property of a waterworks company in excess of the amount which they considered to be the rateable value. The company gave notice of appeal. Both parties then agreed to refer the matter to arbitration, and to be bound by the decision of the umpire. The umpire did not make his award for three years, during which time the company was compulsorily obliged to pay the poor-rate. The umpire made his award and declared that the company was overrated, and that the overseers should repay to them the sums in excess which they had been obliged to pay under compulsion. The overseers refused to consider the award as valid, and when the next rate was made distrained upon the company under a magistrate's warrant. The company replevied, and afterwards moved that the replevin bond might be delivered up:—Held, that the proceedings of the overseers were against good faith, they having agreed to be bound by the award, and that the replevin bond might be given up at the instance of the company. *Leicester Waterworks Co.* v. *Cropstone Overseers*, 44 L. J., M. C. 92; 32 L. T. 567. Compare *L. & N. W. Ry.* v. *Bedford*, 17 Q. B. 978.

Protection of Justices.]—Formerly an action of trespass lay against magistrates for granting a warrant to levy poor-rates, if the party distrained upon had no land in the parish in which the rate was made. *Weaver* v. *Price*, 3 B. & Ad. 409; 1 L. J., M. C. 90.

A local act gave power to certain persons to rate for the repair of bridges in the district, and empowered a justice, on demand and refusal to pay such rate, to enforce payment by a distress warrant, to be directed to the collector; and a right of appeal was given against a rate to any person claiming exemption by reason of his lands being "abbey lands," and the decision of the quarter sessions on such appeal was to be final. The plaintiff was rated, and refused to pay, and a justice granted a distress warrant, directed to the collector, who served and executed it. In an action of trespass by the plaintiff against the justice and collector:—Held, that the plaintiff was not confined for his remedy to the appeal to the quarter sessions; that the justice had acted without jurisdiction, and was not protected by 11 & 12 Vict. c. 44; and that the collector, in the circumstances, was to be considered an officer of the law, and protected by 24 Geo. 2, c. 44, s. 6. *Pedley* v. *Davis*, 10 C. B. (N.S.) 492; 30 L. J., C. P. 374; 8 Jur. (N.S.) 263; 5 L. T. 253.

Protection of Overseers and Officers (17 Geo. 2, c. 38, s. 8).]—The bailiff of an overseer who distrains for poor-rates upon goods under a distress for rent is not within the protection of the 24 Geo. 2, c. 44, s. 6, which requires a previous demand of the perusal and copy of the warrant. *Whitley* v. *Roberts*, M'Clel. & Y. 107; 25 R. R. 755.

Under a warrant against the goods of A., an overseer took goods already in the hands of the bailiff of A.'s landlord, as a distress for rent:—Held, that he was not protected by 24 Geo. 2, c. 44, s. 6. *Kay* v. *Grover*, 7 Bing. 312; 3 M. & P. 634; 9 L. J. (O.S.) C. P. 112. S. P., *Kay* v. *Grace*, 5 M. & P. 140.

In an action for wrongfully and maliciously taking goods of the value of 600*l.* as a distress under a warrant for 141*l.* for a poor-rate:—Held, that the plaintiff was not bound to demand a copy of the warrant pursuant to 24 Geo. 2, c. 44, s. 6, before commencing his action, as the overseers had not acted in obedience to the warrant, and no action would have lain against the justices. *Sturch* v. *Clarke*, 1 N. & M. 671; 4 B. & Ad. 113; 2 L. J., M. C. 29. S. P., *Cotton* v. *Kadwell*, 2 N. & M. 399.

Where an act authorises a justice on oath made that a party refuses to pay his rates to issue a summons calling on him to shew cause why he refuses, oath being first made by the officer that he has demanded the rate and that it is due and in arrear, and authorises a warrant of distress to be issued on neglect to shew good cause, it must be shewn in any pleading or special case on the part of the officer who justifies a distress that there had been a demand and refusal previously to the summons, and if one warrant be issued for two separate rates, a demand of both and refusal of one is not sufficient to support the warrant. *Jay* v. *Halksworth*, 2 C. L. R. 1776.

An action will not lie at the suit of the sheriff against overseers of a parish for taking goods under a warrant of distress for poor's-rates, when he has allowed the defendant, notwithstanding the execution, to continue to be the ostensible owner of the property. *Spicer* v. *Tidy*, 1 L. J. (O.S.) K. B. 10.

3. Inspection of Rate-Books.

Custody of Rate-Book—Refusal to Produce—Liability.]—An assistant overseer having, by virtue of his office, the poor-rate book in his custody, is liable to a penalty under 6 & 7 Vict. c. 18, s. 16, for refusing to produce it to an inhabitant, when lawfully demanded. *Edwards* v. *Bennett*, 6 Bing. 230; 3 M. & P. 749; 3 Y. & J. 458; 8 B. & C. 702; 2 M. & Ry. 482; 7 L. J. (O.S.) M. C. 49; 31 R. R. 403. Affirming 7 B. & C. 586; 1 M. & Ry. 482; 8 L. J. (O.S.) M. C. 71; 31 R. R. 267.

By a local act for certain incorporated parishes, guardians of the poor were appointed, and were authorised to appoint a clerk, and to make rates; and all poor-rates and books purporting to be rates, made for the parishes, and all papers relating to the settlement of the poor, were to be delivered by the churchwardens and overseers to the clerk of the guardians for the time being, who was to cause the same to be preserved and filed. The clerk to the guardians paid the casual and out-poor weekly, and transacted some other matters relating to the poor, and had the custody of the books:—Held, that he was not a person liable to the penalty imposed by 17 Geo. 2, c. 3,

s. 3, on churchwardens, overseers or other persons authorised to take care of the poor, for not permitting an inhabitant to inspect the rates. *Whitchurch* v. *Chapman*, 3 B. & Ad. 693 ; 1 L. J., M. C. 69.

A rated inhabitant of a parish cannot sue an overseer for the penalty for refusing an inspection of the rate-books, unless he shews that he has been injured by the refusal. *Spenceley* v. *Robinson*, 5 D. & R. 572 ; 3 B. & C. 658 ; 27 R. R. 460.

Proper Demand, what is.]—The demand of an inspection must be made at a reasonable time and place ; therefore, where the demand was made at a parishioner's own house at eight o'clock in the evening, and not at the house of the overseer :—Held, that the overseer incurred no penalty by refusing. *Ib.*

A demand to inspect a rate made on the overseer by a rated inhabitant in the presence of his attorney is a lawful demand ; and the refusal to produce the rate upon a lawful demand constitutes the inhabitant a party aggrieved ; and a demand to see the rate is sufficiently specific, there being only one rate in esse at the time. *Edwards* v. *Bennett*, supra.

When a demand to inspect a rate was made upon an overseer on his own premises not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house for that purpose : —Held, that this was a reasonable demand within the statute. *Parker* v. *Edwards*, 7 B. & C. 594 ; 3 M. & P. 761.

Right to have a Copy.]—The 6 & 7 Will. 4, c. 96, which, by s. 2, prescribes the form in which a poor-rate is to be made, and, by s. 5, empowers persons rated to take copies thereof, and imposes a penalty of 5*l.* for refusal, does not repeal so much of 17 Geo. 2, c. 3, as requires the overseers to give copies of the rate to any inhabitant forthwith upon demand, and subjects them to a penalty of 20*l.* for refusal. *Tennant* v. *Craston* or *Creston*, 2 New Sess. Cas. 425 ; 8 Q. B. 707 ; 15 L. J., M. C. 105 ; 10 Jur. 660.

A parishioner is entitled to have, on demand, a copy of the rate forthwith delivered to him, upon paying 6*d.* for every twenty-four names :— Held, that the overseer is entitled to a reasonable time to make the copy. *Spenceley* v. *Robinson*, supra.

Action for Penalty.]—In a declaration against an overseer for the penalty for refusing inspection of a poor-rate, it is sufficient for the plaintiff to describe himself as an inhabitant of the parish, without stating that he is a rated inhabitant. *Batchelor* v. *Hodges*, 6 N. & M. 75 ; 4 A. & E. 592 ; 5 L. J., M. C. 52.

To such a declaration, it is no plea that the rate, at the time of the demand for inspection, was not a subsisting rate. *Ib.*

—— **Who may Sue.**]—A churchwarden or an overseer is not an inhabitant or a parishioner within 17 Geo. 2, c. 3, so as to be entitled to sue a co-churchwarden or overseer for penalties for refusing to permit him to inspect or to give him a copy of a rate. *Wethered* v. *Calcutt*, 5 Scott (N.R.) 409 ; 4 Man. & G. 566 ; 11 L. J., M. C. 123 ; 6 Jur. 487.

—— **Questions for the Jury.**]—In an action against an overseer for not giving to an inhabitant a copy of a rate forthwith, upon demand and offer of payment, the complaint being that the overseer had used undue delay :—Held, that it was not the judge's duty to tell the jury, as a direction in point of law on the facts proved, that the copy was or was not given forthwith, but that he was right in leaving it to them to say whether, under the circumstances, it had or had not been given in reasonable time, and therefore, according to reasonable construction, forthwith. *Tennant* v. *Bell*, 9 Q. B. 684 ; 16 L. J., M. C. 31 ; 10 Jur. 946.

Right to Compel.]—The court cannot compel the officers of a parish to permit the ratepayers of a parish to take copies or extracts from a book containing all parochial rates and accounts of all moneys received for parochial purposes, but not containing any account of parochial disbursements kept under the directions of a local act, although the parish has adopted the provisions of 1 & 2 Will. 4, c. 60 (the Vestry Act). *Reg.* v. *St. Marylebone Vestry*, 6 N. & M. 600 ; 5 A. & E. 268 ; 6 L. J., M. C. 159.

The right of a ratepayer to inspect or take copies from parish accounts is only a private right ; and to entitle him to a mandamus ordering such inspection to be granted, he must shew grounds of a special and public nature in support of his application. *Briggs, Ex parte*, 1 El. & El. 881 ; 28 L. J., Q. B. 272 ; 7 W. R. 445.

4. Appeal against Rates and Reserved Cases.

a. When Appeal Lies.

The simple fact of being left out of a poor-rate where no improper motives are shewn for making the omission, is no ground of appeal against the rate. *Rex* v. *George*, 1 N. & P. 451 ; 6 A. & E. 305 ; W. W. & D. 32 ; 6 L. J., M. C. 34 ; 1 Jur. 39.

A defect in the enumeration of some of the property in a poor-rate is ground of appeal. *Rex* v. *Wilson*, 5 N. & M. 119 ; 1 H. & W. 507.

An objection that a rate is retrospective is ground of appeal. *Reg.* v. *Stretfield*, 32 L. J., M. C. 236 ; 11 W. R. 736.

An objection to a rate on account of the uncertainty of specification of the property rated is ground of appeal only, and is not a bar to an action for the rate. *Curtis* v. *Kent Waterworks Co.*, 7 B. & C. 314 ; 5 L. J. (o.s.) M. C. 106.

Where an inhabitant is rated for certain stock-in-trade which may not be rateable, his remedy is by appeal to the quarter sessions, not by replevin. *Marshall* v. *Pitman*, 2 M. & Scott, 745 ; 9 Bing. 595 ; 2 L. J., M. C. 33.

The justices at the sessions are the proper judges of the equality of poor-rates. *Rex* v. *Aire and Calder Navigation*, 2 Term Rep. 660 ; 1 R. R. 579.

The following order of sessions was removed by certiorari : "Whereas E. L., of, &c., in the parish of St. B., in the city of L., has presented his petition and appeal, setting forth, that by a certificate, &c., the barrister did certify that the L. Literary and Scientific Institution was entitled to the benefit of an act passed in the sixth and seventh years of the reign of, &c., by which certificate the petitioner, as a parishioner and ratepayer of the parish of St. B., in the city of L., in which parish the institution is situate, conceived himself aggrieved, and appealed against the certificate ; now upon hearing the petition

and appeal of E. L. against the certificate, in the presence and hearing of all parties concerned, &c., it is ordered that the certificate be annulled": —Held, first, that it was sufficiently alleged that E. L. was a ratepayer; that the allegation that he was a ratepayer was equivalent to an allegation that he was assessed, and therefore he was entitled to appeal against the certificate of the barrister, and that it was not necessary to set out the rate to which he was assessed. *Reg.* v. *Stacy*, 14 Q. B. 789; 19 L. J., M. C. 177; 14 Jur. 549.

Held, secondly, that the sessions having annulled the certificate because the statute mentioned in it was described as passed in the sixth and seventh years of the reign, the decision could not be reviewed by the court. *Ib.*

Local Act—Who may Appeal.]—By a local act guardians were empowered to ascertain what sum each parish in the city of Norwich should contribute towards the expenses of maintaining the poor, and to certify the same to two justices, who were to issue their warrant to the proper officers to rate and assess the amount; any person, parish, &c., unequally assessed might appeal at the next sessions held after such assessment made and demanded:—Held, that the churchwardens and overseers of an over-assessed hamlet might appeal against both the certificate and the warrant. *Rex* v. *Norwich Corporation*, 3 D. & R. 42.

Arbitration by Agreement—Breach of Faith.]—A vestry constituted under 1 & 2 Will. 4, c. 60, but exercising powers under a local act (which gave the vestry all the authorities of a public vestry), made a poor-rate, whereby certain amounts were charged upon a railway company in respect of various properties within the parish. By the local act, a party aggrieved by any assessment might appeal to the vestry at any meeting within one month after demand of the rate, and the vestry might give relief; and the appellant, if not satisfied with the determination, might, within three months after it, appeal to the sessions. The company appealed to the vestry, and by agreement (September 14th, 1850), between the company and the vestry (who authorised their chairman to sign it), the question whether or not the property had been overrated was referred to an arbitrator, who was to have the powers of a court of quarter sessions on appeal; and the company having paid the rate, it was agreed that if the assessment should be reduced, the amount overpaid should be credited to them on account of the next rate; that the award should regulate the assessment to all future rates up to its date; and that all payments on such future rates should be credited to the company in the same manner as the payment already made. Pending the reference, a second rate was made (September 21st, 1850), and a third in March following, both on the same rateable value as the first, and the company paid the second. The parties attended before the arbitrator, and he made his award, assessing the company's properties at reduced values, and fixing the entire rateable value at an amount lower than that in dispute by 573*l.* Taking the total as correct, the company was a creditor, upon the three rates, to the amount of 418*l.*, but by an error of figures the total stated in the award exceeded by a few pounds the aggregate of the sums assessable on the several properties, according to the arbitrator's finding. The vestry clerk proposed to refer the matter back to the arbitrator. The company objected, but offered to discard the total sum and take the assessment according to the valuations on the several parcels. This was not agreed to, but no proceeding was taken to set the award aside. The vestry, of whom forty had come into office in place of forty who retired, after the making of the award refused to consider it as valid, and distrained upon the company under a magistrate's warrant for the third rate on the original scale of assessment. The company replevied, and afterwards moved the court that proceedings might be stayed and the replevin bond delivered up:—Held, that whether the award was binding on the vestry or not, their proceeding by summons and distress was against good faith, the company having, by their agreement with the vestry, been led into a course of proceeding which had deprived them of an appeal to sessions, and that the proceedings of the company in replevin might be stayed, and their bond given up at their own instance. *L. & N. W. Ry.* v. *Bedford*, 17 Q. B. 978.

b. To what Court.

Quarter Sessions—"Failed to obtain Relief."]—A ratepayer, aggrieved by his assessment to the poor-rate, gave notice of objection to the assessment committee, under the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1. The committee, considering that a case then pending in a superior court would govern this case, adjourned their decision. The ratepayer thereupon appealed against the rate to the quarter sessions:—Held, that he had not "failed to obtain relief" from the assessment committee within the above section; and that the quarter sessions had consequently no jurisdiction. *Reg.* or *Williams* v. *Bedminster Union*, 45 L. J., M. C. 117; 1 Q. B. D. 503; 34 L. T. 795.

—— **Parish under Special Act.**]—A metropolitan parish was regulated by a local act, under which a rate for the relief of the poor and other parish purposes was to be made by the vestrymen, and any person aggrieved by the rate was to apply to the guardians for relief, and if dissatisfied with their decision, might then appeal to the quarter sessions, giving notice to the guardians. A valuation list for the parish was made by the overseers and finally settled by the assessment committee under 32 & 33 Vict. c. 67, in which certain property occupied by the appellants was newly assessed, but no notice was given to them by the overseers as required by s. 9. The appellants appealed direct to the quarter sessions, proceeding as in an appeal against a poor-rate under 17 Geo. 2, c. 38:—Held, that the rate was still made under the local act, though the valuation was to be in conformity with the valuation list under 32 & 33 Vict. c. 67; and that the proceedings not having been in conformity with the local act the quarter sessions had no jurisdiction. *Reg.* v. *Middlesex JJ.*, L. R. 7 Q. B. 653; 26 L. T. 902; 20 W. R. 774.

County Sessions—Rate in Borough.]—A parish contained a borough, which was not co-extensive with the parish, and which before the Municipal Corporations Act (5 & 6 Will. 4, c. 76), had a quarter sessions with jurisdiction over the whole parish. The borough had not six justices, and therefore the parish had the power of appealing to the county sessions against a rate under 1 Geo. 4,

c. 36. The Municipal Corporations Act threw the outlying parts of the parish into the county jurisdiction :—Held, that s. 3 did not take away the power of an inhabitant in the outlying parts of the parish to appeal against a poor-rate to the county sessions, and that the sessions might amend or quash the whole rate. *Reg.* v. *Bridgewater*, 2 P. & D. 586 ; 10 A. & E. 711 ; 8 L. J., M. C. 72 ; 3 Jur. 1123.

Queen's Bench—Preliminary Questions.]—On an appeal against a poor-rate the sessions granted an application to enter and respite the appeal, subject to a case for the opinion of the court of queen's bench ; the reservation at the end of the case being, if the court should be of opinion that the quarter sessions ought not to have granted the application, the entry of the appeal is to be struck out :—Held, that the point being raised on an order which did not finally dispose of the appeal, the court would not entertain the case. *Reg.* v. *L. & N. W. Ry.*, or *Sutton Coldfield Overseers*, 43 L. J., M. C. 57; L. R. 9 Q. B. 153; 29 L. T. 840 ; 22 W. R. 324.

—— **Appeal from.**]—The jurisdiction of the queen's bench upon questions relating to the validity of local rates is not purely consultative but judicial, and the decisions of that court upon such matters are therefore open to appeal. A decision of the queen's bench on such a matter, though given in the form of discharging a rule for quashing an order of sessions, is an "order" within the 19th section of the Judicature Act, 1873, and is therefore subject to appeal. *Walsall Overseers* v. *L. & N. W. Ry.*, 48 L. J., M. C. 65 ; 4 App. Cas. 30 ; 39 L. T. 453 ; 27 W. R. 189—H. L. (E.)

Next Sessions—General Rule.]—An appeal against a poor-rate to the justices at a special petty sessions, under 6 & 7 Will. 4, c. 96, s. 6, must be either to the next practicable special sessions after the making of the rate, or within a reasonable time. *Reg.* v. *Lancashire JJ.*, 4 New Sess. Cas. 130 ; 19 L. J., M. C. 199 ; 14 Jur. 552. *S. C.*, nom. *Reg.* v. *Trafford*, 15 Q. B. 200.

An appeal against a poor-rate to the special sessions cannot be made to a later sessions than the second after the publication of the rate. *Reg.* v. *Hammond*, 4 New Sess. Cas. 316.

A poor rate was made on the 9th, allowed on the 11th, and published on the 14th, the sessions commencing on the 15th of April :—Held, that an appeal against the rate need not be entered until the sessions next but one after the publication of the rate. *Rex* v. *Hendon*, 2 D. & R. 249.

Where a rate is published on May 30 an appeal to the Michaelmas quarter sessions is not an appeal to the next practicable sessions. *Reg.* v. *Weedon Beck Churchwardens*, 1 W. R. 385.

—— **Failure to obtain Relief.**]—Though, under 17 Geo. 2, c. 38, s. 4, an appeal against a poor-rate must be to the next practicable sessions after publication, it is now, by 27 & 28 Vict. c. 39, s. 1, a condition precedent to the right to appeal that the party shall have failed to obtain relief from the assessment committee on the hearing of his objections to the valuation list. *Lawes* v. *Arlsey Overseers*, 18 W. R. 293.

Where, therefore, a rate was published on the 30th of May, and notice of objection was given to the assessment committee on the 11th of June, but the committee did not sit to hear the objections till the day of holding the Midsummer quarter sessions :—Held, that an appeal against the rate might be entered and respited at the October sessions. *Ib.*

On August 3rd a gas company failed to obtain relief against a poor-rate from an assessment committee, and on October 5th they gave notice of appeal to the sessions to be held on October 26th. Meanwhile sessions had been held on September 1st :—Held, as from August 3rd to September 1st there were seven days beyond the twenty-one days requisite for notice under 27 & 28 Vict. c. 39, that the September sessions were the next practicable sessions within 17 Geo. 2, c. 38, s. 4 ; and that, therefore, the appeal could not be entered at the October sessions. *Liverpool United Gas Light Co.* v. *Everton Overseers*, 40 L. J., M. C. 104 ; L. R. 6 C. P. 414 ; 23 L. T. 813 ; 19 W. R. 412.

A poor-rate was made for a parish in a county and published on May 30th. On the 11th of June L. gave notice of objection to the union assessment committee. The committee at its next meeting on the 30th of June refused to grant him relief. The Midsummer quarter sessions for the county were held on the same day. L. appealed to the Michaelmas sessions, and the justices allowed the appeal to be entered : —Held, on a motion for a prohibition against L. and the justices to stay all further proceedings in connection with the appeal, that L. could not be said to have failed to obtain relief from the union assessment committee until June 30th, when the committee heard his case, and refused to allow his objections. *Reg.* v. *Biggleswade Union*, 21 L. T. 494.

Held, also, that L. would not have been right in giving notice of appeal to the sessions until he had so failed before the union assessment committee. *Ib.*

Held, also, that as L. was, under the circumstances, prevented by 27 & 28 Vict. c. 39, from appealing to the Midsummer sessions, it was not too late for him to appeal to the Michaelmas sessions. *Ib.*

—— **In London or Middlesex.**]—An appeal against a poor-rate in London or Middlesex must be made, as in all other counties, to the next (i.e. next practicable) general quarter sessions ; though the 17 Geo. 2, c. 38, s. 4, in its terms gives the appeal to the next general or quarter sessions ; it appearing from other parts of the act as well as from other acts in pari materiâ, that those terms are used synonymously ; and though in the two counties named there are four general as well as four general quarter sessions. *Rex* v. *London JJ.*, 15 East, 632 ; 13 R. R. 540.

Claim of Exemption—Appeal within Four Months.]—A society obtained a barrister's certificate which was filed, after which an assessment of rates was made under a local act ; afterwards notice of the filing was given to the collector of rates, and to the trustees under that act ; after which another assessment was made : —Held, that an appeal, made within four calendar months next after the assessment first mentioned, was in time within 6 & 7 Vict. c. 36, s. 6, as being made within four calendar months next after the first assessment after such exemption shall have been claimed by such society. *Reg.* v. *Pocock*, 8 Q. B. 729 ; 15 L. J., M. C. 132 ; 10 Jur. 662.

c. Notice of Appeal.

Necessity of—Action for Excessive Rate.]—On the 15th August, 1828, an increased poor-rate was assessed on certain premises, against which an appeal was entered at the October sessions, and respited to the following sessions in January. On the 15th December, 1828, the overseers distrained for the increased rate; but, to prevent a sale, the amount was paid under protest, and the distress relinquished. The rate was subsequently reduced, in consequence of the decision of the court on a case sent up by the justices on the hearing of the appeal. It did not appear that any notice in writing of the appeal had been given to the overseers pursuant to 41 Geo. 3, c. 23, s. 2, before the levy. In an action by the party on whom the increased rate was made, against one of the overseers, at the time of the levy, to recover back the excess above the last effective rate:—Held, that, as no notice of appeal had been given to the overseers, the action could not be maintained. *Priestly* v. *Watson*, 2 C. & M. 621; 4 Tyr. 916; 3 L. J., M. C. 113.

One Notice by Several Persons.]—Several parties having a joint grievance, such as the omission of persons in the rate who ought to be rated, may join in giving one notice of appeal. *Rex* v. *Sussex JJ.*, 15 East, 206; 13 R. R. 447.

To whom given.]—Notice of appeal against a rate served upon one of the churchwardens of the parish, and the two overseers, is good service under 6 & 7 Will. 4, c. 96. *Rex* v. *Weedon Beck Overseers*, 1 W. R. 385.

Where there is an appeal on the ground that some person is omitted who ought to be rated, the justices cannot hear the appeal unless notice of it has been given to the party said to have been improperly omitted. *Rex* v. *Brooke*, 9 B. & C. 915; 4 M. & Ry. 719; 8 L. J. (O.S.) M. C. 33.

By a local act the management of the poor of a town was vested in certain persons, who were empowered to make rates, and an appeal was given to the party aggrieved to the town sessions against every such rate; and a further appeal, if necessary, to the county sessions. An appeal against four rates being entered at the January town sessions, four grounds of appeal were specified in the notice; the party being dissatisfied, made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being that the party was rated in respect of his lands in a higher proportion than all the other inhabitants mentioned in the rate:—Held, that it was not necessary to give notice of appeal to all the inhabitants named in the rate. *Rex* v. *Suffolk JJ.*, 1 B. & Ald. 640.

Entry of Recognizances.]—By 6 & 7 Will. 4, c. 96, s. 6, the decision of the special petty sessions shall be binding unless notice of appeal be given within fourteen days after the decision, and a recognizance be entered into within five days of such notice before some justice of the peace. Where recognizances were duly entered into within five days, and a minute of the recognizances was entered in the minute-book by the clerk of the peace, but the recognizance itself was not then drawn up and signed by a justice of the peace: the court held that the words of the statute were satisfied. *Reg.* v. *St. Albans' JJ.*, 1 P. & D. 148; 8 A. & E. 932; 8 L. J., M. C. 33.

d. Notice of Objections.

Necessity of.]—Under 27 & 28 Vict. c. 39, s. 1, it is a condition precedent to the right of appeal against each and every rate made in conformity with the valuation list, that the appellant should give a notice of objection against the list to the assessment committee; and that notwithstanding an appeal against the next preceding rate by the appellant is pending, and the figures in the valuation list are the same, so far as the appellant is concerned. *Reg.* v. *G. W. Ry.*, 10 B. & S. 318; 38 L. J., M. C. 89; L. R. 4 Q. B. 323; 20 L. T. 481; 17 W. R. 670.

Under the authority of their local act, 25 Geo. 3, c. xli., the vestry of Richmond had made a rate for the relief of the poor within that parish, for which the appellant had been assessed upon a valuation of 150*l.* made by the vestry. The assessment committee of the Richmond Union had also made a valuation list, under which the appellant's premises were assessed at 102*l.* The appellant appealed against the vestry's rate to the special sessions held under the provisions of 6 & 7 Will. 4, c. 96; but the justices held that they had no jurisdiction to hear the appeal, on the ground that he had not given notice to the union assessment committee of any objection to the valuation list approved by them, which was made a condition precedent to an appeal by s. 1 of the Union Assessment Committee Amendment Act, 1864:—Held, that the justices were wrong, inasmuch as the provisions for an appeal against a poor-rate given under 6 & 7 Will. 4, c. 96, were applicable to poor-rates, whether made under local or general acts, whereas the requirements as to notice of objection under s. 1 of the Union Committee Assessment Amendment Act, 1864, applied only to valuations made under the Union Assessment Committee Act, 1862, and that, therefore, the rule for the mandamus must be made absolute. *Reg.* v. *Price, Cole, Ex parte*, 62 L. J., M. C. 71; 68 L. T. 171; 57 J. P. 294.

Fresh Notice after Rate made.]—An appellant who has given notice of objection to the valuation list, under 27 & 28 Vict. c. 39, s. 1, and failed to obtain relief before a rate is made in conformity with the list, is not bound by the above enactment to give a fresh notice of objection to the list after the rate is made in order to be entitled to appeal. *Reg.* v. *Wiltshire JJ.*, 48 L. J., M. C. 142; 4 Q. B. D. 326; 40 L. T. 681.

A valuation list having been duly made in accordance with the provisions of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), the appellants gave notice of objection to the list. A rate was made in conformity with the list, and subsequently the objection of the appellants was heard by the assessment committee, who made a deduction from the amount at which the property of the appellants was valued, and altered the valuation list accordingly. The rate was then amended in conformity with the amended list. The appellants being dissatisfied with the deduction, gave the requisite notice of appeal against the original rate, but did not give to the assessment committee any further notice of objection to the valuation list, or any notice of appeal against the rate founded upon it:—Held, that the appellants had done all that was contemplated by the statute, and that it was not a condition precedent to their right of appeal that they should give fresh notice of

objection to the amended list, or notice of appeal against the amended rate. *Reg.* v. *Derbyshire JJ.*, 25 L. T. 43; 19 W. R. 934.

A person who has once given to the assessment committee notice of objection against a valuation list and failed to obtain such relief as he deems just, may appeal to quarter sessions against any subsequent poor-rate made in conformity with the list, and 27 & 28 Vict. c. 39, s. 1, does not make it a condition precedent of such appeal that previously thereto he should repeat his application to the committee for relief. *Reg.* v. *Denbighshire JJ.*, 54 L. J., M. C. 142; 15 Q. B. D. 451; 53 L. T. 389; 33 W. R. 784.

Failure to obtain Relief.]—The 27 & 28 Vict. c. 39, s. 1, makes it in all cases a condition precedent to the right of appeal to the quarter sessions against a poor-rate made in conformity with the valuation list approved of by the assessment committee, that the appellant should have given to the assessment committee notice of the objection against the list, and shall have failed to obtain relief. *Reg.* v. *Lancashire JJ.*, 43 L. J., M. C. 116; 30 L. T. 403; 22 W. R. 648. *See cases* ante, cols. 1717, 1718.

Contents of Notice.]—The notice required by 27 & 28 Vict. c. 39, s. 1, to be given to the assessment committee, before an appeal to quarter sessions against a rate, must contain all the grounds of appeal, though on some of those grounds the assessment committee may be unable to give relief. *Williams* v. *Bedminster Union*, 30 L. T. 710; 22 W. R. 943.

The court of quarter sessions has no power to quash a rate for a defect not pointed out in the notice of appeal, though apparent on the face of the rate. *Rex* v. *Bromyard*, 2 M. & Ry. 280; 8 B. & C. 240; 6 L. J. (o.s.) M. C. 100.

Service of, on one Overseer.]—In order to entitle a person to be heard before justices at special sessions, under 6 & 7 Will. 4, c. 96, s. 6, against a rate, it is only necessary to prove service of notice of objection on one of the overseers or other persons by whom such rate was made. *Reg.* v. *Devon JJ.*, 3 New Sess. Cas. 96.

—— **To Person omitted from the List.**]—Where there is an appeal, on the ground that some person is omitted who ought to be rated, the justices at the sessions cannot hear the appeal, unless notice of the appeal and the ground of it have been given to the party said to have been improperly omitted. *Rex* v. *Brooke*, 9 B. & C. 915; 4 M. & Ry. 719; 8 L. J. (o.s.) M. C. 33.

e. Practice at Sessions.

Disqualification of Justice.]—When the judge (deputy recorder), presiding at the trial of an appeal against an assessment to a poor-rate, was the registered owner of five shares in a company which was a party to the appeal:—Held, that he was interested in the appeal, and that the order of sessions in the appeal must be quashed. *Reg.* v. *Storks*, 5 W. R. 563.

Sect. 1 of 16 Geo. 2, c. 18, has not been repealed by s. 6 of the Union Assessment Committee Amendment Act, 1864. Justices in special sessions can, therefore, hear appeals against rates made by a parish though they are themselves ratepayers in the same parish. *Reg.* v. *Bolingbroke*, 62 L. J., M. C. 180; [1893] 2 Q. B. 347; 5 R. 536; 69 L. T. 717; 42 W. R. 128; 58 J. P. 118.

A justice is not disqualified from acting at special sessions in the determination of a rating appeal by reason of the fact that he is a ratepayer in the parish in which the rate appealed against was made. *Reg.* v. *Bolingbroke* (supra) followed. *Workington Overseers, Ex parte*, [1894] 1 Q. B. 416; 9 R. 135; 70 L. T. 143; 42 W. R. 177; 58 J. P. 381—C. A.

One Appeal against Four Rates — Fresh Grounds of Objection.] — By a local act, the management of the poor of a town was vested in certain persons, who were empowered to make rates, and an appeal was given to the party aggrieved to the town sessions against every such rate; and a further appeal, if required, to the county sessions. An appeal against four rates being entered at the January town sessions, four grounds of appeal were specified in the notice; the party being dissatisfied, made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being, that the party was rated in respect of his lands in a higher proportion than all the other inhabitants mentioned in the rate:—Held, first, that one appeal against the four rates was sufficient. *Rex* v. *Suffolk JJ.*, 1 B. & Ald. 640.

Held, also, that the appellant must, at the county sessions, be confined to the original grounds of appeal at the town sessions. *Ib.*

Divisibility of Appeals.]—M. being dissatisfied with his assessment, on the ground that he was overrated, and that other ratepayers, viz. W., T. and P., were underrated, and that he was unequally rated having regard to the ratings of his neighbours, W., T. and P., gave notice to the assessment committee, and to the parties whose assessments were objected to, stating the grounds of such objections, and attended before the assessment committee pursuant to such notice. That body affirmed his rating on its former basis, and thereby refused relief on the first ground, and only made a nominal addition to the assessment of T., and thereupon M. withdrew, and did not proceed with his objections against the assessments of W. and P. The assessment committee having declined to amend the valuation list (except in so far as the nominal increase of T.'s assessment involved alteration), M. appealed to the quarter sessions. At the appeal M. offered to abandon his objection against W., and withdrew, as regarded him (P. did not appear), but claimed his right to prosecute his appeal against the decision of the assessment committee in respect of his own assessment and that of T. The justices, however, held, that the appeal was not divisible, and, therefore, dismissed it altogether:—Held, that they were wrong, and that M., on offering to abandon his objections to the rating of W., should have been allowed to do so, and to proceed with his appeal against the decision of the assessment committee in the cases of himself and T. *Reg.* v. *Kent JJ.*, 40 L. J., M. C. 76; L. R. 6 Q. B. 132; 19 W. R. 205.

Power to allow Abandonment of Particular Ground.]—The respondents objected that, in respect of one of the grounds of appeal, it was necessary, under 41 Geo. 3, c. 23, s. 6, that notice of the appeal should have been given to the

persons therein named. The appellants denied that the ground of appeal came within that section. The sessions, however, decided that a notice was necessary to be given. The appellants then offered to abandon that ground of appeal, and proceed with others in respect of which no notice at all was required. The sessions refused to permit them to do so, and dismissed the appeal:—Held, that the sessions had power to decide whether they would permit the appellants to abandon that particular ground of appeal and proceed with the others. *Reg.* v. *Cambridgeshire JJ.*, 1 L. M. & P. 47; 19 L. J., M. C. 130; 4 New Sess. Cas. 87.

When Amount in Dispute.]—Where an appellant disputes before the sessions the quantum of the rate, as well as the rateability of the property for which he is assessed (which was tithe rents and compositions under an inclosure act), it is not enough for the parish officers to shew that he was in receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence. *Rex* v. *Topham*, 12 East, 546.

Onus Probandi.]—On an appeal, on the ground that the appellant was overrated, the practice at the sessions required the appellant to begin by proving his case, which the appellant refused to do; and the appeal was dismissed: the court refused a mandamus to the sessions to rehear the appeal on this objection. *Rex* v. *Suffolk JJ.*, 6 M. & S. 57.

If a party appeals on the ground that he has no rateable property in the parish, the respondents must first establish their case. *Rex* v. *Newbury*, 4 Term Rep. 475.

—— **Property omitted from Rate.**]—If the ground of appeal is, that certain rateable property has been altogether omitted, the onus does not lie upon the appellant to give the sessions the means of amending the rate, it being the duty of the parish officers to include all rateable property in the rate, and take what means they can to ascertain its value. *Rex* v. *Hull Dock Co.*, 5 D. & R. 359; 3 B. & C. 516.

Second Rate—Fresh Application for Relief.]—When an appeal has been made to the sessions against a rate, after failure to obtain relief from the assessment committee, under 27 & 28 Vict. c. 39, s. 1, it is necessary, before appealing against a second rate, to make a fresh application for relief to the assessment committee, although the list upon which the second rate is made contains precisely the same valuation of the appellant's property as that in the list which has been previously objected to. *Reg.* v. *G. W. Ry.*, 10 B. & S. 318; 38 L. J., M. C. 89; L. R. 4 Q. B. 323; 20 L. T. 481; 17 W. R. 670.

Adjourning and Respiting Appeals.]—The 17 Geo. 2, c. 38, s. 4, does not make it imperative on justices to hear and determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. *Rex* v. *Wilts JJ.*, 8 B. & C. 380; 2 M. & Ry. 401; 6 L. J. (O.S.) M. C. 97.

After an appeal has been respited at the instance of the respondents, the appellant cannot be called upon to prove his notice of appeal. *Rex* v. *Hertfordshire JJ.*, 1 N. & M. 331; 4 B. & Ad. 561; 2 L. J., M. C. 41.

A ground of appeal was, that persons who occupied property in the parish were omitted to be rated. Notice of appeal, addressed to the parish officers and to the other persons, was duly given to the parish officers, but not to the other persons. The respondents objected that proof of such notice was necessary. The appellant then applied to the sessions to adjourn the appeal, which they refused to do, and dismissed it with costs:—Held, that under 17 Geo. 2, c. 38, s. 4, and 41 Geo. 3, c. 23, s. 6, they were bound to adjourn the appeal until the next sessions. *Reg.* v. *Eyre*, 6 El. & Bl. 992; 26 L. J., M. C. 14; 2 Jur. (N.S.) 1207; 5 W. R. 55.

Afterwards the appellant served a fresh notice on the parish officers, addressed to them only, containing substantially the same grounds of appeal as the former notice. The sessions dismissed the appeal:—Held, that the fresh notice altered the character of the appeal, and therefore it was too late, and the sessions were right in dismissing it. *Reg.* v. *Eyre*, 7 El. & Bl. 619; 26 L. J., M. C. 125; 3 Jur. (N.S.) 912; 5 W. R. 533.

A notice, accompanied by grounds of appeal, was served on the parish officers fourteen days before the sessions, stating an intention to enter, and not to try the appeal, but to petition for a respite to the next following sessions. The respondents gave a counter-notice that they should appear and oppose a respite. The appeal was entered, and motion made that it should be respited, which the respondents opposed; and the sessions, being of opinion that no sufficient ground had been stated for respiting it, called upon the appellant to proceed, and on his declining, dismissed the appeal with costs:—Held, that it was discretionary with the sessions whether they would permit the appeal to be respited. *Reg.* v. *Eyre*, 7 El. & Bl. 609; 26 L. J., M. C. 121; 3 Jur. (N.S.) 910; 5 W. R. 532.

Abandonment of Rate.]—Where a poor-rate has been made, allowed, and published, and a party has appealed against it, the overseers cannot abandon it, but the appellant is entitled to have the rate quashed at the sessions. *Rex* v. *Cambridge JJ.*, 2 A. & E. 370; 4 N. & M. 238; 4 L. J., M. C. 8.

Although parish officers cannot abandon a poor-rate, after it has been allowed and published, so as to render it no longer a subsisting rate, yet they may so far abandon it as to refuse to incur expense in supporting it on appeal; and they have no right, as matter of law, independently of the discretion of the justices, to have the expense of contesting such an appeal allowed them in their accounts. *Reg.* v. *Fouch*, 1 G. & D. 585; 2 Q. B. 308; 11 L. J., M. C. 1.

Evidence—Rateable Value—Public-house.]—Upon an appeal to quarter sessions by the tenant of a public-house in a town against the rateable value put upon his premises, the appellant's witnesses cannot be cross-examined, and evidence in chief cannot be given on behalf of the respondents, as to the takings of the appellant's business, the rateable value having no relation to the takings of the particular tenant, but being measured by the rent which might be expected to be obtained in the market for that public-house, having regard to the rent paid for similar public-houses in that town. *Dodds* v. *South Shields Assessment Committee*, 64 L. J., Q. B. 508; [1895] 2 Q. B. 133; 14 R. 422; 72 L. T. 645; 43 W. R. 532; 59 J. P. 452—C. A.

f. Amending, Quashing and Reducing Rate.

Power of Amendment.]—On appeal, because particular persons are or particular property is omitted in the rate, the sessions ought not to quash the whole rate, but should amend it in such particular. *Rex* v. *Ringwood*, Cowp. 326.

The 41 Geo. 3, c. 23, s. 1, does not give the court of king's bench power of amending a poor-rate, as such statute confines the amendment to the quarter sessions. *Rex* v. *Milton*, 3 B. & Ald. 112; 22 R. R. 317.

—— **Contents of Rate Book.**]—When the subject-matter of a rate is improperly described in a rate-book, the rate is not to be quashed by striking out the name of the person rated, but amended by altering the description of the property rated. *Reg.* or *Williams* v. *Bedminster Union*, 45 L. J., M. C. 117; 1 Q. B. D. 503; 34 L. T. 795.

Amendment of Rate when Person Overcharged.]—When a person is overcharged, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him, under 17 Geo. 2, c. 38, s. 6. *Rex* v. *Cheshunt*, 2 Term Rep. 623; 1 R. R. 559.

Quashing Rate.]—The court will not quash a poor-rate, unless it is unequal upon the face of it. *Rex* v. *Hardy*, Cowp. 579. S. P., *Rex* v. *Tomlinson*, 9 B. & C. 163; 4 M. & Ry. 169; 7 L. J. (O.S.) M. C. 64.

An order of quarter sessions, made on an appeal against the whole of a poor-rate, and directing the rate to be quashed, is not bad because it does not also order the overseers to make a new rate, under 17 Geo. 2, c. 38, s. 6. *Reg.* v. *Hampshire JJ.*, 33 L. J., M. C. 104; 9 L. T. 730; 12 W. R. 441.

Justices, upon appeal from a rate to the quarter sessions, cannot make a new, but only quash the subsisting rate. *Rex* v. *St. Andrew's, Holborn*, 3 Burr. 1458.

The court of quarter sessions has no power to quash a rate for a defect not pointed out in the notice of appeal, though apparent on the face of the rate. *Rex* v. *Bromyard*, 2 M. & Ry. 280; 8 B. & C. 240; 6 L. J. (O.S.) M. C. 100.

—— **Validity of Order.**]—An order of sessions, quashing a rate, upon appeal generally, without assigning any reasons, is good. *Rex* v. *Cornwall JJ.*, 4 Burr. 2102.

Power to reduce Rate.]—Where, by a local act, power is given to two justices to relieve an applicant aggrieved by a poor-rate, they have power to relieve in an individual case, by reducing the amount in which the party was assessed, although the ground upon which they consider him entitled to relief is, that the whole rate is made according to an erroneous principle. *Rex* v. *St. James, Westminster*, 4 N. & M. 252; 2 A. & E. 241; 4 L. J., M. C. 15.

Credit for Excess Payment.]—Under 41 Geo. 3, c. 23, s. 8, if a rate is appealed against, and reduced, but the party rated has, during the appeal, paid on the unreduced assessment, the parish officers may in subsequent rates credit him for the excess paid, without an order of sessions. *Reg.* v. *Parker*, 7 El. & Bl. 155; 26 L. J., M. C. 199; 3 Jur. (N.S.) 771; 5 W. R. 234, 681.

Payment of Quashed Rate.]—A poor-rate was made in January, and quashed on appeal, but was levied, the amount to be taken as payment on account of the next effective rate on the parish. The next effective rate was made in June; but, the parish being in want of money, it was arranged between the ratepayers generally and the overseers, that the same rate should be levied in full, the payments of the quashed rate being allowed in the collection of the next rate; a rate being subsequently made in October, the overseers, being apprehensive that they might be surcharged if they carried out this arrangement, applied for a distress warrant to levy the October rate in full against an occupant of a house, whose predecessor had paid the quashed rate. The justices refused to issue their warrant on a rule to order them so to do:—Held, by Lord Campbell, J., and Wightman, J., that the payment of the quashed rate was to be taken as payment on account of the next effective rate, which was that made in June, and could not be taken as payment. By Erle and Compton, JJ., that under the circumstances it would be unjust to enforce the payment in full, and that the court in its discretion ought to refuse to make the order absolute. *Reg.* v. *Kingston-on-Thames JJ.*, El., Bl. & El. 259; 27 L. J., M. C. 199; 4 Jur. (N.S.) 759; 6 W. R. 551.

Recovery of Excess Payment.]—An application for an order, under 41 Geo. 3, c. 23, s. 8, to refund money paid for a poor-rate after it has been reduced on appeal, must be made to the same court of general quarter sessions which heard the appeal, or, at least, to that court which ordered the rate to be lowered. *Rex* v. *St. Peter's, York, JJ.*, 4 B. & Ad. 342; 1 N. & M. 108; 2 L. J., M. C. 46.

g. Costs.

Power to Order and Enforce.]—An order of sessions dismissing an appeal against a poor-rate, and ordering costs to be paid by the appellant to the respondent, was removed into the queen's bench, and execution was issued thereon, under 12 & 13 Vict. c. 45, s. 18:—Held, that the order was valid, because s. 18 did not take away the power of awarding costs given by 17 Geo. 2, c. 38, s. 4, but gave an additional remedy for enforcing the order. *Reg.* v. *Huntley*, 3 El. & Bl. 172; 2 C. L. R. 246; 23 L. J., M. C. 106; 18 Jur. 745.

If a person gives notice of his intention to appeal, but does not enter his appeal, the sessions cannot award costs to the other party under 17 Geo. 2, c. 38, s. 4. *Rex* v. *Essex JJ.*, 8 Term Rep. 583.

Where an appeal was entered at the Midsummer, and respited until the Michaelmas sessions, and then further respited, at the instance of the appellant, till the Epiphany sessions, four days previously to which the respondents gave notice that they would not oppose the appeal, and it was accordingly allowed without opposition:—Held, that the appellant was entitled to costs as upon an appeal which had been heard and determined, within 17 Geo. 2, c. 38, s. 4. *Rex* v. *Causton*, 4 D. & R. 445.

Where an appeal is entered, and the appellant does not appear to support his appeal, the sessions have power to hear the appeal, and make an order for the respondent's costs on the appellant. *Rex* v. *Essex JJ.*, 1 D. P. C. 539.

On an appeal being entered and abandoned, the respondents are entitled to costs under 17 Geo. 3, c. 38, s. 4, up to the time of abandonment. *Holloway, Ex parte*, 1 D. P. C. 26.

—— **Non-appearance—Assessment Committee Respondents.**]—Where an assessment committee, which has been served with notice of appeal as a respondent, does not appear at the hearing of the appeal at quarter sessions, an order for costs cannot be made against it. *Reg.* v. *Salop JJ.*, 60 J. P. 552.

—— **Appearance—Consent of Guardians.**]—An assessment committee of a union are not entitled to costs incurred by them in respect of their appearance as respondents unless the conditions precedent imposed by s. 2 of the Union Assessment Committee Amendment Act, 1864, have been fulfilled and the consent of the guardians of the union, after notice has been sent to every guardian to so appear, has been first obtained. *West Ham Union* v. *Essex JJ.*, 65 L. J., M. C. 231; [1896] A. C. 443; 75 L. T. 1; 60 J. P. 756—H. L. (E.)

—— **Agricultural Rates Act, 1896.**]—The occupier, being entitled to be heard at quarter sessions, will be heard on appeal to the High Court, but will not be allowed costs, as only one set will be allowed. *Worthing Overseers* v. *Richmond*, 77 L. T. 161; 61 J. P. 710.

Order for Taxed Costs.]—Upon the hearing of an appeal against a poor-rate for a parish within a union, at borough sessions, the recorder decided that the rate should be amended with costs. The costs were not then taxed; and at the sessions following, the deputy recorder made an order for the amount of the taxed costs, he being at the time a ratepayer within another of the parishes in the same union:—Held, that the order for costs, being a judicial act, was void, on the ground that the deputy recorder was interested in the matter of the appeal. *Reg.* v. *Cambridge* (*Recorder*), 8 El. & Bl. 637; 27 L. J., M. C. 160; 4 Jur. (N.S.) 334; 6 W. R. 80.

When a rate was quashed with costs, and the costs having been subsequently taxed, the order for them was made at an adjourned session:—Held, that the order was good. *Reg.* v. *Hampshire JJ.*, 33 L. J., M. C. 104; 9 L. T. 730; 12 W. R. 441.

Against Overseers — Change of Overseers meanwhile.]—A poor-rate was made in September, 1858. An appeal against the rate at the January sessions, in 1859, was adjourned, on the application of the respondents, until the April sessions; and it was ordered that the respondents should pay full costs to that time to the appellants. At the April sessions the respondents did not appear, and the quarter sessions quashed the rate, and, reciting the order of January as to costs, ordered full costs to be paid to the appellants "by the respondents." In December the appellants applied for payment of the costs, and the costs not being paid, in March, 1860, they obtained an order of a judge to remove the order for the purpose of enforcing it. The overseers who made the rate, and were the respondents in the appeal, went out of office on the 29th March, 1859, and new overseers were appointed. On an application to set aside the order of sessions and the order of the judge on the ground that the existing overseers were not parties to the appeal, and therefore not liable to the costs, the court refused the application, both orders being good on the face of them. *Fletton Overseers, Ex parte*, 2 El. & El. 712; 29 L. J., M. C. 205; 6 Jur. (N.S.) 822; 2 L. T. 174; 8 W. R. 432.

Order of Reference—Jurisdiction.]—On an appeal against a poor-rate, the sessions ordered the appeal to be entered and respited, and referred the matter in dispute to an arbitrator under 12 & 13 Vict. c. 45, s. 13, the order of reference being silent as to costs. The appeal was regularly adjourned from sessions to sessions until the arbitrator, having duly heard the parties to the appeal, made his award, whereby he adjudged that the appeal should be dismissed with costs as against the appellants. The court of queen's bench, at the instance of the appellants, directed that the award should be referred back to the arbitrator, and that he should amend that part of it relating to the costs, inasmuch as the order of sessions referring the appeal to his arbitration gave him no jurisdiction over them. The arbitrator, having amended his award accordingly, the sessions ordered the same to be entered as the judgment of the court, but refused to add to their judgment that the appellants should be ordered to pay to the respondents their costs of the appeal:—Held, that the sessions were right in so refusing to add to their judgment; that their duty was ministerial only, and that the award was a judgment, and not merely a report; that the reference was under 12 & 13 Vict. c. 45, s. 13, which did not give to any sessions holden subsequently to that at which the order of reference was made jurisdiction over the costs of the reference. *Reg.* v. *Middlesex JJ.*, *West London Extension Ry.* v. *Fulham Assessment Committee*, 40 L. J., M. C. 109; L. R. 6 Q. B. 220; 24 L. T. 131; 19 W. R. 744.

—— **Costs Payable by Assessment Committee—Action for.**]—An assessment committee being respondents in an appeal against a poor-rate, an agreement was entered into which was expressed to be made between the appellants and the assessment committee for and on behalf of the guardians, and was signed by the chairman of committee, by which the rateable value of the subject-matter of the rate was referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The award was in favour of the appellants, and directed the "other party" to pay the appellants' costs of the reference and the costs of the award:—Held, that an action against the chairman and vice-chairman of the committee would not lie to recover these costs. *Leicester Waterworks Co.* v. *Barrow Union*, 48 L. J., M. C. 41; 4 Q. B. D. 18; 39 L. T. 624; 27 W. R. 364.

Costs of Arbitration—"Such Costs as they may be entitled to."]—Upon a poor-rate appeal to quarter sessions there was a reference to arbitration under 12 & 13 Vict. c. 45, and the respondents succeeded. The quarter sessions made an order for "such costs as they might be entitled to," and they claimed the costs of the arbitration. The clerk, however, deeming those costs not within the statute declined to tax them:—Held, that mandamus could not go to the sessions to hear and determine the application for those costs, as it could not be put as a

case in which they had declined jurisdiction, nor as a case in which they were clearly wrong. *Sheffield Gas Co.* v. *Sheffield Overseers*, 12 Jur. (N.S.) 162.

Quære whether the respondents are entitled to costs of arbitration. *Ib.*

—— **Award Silent as to Costs.**]—On an appeal at quarter sessions against a poor-rate, an order, under 12 & 13 Vict. c. 45, s. 13, was made by consent, respiting the appeal, in order that the opinion of the court of queen's bench might be taken to ascertain the principle on which the property should be rated; and when that was ascertained, the matter should be referred to an arbitrator, to certify whether the appellants had been rated properly. The order was silent as to costs, and the case was respited from sessions to sessions. The court having laid down the principle on which the property should be rated, the arbitrator found that the appellants had not been rated too high:—Held, that a subsequent court of quarter sessions had no power to allow the respondents the costs of the reference and award. *Reg.* v. *Yorkshire, W. R., JJ.*, 6 B. & S. 531; 12 Jur. (N.S.) 162.

Enforcing Order—Validity.]—When, upon an appeal to the sessions against a poor rate, the court, under 12 & 13 Vict. c. 45, s. 5, directs the party against whom it is decided to pay to the other party his costs, such costs are to be recovered in the manner pointed out by 11 & 12 Vict. c. 43, s. 27, and an order of sessions, directing such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled to them, is good. *Gay* v. *Mattheus*, 4 B. & S. 425; 33 L. J., M. C. 14; 9 Jur. (N.S.) 716; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

h. Reserved Cases.

Power to State.]—The 20 & 21 Vict. c. 43, s. 2, does not apply to the hearing of an appeal against a poor-rate at special sessions, and the magistrates sitting at such sessions have no power to state a case for the opinion of the court upon a point of law raised on such an appeal; but the case should, if necessary, be stated under 12 & 13 Vict. c. 45, s. 11. *Wheeler* v. *Burmington Overseers*, 29 L. J., M. C. 175, n.; 6 Jur. (N.S.) 698; 2 L. T. 171; 8 W. R. 412.

Right to Begin.]—According to the practice of the court of exchequer, on appeals upon cases stated under 12 & 13 Vict. c. 45, s. 11, the respondent is entitled to begin. *Liverpool Library* v. *Liverpool Corporation*, 5 H. & N. 526.

Jurisdiction of Court.]—The court is not precluded, by the sessions stating in the case "that the party rated is the occupier," from examining into the propriety of that conclusion, if the sessions also state all the circumstances of the case, and desire to have the opinion of the court upon the whole. *Rex* v. *Field*, 5 Term Rep. 587.

Alternative Findings — Arbitration.]—A special case stated by an arbitrator upon an appeal against an assessment to poor-rates set out two alternative modes, neither contrary to law, for ascertaining the value of the tenements assessed:—Held, that the arbitrator must find the facts affirmatively, and not in the alternative. Case remitted to be restated. *North and South Western Junction Ry.* v. *Brentford Union*, 58 L. J., M. C. 95; 13 App. Cas. 592; 60 L. T. 274—H. L. (E.)

II. COUNTY RATES.

A. JURISDICTION.

Borough and County Justices.]—A charter granting jurisdiction to borough justices over a district not within the borough, without words of exclusive jurisdiction, does not exclude the county justices from rating the district to a county rate. *Bates* v. *Winstanley*, 4 M. & S. 429.

Parish in two Counties.]—Before 1856, Deeping St. Nicholas was extra-parochial, and for secular purposes was situate partly in H. county and partly in K. county. In that year an act was passed which provided that Deeping St. Nicholas should form a parish and be deemed to be altogether in H., and that the laws for the time being in force for the relief and employment of the poor in England should be executed and put in force within the said parish in like manner as in other parishes; but a proviso was added that the county rate should continue to be paid and payable to the respective treasurers of the said rates for K. and H., within which the lands were situated. The guardians of the union in which the parish was situated received precepts for county rates from the county councils of H. and K., and issued a precept to the churchwardens for rates, including the county rate. The plaintiff claimed that the county rates for H. and K. ought not to be paid by a rate levied equally on the whole parish, but that each part of the parish should pay its respective share to its own county:—Held, that the County Rates Act, 1852, was incorporated in the act of 1856, and that s. 34 of the former act applied; that the rating powers of the respective justices were preserved by the proviso; and that each part of the parish must pay the county rate only of the county in which it was situated. *Att.-Gen.* v. *Deeping St. Nicholas*, 62 L. J., Ch. 188; 68 L. T. 278; 57 J. P. 196.

—— **In what Cases—New Gaol.**]—Under 4 Geo. 4, c. 64, two justices of a town, and county of a town, mentioned in Schedule A. to that act, may rate the inhabitants for rebuilding the gaol of such town and county on a new site. *Thompson* v. *Raikes*, 1 A. & E. 863.

When a presentment has been made as to the propriety of changing the site of a gaol, and the justices in sessions have taken such presentment into consideration, giving the notices required by 4 Geo. 4, c. 64, s. 45, and have resolved that the site ought to be changed, such justices may at their next sessions confirm the resolution, and contract for building the new gaol, without having given fresh notices. *Ib.*

Under 4 Geo. 4, c. 64, s. 68, the justices of a town and county might have power to raise money on the inhabitants in general for the purposes of building a gaol, though other persons might have been liable at the time of passing the act, and might continue liable to the expense of repairing and maintaining such gaol. *Rex* v. *Kingston-upon-Hull JJ.*, 1 A. & E. 880.

B. LIABILITY OF BOROUGH.

Borough meaning County.]—A borough was incorporated by royal charter and had a separate commission of the peace, with a non-intromittant clause, and held a separate court of quarter sessions. It had never contributed to or paid the rates for the county at large. Sessions had been regularly held by the borough justices, but the only business done was the presentment of nuisances. Offenders were sent to the county gaol for trial at the assizes or county sessions, and the cost of maintaining such offenders had been sometimes paid by the corporation out of the borough poor-rate:—Held, that the borough fell within the meaning of the word county in 15 & 16 Vict. c. 81, s. 51, and that although no rates in the nature of county rates had been levied in the borough, there was no reason why they should not be levied, and that therefore the borough was not liable to be assessed to the rate for the county at large. *Reg.* v. *East Looe*, 3 B. & S. 20; 31 L. J., M. C. 245; 8 Jur. (N.S.) 1128; 6 L. T. 748; 10 W. R. 866.

Borough with Separate Quarter Sessions.]—B., an ancient borough, situate in a county, had, as was found in an inquisition in the reign of Edward I., "a gallows, pillory, and tumbril, pleas of withernam," &c. By a charter of James I., the mayor, burgesses, and recorder should thenceforth be justices of the peace therein, with full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences, which might be inquired into before any justices of the peace in any county, so, nevertheless, that they do not in any manner proceed to the determination of any treason, murder, or felony, or of any other matter touching the loss of life or limb. There were also a grant and confirmation "of the same and similar courts of record, customs, liberties, privileges, franchises, immunities," &c., which the borough had heretofore holden and enjoyed. The borough justices had always held quarter sessions, and tried felonies and misdemeanors to the same extent and in the same manner as the justices of the county, and the latter justices had never interfered in any manner within the limits of the borough, which also maintained its own police:—Held, that the borough, in the absence of a non-intromittant clause, the existence of which could not, under the circumstances, be inferred, was liable to be assessed to the county rate, under 15 & 16 Vict. c. 81, and also to the police rate. *Were* v. *Devon (Clerk of the Peace)*, 6 B. & S. 7; 34 L. J., M. C. 47; 11 Jur. (N.S.) 322; 11 L. T. 626; 13 W. R. 313.

Under 5 & 6 Will. 4, c. 76, ss. 112, 117, when a borough, which before that statute was contributory to the county rate, is incorporated, and receives the grant of a separate court of quarter sessions, it remains contributory to the county rate as to all expenses, except the costs in regard to prisoners tried at the county assizes: it being provided by s. 113, that it shall pay all the costs in regard to prisoners committed from it for trial there. *Reg.* v. *Hilton*, 13 Jur. 1093. *See* 12 & 13 Vict. c. 82.

Under 5 & 6 Will. 4, c. 76, s. 117, a borough having a separate court of quarter sessions is not exempt from contributing a proportion of the money expended by the county in the purchase of a gaol pursuant to the provision of a particular statute. *Birmingham Corporation* v. *Reg.*, 10 Q. B. 116; 18 L. J., M. C. 176—Ex. Ch.

The parish of R. was subject to the jurisdiction of quarter sessions of S., but not to those of the county in which it was situate. In 1878 R., with a part of the county called the "added area" was put under commission for paving, &c., by a local act, which provided that if a charter were granted to the whole district, the quarter sessions of S. should have jurisdiction over the "added area," and that the "added area" should cease to be liable to county rates. In 1884 a charter was granted, which incorporated the whole district as the borough of R.:—Held, that the borough of R. was a borough having a separate court of quarter sessions, and that the "added area" was no longer liable to county rates. A separate court of quarter sessions in s. 150 of the Municipal Corporations Act, 1882, means a court separate from that of the county. *St. Lawrence Overseers* v. *Kent JJ.*, 51 J. P. 262.

Parishes partly Within and partly Without Borough.]—The 15 & 16 Vict. c. 81, ss. 32, 34 and 35, which provide for the collection of the county rate in parishes situate partly within boroughs and partly without, apply only to boroughs "not subject to contribute to the county rate;" and therefore, where a parish is situate partly within a borough which contributes to the country rate, a separate rate towards the expenses of the county police cannot be made upon the part without the borough, though the part within it is governed by a local act, under which police constables are appointed and paid. *Reg.* v. *Huddersfield Overseers*, 1 B. & S. 961; 31 L. J., M. C. 131; 8 Jur. (N.S.) 697; 7 L. T. 157; 10 W. R. 351.

—— **Main Roads.**]—By a local act, passed in 1874, the limits of the borough of Middlesborough were extended, and all lands, &c., within the extended area, and all persons in respect of the same, were exempted "from all county rates, save only in respect of the purposes for which any county rates are now leviable within the existing borough;" and the act further provided that the urban sanitary authority should be liable to the maintenance and repair of all streets and roads being public highways within the extended area, and that the inhabitants should not, in respect of any lands, &c., within that area, be liable to any payment in respect of the making or repairing of any highway beyond the limits thereof. At the time of the passing of the act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding, but those purposes did not include the maintenance of any main or other roads outside the limits of the borough. By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, any road which has ceased to be a turnpike-road in manner described by the act, shall be deemed to be a "main road," and one half of the expense incurred by the highway authority in the maintenance of such road shall, as to every part thereof within any highway area, be contributed out of the county rate:—Held, that the provisions of the local act did not exempt the inhabitants of the extended area of the borough from liability to pay county rates, under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, in respect of the maintenance of main roads out-

side the limits of the extended area. *Middlesborough Overseers* v. *Yorkshire JJ.*, 12 Q. B. D. 239; 32 W. R. 671.

—— **Highways.**]—By a local act, power was given to the mayor, aldermen, and burgesses to make and levy a highway rate upon the occupiers of all messuages, houses, &c., lands, tenements, and hereditaments within the borough, when sewered and otherwise completed, and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same." The borough consisted of a part of one of the four divisions of the parish of Ashton-under-Lyne, and the whole of another of such divisions, the latter being subdivided into two districts; and before the passing of the act each of such districts separately maintained its own highways and had its own surveyor. The greater part of one district was a county district. After the passing of the act the mayor, &c., acting as surveyor, laid a rate on each rateable property within each of the districts exclusively for the repair of such highways within them as had not been sewered, drained, levelled, paved, flagged, and otherwise completed, to the satisfaction of the mayor, &c.:—Held, that under the local act, taken in connection with 10 & 11 Vict. c. 34, ss. 48, 49, the mayor, aldermen, and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the local act, and the other for the repair of the usual ways not within that act, and therefore that the rate was bad. *Reg.* v. *Slater*, 18 Q. B. 398; 21 L. J., M. C. 185; 16 Jur. 992.

Highway Rates.]—*See* WAY.

C. PERSONS AND PROPERTY LIABLE.

County Gaol.]—By local acts, improvement commissioners were appointed to act in and for a town in a county, and were authorised to levy annually within the town, for the purposes of the act, a certain rate upon all gaols situated within the town. A subsequent local act, after reciting that it was expedient that the county should be relieved and exonerated from any taxes in respect of any of the gaols of the county, enacted that "no rate, tax, or assessment whatsoever, parliamentary or parochial, should be raised, assessed, or levied on, or be payable by, the county for or on account of the gaols, or any or either of them":—Held, that this latter act exempted a county gaol, situated in the town, from assessment to the annual rate leviable by the improvement commissioners. *Reg.* v. *Kent JJ.*, 2 El. & El. 911; 29 L. J., M. C. 191; 6 Jur. (N.S.) 894; 2 L. T. 353; 8 W. R. 496.

By an act passed for the purpose of keeping the streets of a town in repair and lighted, a sum was to be assessed upon all halls, gaols, churchyards, &c., within the town, "for every yard running measure of the length in front of such halls, gaols," &c.:—Held, that, notwithstanding the 4 Geo. 4, c. 64, s. 48, the county gaol was liable to the payment of the rate, and that every part of the building which abutted on a public street was to be included in the measurement. *Beds JJ.* v. *Bedford Commissioners*, 7 Ex. 658; 21 L. J., M. C. 224.

—— **Unoccupied Houses.**]—By 15 & 16 Vict. c. 81, s. 2, the basis or standard for the county rate is to be founded and prepared according to the full and fair annual value of the property rateable to the relief of the poor in every parish within the county:—Held, that unoccupied houses capable of being rated were to be included in the valuation. *Reg.* v. *Hammersmith*, 7 W. R. 524.

—— **Tenants in Ancient Demesne.**]—The exemption of tenants in ancient demesne from parliamentary taxes and tallages is limited to taxes granted by parliament to the crown, and does not extend to local taxation levied under the authority of an act of parliament upon and for the benefit of particular portions of the community. Tenants in ancient demesne are not therefore, as such, exempt from payment of county rates. *Reg.* v. *Aylesford*, 2 El. & El. 538; 29 L. J., M. C. 83; 6 Jur. (N.S.) 297; 1 L. T. 328; 8 W. R. 185.

Mode of Assessment—Parish traversed by Canal.]—A local act enacted that a canal company should be rated to all parliamentary and parochial taxes and assessments for its lands and buildings in the same proportion as other lands and buildings lying near should be rated, and as the lands and buildings of the company would be rateable if they were the property of individuals in their natural capacity:—Held, that a parish in Buckinghamshire was to be assessed to the county rate on an estimate in which the company's lands and buildings were assessed as directed by the statute. *Reg.* v. *Aylesbury-with-Walton*, 9 Q. B. 261; 4 Railw. Cas. 315.

—— **Equality of Rates.**]—Where before 12 Geo. 2, c. 29, the county rates had been assessed upon the entire district or place of Hartishead-with-Clifton, but the two townships of H. and C. separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves: yet, as that statute only establishes the accustomed proportions of contributions to the county rates as between the entire districts which were before assessed to such rates within the limits of the respective counties, and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts, this case was held to fall within the third section, which provides that, where there is no poor-rate in the parish, township, or place assessed to the county rates (by which must be understood no entire poor-rate co-extensive with the place or district assessed to the county rates), the county rates shall be raised by the petty constables in such manner as by law the poor-rate is to be assessed and levied, that is, by an equal rate on all the inhabitants. *Rex* v. *Yorkshire, W. R., JJ.*, 12 East, 117. And see *Rex* v. *Austen*, D. & R., N. P. C. 24.

D. PURPOSE OF RATES.

Legal Proceedings.]—If a fine is imposed on a county which the justices at the sessions think illegal, they may order the treasurer to defray the expenses of litigating the question out of the county stock. *Rex* v. *Essex*, 4 Term Rep. 591; 2 R. R. 470.

But they cannot order the costs of a prosecution for a misdemeanour carried on under the direction of magistrates to be allowed out of the county rates. *Rex* v. *Yorkshire, W. R., JJ.*, 7 Term Rep. 377.

Repayment of Loans.]—An order of sessions for assessing and levying a specific sum of money to enable a county treasurer to repay persons who had advanced money for county purposes, on the credit of the county rates, is bad on the face of it, inasmuch as it is a rate to reimburse, which the sessions have no authority to make. *Rex* v. *Flintshire JJ.*, 5 B. & Ald. 761; 1 D. & R. 470; 24 R. R. 548. S. P., *Rex* v. *Flintshire JJ.*, 2 D. & R. 843.

Damages for Riot—Exemption.]—By a local act for raising 21,000*l.* to pay the damages recovered of a hundred for the partial destruction of Nottingham Castle by rioters, the justices of the peace for the county were empowered to borrow the required sum by mortgage, or a sale of annuities secured on the proportion of the county rate chargeable on the inhabitants of the hundred. By s. 5, the justices were required to charge the proportion of the county rate to be raised upon the inhabitants of the hundred, not only with the interest of the money borrowed, but also with the payment of such further sum as should ensure the payment of the sum borrowed within seven years, or with the payment of such annuities for the like period as should be agreed to be paid or granted in respect of any part of the money so borrowed; and such sums should be assessed and recovered on the hundred in such manner as county rates are directed to be assessed and recovered, and should be paid and applied under the direction of the justices in discharge of the interest, and so many of the principal sums secured, or of such annuities, as such money would extend to discharge in each year, until the whole of the money should be paid. The 8th section provided a method for each parish to exempt itself from the operation of the act by paying its quota in the first instance, and for that purpose directed the justices, after ascertaining the amount to be borrowed, to specify and declare the sum to be paid or contributed by each parish as the quota or share of the whole sum so ascertained, and also to appoint a day on or before which the churchwardens or overseers of any such parish, desirous of paying the full amount of its quota, might pay the same to the person appointed as receiver under the act; and upon payment such parish should be discharged from all future payments relating to the integral sum whereof such quota should have been so paid, and from the interest, and from any expenses, &c.; and s. 9 enabled the churchwardens and overseers to raise the sum required as the quota of such parish by loan on the security of their parochial rates, to be repaid within seven years. In pursuance of s. 8, the justices fixed the quota of each parish in the hundred. Four availed themselves of the option of paying their quota. The parish of R. and thirty more did not; and the justices raised the required sum, after allowing for these payments, by granting annuities of 3,600*l.* per annum for seven years:—Held, that the effect of ss. 8 and 9 was to exempt from the operation of s. 5 those parishes only which paid their ascertained quota; that the annuities granted by the justices to pay the remainder were to be secured upon the portion of the county rate raised upon the hundred with the exception of those parishes which had paid; and that the county rate, with those exceptions, was liable in the aggregate to the incumbrance which was to be raised, in addition to the ordinary county rate, by order of the justices, in the same way in all respects as the other county rate is levied. *Walker* v. *Sherwin*, 9 M. & W. 266.

New Shire Hall.]—An act for building a new shire hall for a county enacted, that when the hall should be completed it should be for ever insured, supported, and maintained at the expense of the county and town, in the proportions following: that one-tenth part of the charges should be paid by the borough, and the remainder by the inhabitants of the county; that it should be lawful for the county justices to order the hall to be insured, supported, maintained, and repaired as they should think fit, and that they should and might order the expenses of the insurance and repairs to be paid in the proportion before mentioned. After the completion of the hall, 1,000*l.* was, in pursuance of the act, and of an order of county justices, expended in insuring and supporting the hall, and a tenth part thereof ordered to be paid by the borough, and the remainder by the inhabitants of the county. Subsequently a further sum of 28*l.* 2*s.* was ordered by the county justices to be laid out in repairing the hall and a tenth part of that sum was ordered to be paid by the borough, and the remainder by the inhabitants of the county:—Held, first, that the borough was bound to pay the proportion of the 1,000*l.* actually expended, although the borough had not been summoned to oppose the order of justices, nor had any notice that it was to be made. *Hinckley* v. *Stafford Corporation*, 6 Ex. 279; 20 L. J., Ex. 171.

Held, secondly, that the borough was bound to pay the proportion of the 28*l.* 2*s.*, although that sum had not been expended before action. *Ib.*

E. COUNTY TREASURER.

Security for Office.]—The 12 Geo. 2, c. 29, s. 6, does not make the giving the security a condition precedent to a person's becoming treasurer, or being responsible or accountable to the justices, but the appointment is complete without such security being given. *Rex* v. *Patteson*, 4 B. & Ad. 9; 1 N. & M. 612; 2 L. J., K. B. 33.

The condition of a bond, after reciting that the obligor had been nominated treasurer and receiver of the rates and assessments made for the county, upon giving security to the clerk of the peace for the due and faithful execution of the trusts reposed in him according to 12 Geo. 2, c. 29, was, that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the magistrates duly appointed for that purpose, by any order of the court of quarter sessions now made or hereafter to be made, well and truly account for all sums of money received by him by reason or on account of his office, and also should faithfully perform all the trusts reposed in him by virtue of the appointment:—Held, that, by the condition of this bond, the county treasurer was bound to account for moneys received by him in discharge of duties imposed by the act of parliament passed subsequently to 12 Geo. 2, c. 29. *Farr* v. *Hollis*, 9 B. & C. 315; 4 M. & Ry. 230; 8 L. J. (o.s.) K. B. 11.

Payments by—Allowance of.]—Where a sum of money not legally payable out of county rate was paid by a county treasurer under an order of two justices, made under colour of rules sanctioned by the sessions, authorising them to draw on the treasurer:—Held, that the sessions properly disallowed such payment, and that an order of a subsequent sessions, rescinding the previous order and allowing the payment, was bad on several grounds. *Reg.* v. *Saunders*, 2 C. L. R. 1689; 3 El. & Bl. 763; 24 L. J., M. C. 45; 1 Jur. (N.S.) 86; 2 W. R. 492.

Liability to make Payments—Police Expenses—Metropolitan District.]—Under 27 Geo. 2, c. 3; 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47, and 11 & 12 Vict. c. 42, if a prisoner is committed for trial for felony to a county gaol for an offence committed in the county within the metropolitan police district, the committal being by a county magistrate within such county and district, and the warrant is delivered to a metropolitan police constable, a county magistrate may order repayment by the county treasurer to the metropolitan police constable of the expenses incurred by him in conveying the prisoner to the gaol, the prisoner himself having no funds available for that purpose; and the county treasurer is liable to an action if he refuses to pay under such order. *Leverick* v. *Mercer*, 14 Q. B. 759; 22 L. J., M. C. 81; 1 W. R. 180.

So in the case of a committal for misdemeanor. *Ib.*

So in the case of summary conviction and sentence of fine and imprisonment in default of payment, and committal upon such default by order, under 11 & 12 Vict. c. 43, s. 23. *Ib.*

So in the case of a remand on a charge of felony or misdemeanor, whether the prisoner is ultimately committed for trial or not. *Ib.*

So where the warrant of commitment is directed only to the keeper of the county gaol. *Ib.*

So where the magistrate who issues the warrant is a police magistrate sitting in a metropolitan police court under 10 Geo. 4, c. 44, and 2 & 3 Vict. c. 71. *Ib.*

So where the magistrate who makes the order on the treasurer is such a police magistrate. *Ib.*

So where there is no express direction of the warrant. *Ib.*

So where the committal is for a refusal to enter into recognizances to appear at sessions, and to keep the peace in the meantime. *Ib.*

So where the committal is for further examination on a charge of felony or misdemeanor, but the prisoner is afterwards summarily convicted of misdemeanor. *Ib.*

——**When Constable not entitled.**]—But where a prisoner is remanded for examination and the keeper of the gaol delivers such prisoner to a constable to be conveyed before the magistrates, the constable is not entitled to be remunerated from the county rate for the expense of such conveyance. Though he would be so entitled if he conveyed him before the magistrate, by order of the magistrate. *Ib.*

——**County Surveyor's Bill—Mandamus—Discretion of Justices.**]—The court will not grant a mandamus to compel county justices to make an order on the county treasurer for the payment of the amount of the county surveyor's bill for estimates and expenses after deducting the items objected to by the finance committee, the costs and charges to be allowed being in the magistrates' discretion. *Reg.* v. *Southampton JJ.*, 2 W. R. 409.

F. PROCEEDINGS.

1. Before the Assessment Committee.

Conduct of Business.]—All business relating to the assessment, application and management of the county rate, must be transacted by the justices in open court; but no ratepayer, or person not being a member of the court, is entitled in any way to interfere with the exercise of the jurisdiction of the justices, in respect of such assessment. *Rex* v. *Nottingham JJ.*, 5 N. & M. 160; 3 A. & E. 500; 1 H. & W. 318; 4 L. J., M. C. 113.

Power to Summon Witnesses.]—Under 15 & 16 Vict. c. 81, s. 7, the committee has power to summon and examine private persons, and to require them to produce any documents in their possession which are necessary to enable the committee to ascertain the value of the property. *Dickson* v. *Doubleday*, 3 El. & El. 501; 30 L. J., M. C. 99; 7 Jur. (N.S.) 705; 3 L. T. 663; 9 W. R. 272.

2. Production and Inspection of Accounts.

Mandamus for.]—A mandamus will not go to inspect the accounts relating to county rates, on an application made to the court of quarter sessions for the inspection, whilst the court was in actual discussion upon the accounts. *Rex* v. *Nottingham JJ.*, 5 N. & M. 160; 3 A. & E. 500; 1 H. & W. 318; 4 L. J., M. C. 113.

A mandamus was granted, commanding the justices and clerk of the peace of a borough to permit the attorney on behalf of several persons who contributed to the county rates, to inspect and take copies of the last two rates made by the justices, and all orders made for the expenditure of the same and the several orders of sessions, made thereon, and other proceedings and documents relating thereto. *Rex* v. *Leicester JJ.*, 7 D. & R. 370; 4 B. & C. 891.

But before such writ can be obtained, an application for such inspection must be made to the justices assembled at quarter sessions. *Ib.*

Who Entitled to.]—The ratepayers of a county have neither at common law nor by statute any right to inspect and copy the bills of charges of county officers, when they are deposited with the clerk of the peace among the county records, in pursuance of 12 Geo. 2, c. 29, s. 8. The right of inspection is confined to the justices of the peace for the county. *Rex* v. *Staffordshire JJ.*, 1 N. & P. 260; 6 A. & E. 84; 6 L. J., M. C. 65.

3. Appeal.

Time for.]—An appeal against a county rate might be made at any time under 55 Geo. 3, c. 51, s. 14, though the rate was made under a prior local act, which required the appeal to be made within a certain time. *Rex* v. *Buckinghamshire JJ.*, 7 B. & C. 3; 9 D. & R. 777; 5 L. J. (O.S.) M. C. 93.

Notice of.]—It is not necessary in a notice of appeal against a county rate to specify the grounds of appeal; but, if the appellant states in his notice, as causes of appeal, matters which are not so, the court of quarter sessions ought to adjourn the appeal, if they think the respondents

have been misled, or, otherwise, to hear it. *Rex* v. *Westmoreland JJ.*, 10 B. & C. 226; 8 L. J. (O.S.) M. C. 70.

Grounds for.]—It is no ground of appeal against a county rate, that individuals in one parish are rated in higher proportion than in another. *Ib.*

In an appeal against a county rate, the party appealing must, in his notice of appeal, state that he is aggrieved, or state that from which it follows of necessity that he is so; and where a notice of appeal against such a rate stated, as the ground of appeal, that the county rate was unequal and defective, inasmuch as the appellant parish was charged and assessed in the rate at a higher proportion of the pound sterling, according to the fair annual value of the rateable property, than the respondent parish; and the sessions, upon the hearing of the appeal, received the evidence of surveyors as to the annual value of the rateable property of both parishes, and amended the rate by altering the assessment according to the annual value of the two parishes according to the evidence so taken, but leaving the statement of the annual value of the two to remain as before:—Held, that the sessions were not warranted by the notice of appeal in so amending the rate. *Rex* v. *Blackawton*, 10 B. & C. 792; 8 L. J. (O.S.) M. C. 123.

Rate in Fixed Proportions—Right of Appeal.]—A power of appeal was given by 55 Geo. 3, c. 51, s. 14, against a county rate made in fixed proportions, and invariably adopted for a series of years. *Rex* v. *York JJ.*, 2 B. & C. 771.

—— **Power to Vary.**]—The sessions have no power to vary the proportion in which the county rate has usually been assessed on the several parishes. *Rex* v. *St. Paul's, Covent Garden.* Cald. 158.

III. OTHER RATES.

Highways.]—*See* WAY.

Metropolitan.]—*See* METROPOLIS.

Coal Dues.]—*See* COALS.

Sanitary.]—*See* HEALTH.

Water.]—*See* WATER.

Watching and Lighting.]—*See* HEALTH.

RATIFICATION.

When Impossible.]—An act which is illegal and void is incapable of ratification. *Brook* v. *Hook*, 40 L. J., Ex. 50; L. R. 6 Ex. 89; 24 L. T. 34; 19 W. R. 506.

A forged instrument cannot be ratified by the person whose name is forged, and he cannot adopt it so as to make himself liable thereon. *Ib.*

There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept, by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, and has not, at the time of the supposed ratification, the means of forming an independent judgment. *Sweeny* v. *King*, 5 H. L. Cas. 627; 25 L. J., Ch. 482; 2 Jur. (N.S.) 503; 4 W. R. 571.

By Principal of Acts of Agent.]—*See* COMPANY—PRINCIPAL AND AGENT.

By Infant.]—*See* INFANT.

See FRAUD—WAIVER AND ACQUIESCENCE.

REBELLION.

Writ.]—The persons named in a writ of rebellion, and charged with the execution of it, have a right, at their discretion, to require the assistance of any of the liege subjects of the crown, to assist in the execution of the writ. *Miller* v. *Knox*, 4 Bing. (N.C.) 574; 6 Scott, 1.

RECEIPT.

Power to Give.]—*See* POWERS.

As Evidence.]—*See* EVIDENCE.

Stamping.]—*See* REVENUE.

END OF VOLUME XI.

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